NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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CITE THIS VOLUME

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OF
NORTH CAROLINA

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1. Appointed Resident Judge 20 August 1982 to succeed Robert D. Rouse, Jr. who retired 31 July 1982.
2. Appointed Resident Judge 6 August 1982 to succeed Clifton E. Johnson who was appointed to the Court of Appeals on 3 August 1982.
3. Appointed Special Judge 23 July 1982.
4. Appointed Special Judge 23 July 1982.
5. Appointed Emergency Judge 1 August 1982.

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1. Appointed Chief Judge 23 July 1982 to succeed Herbert O. Phillips III who was appointed to the Superior Court as a Special Judge on 23 July 1982 and then Resident Judge on 20 August 1982.

2. Appointed Chief Judge 20 August 1982.

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CASES REPORTED

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

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

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LICENSED ATTORNEYS

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

On April 22, 1982, the following individuals were admitted:

KAREN L. CASSER, Durham, Applied from the State of New York, 1st Department
DON RAY CASTLEMAN, Winston-Salem, applied from the State of Iowa
CALVIN WAYNE COLYER, Raleigh, applied from the State of Virginia
SCOTT E. JARVIS, Asheville, applied from the State of Ohio
RICHARD A. KOOMEY, Greensboro, applied from the State of New York, 1st Department
LARRY JOSEPH MINER, Jacksonville, applied from the District of Columbia
JOHN TYRELL ORCUTT, Durham, applied from the State of New York, 3rd Department
ANN BACH PETERSEN, Chapel Hill, applied from the State of Wisconsin
CLARA TAYLOR YAGER, Chapel Hill, applied from the State of New York, 4th Department

On May 6, 1982, the following individual was admitted:

STEPHEN A. YEAGY, Winston-Salem, applied from the State of Pennsylvania

On June 23, 1982, the following individual was admitted:

ROBERT B. SCHNEIDER, Charlotte, from the State of Missouri

Given over my hand and Seal of the Board of Law Examiners this the 29th day of June, 1982.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1981

ELSIE T. MORRISON EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 114

(Filed 6 October 1981)

Master and Servant §§ 68, 72— total incapacity partially caused by occupational disease—compensability

Where the evidence supported the Industrial Commission's conclusion that claimant was totally disabled and 55 percent of her disability was due to an occupational disease and 45 percent of her disability was due to other physical infirmities including bronchitis, phlebitis, varicose veins and diabetes, it was not error for the Industrial Commission to award claimant compensation for a 55 percent partial disability rather than for total disability. In occupational disease cases, disablement of an employee resulting from an occupational disease which arises out of and in the course of the employment, G.S. 97-52 and G.S. 97-2(6), is compensable and claimant has the burden of proof "to show not only disability, but also its degree." The Commission does not have authority to award a claimant compensation for total disability when 40 to 50 percent of the claimant's disablement is not occupational in origin and was not aggravated or accelerated by any occupational disease.

Justice EXUM dissenting.

Justice CARLTON joins in this dissent.

APPEAL pursuant to G.S. 7A-30(2) from decision of the North Carolina Court of Appeals, 47 N.C. App. 50, 266 S.E. 2d 741 (1980),

reversing an award of the Industrial Commission for partial disability and remanding for entry of an award for total disability. The case was argued as No. 60, Fall Term 1980 and re-argued as No. 77, Spring Term 1981.

Claimant, Elsie Morrison, certified to her employer in her Notice of Accident and Claim filed with the Commission that she had "contracted an occupational disease, *to wit*: byssinosis . . . caused by exposure to cotton dust" which had resulted in "permanent, total disability."

Three hearings were held in the matter after which Commissioner Brown concluded that Mrs. Morrison was entitled to compensation for total disability pursuant to G.S. 97-29.

Defendants appealed to the Full Commission which modified Commissioner Brown's findings and award. The Full Commission found that although Mrs. Morrison suffered from "chronic obstructive lung disease, an occupational disease," she also suffered "from phlebitis, varicose veins and diabetes" and such "conditions constitute an added factor in causing her disability." The Commission then found: "Due to the occupational disease suffered by plaintiff and due to her other physical infirmities, including bronchitis, phlebitis, varicose veins and diabetes, plaintiff has no earning capacity in any employment for which she can qualify in the labor market. Fifty-five percent of such disability is due to her occupational disease and 45 percent of such disability is due to her physical infirmities not related to her employment with defendant-employer." The Commission concluded upon these findings that Mrs. Morrison was entitled under G.S. 97-30 to compensation for a 55 percent partial disability and issued its award accordingly.

Mrs. Morrison appealed, and, by a majority vote, the Court of Appeals concluded the Commission lacked authority to award claimant compensation for partial rather than total disability. That court said:

> As a result of the Full Commission's amendments to Commissioner Brown's order, the Commission has found that plaintiff is totally disabled from work, that her disability was in part caused by occupational disease compensable under the law and in part caused by other noncompensable illnesses,

> and therefore plaintiff is only entitled to compensation for partial, not total, disability. The Commission erred in this conclusion . . . . If the worker's incapacity to work is total and if the incapacity is occasioned by a compensable injury or disease, the worker's incapacity to work cannot be apportioned to other pre-existing or latent illnesses or infirmities, nor may the entitlement to compensation be diminished for such conditions.

47 N.C. App. at 55-56, 266 S.E. 2d at 744. The Court of Appeals remanded the matter to the Industrial Commission for entry of an order consistent with its opinion. Chief Judge Morris dissented on the ground that an employee should be compensated only for disability "resulting from the injury," and not for factors "totally unrelated to . . . employment."

On defendant's appeal to this Court arguments were first heard on 13 October 1980. Thereafter the Court, concluding "that the medical evidence before the Commission is not sufficiently definite on the cause of plaintiff's disability to permit effective appellate review," remanded the case to the Commission with the suggestion that the physicians more adequately address "the interrelations, if any, between the cotton dust exposure and claimant's other infirmities such as her bronchitis, upper respiratory infection, sinusitis, phlebitis, and diabetes."[1] 301 N.C. 226, 231, 271 S.E. 2d 364, 367 (1980). The Court ordered that new findings of fact be made based thereon.

Responding to this order, further testimony was taken before Commissioner Shuford from physicians Sieker, Battigelli and Mabe, each of whom had treated and examined Mrs. Morrison and had testified at the initial hearings. After rehearing, the Commission again made findings of fact, conclusions of law and an award

1. The Court formulated three questions to clarify the medical evidence, *to wit*:

> (1) what percentage, if any, of plaintiff's disablement, *i.e.*, incapacity to earn wages, results from an occupational disease; (2) what percentage, if any, of plaintiff's disablement results from diseases or infirmities unrelated to plaintiff's occupation which were accelerated or aggravated by plaintiff's occupational disease; and (3) what percentage, if any, of plaintiff's disablement is due to diseases or infirmities unrelated to plaintiff's occupation which were *not* accelerated or aggravated by plaintiff's occupational disease. 301 N.C. at 231, 271 S.E. 2d at 367 (emphasis original).

based on all the evidence before it, including all evidence presented prior to the remand of this Court. The Commission found the following facts which are pertinent to this appeal:

> 5. Dr. Sieker examined plaintiff January 18, 1977. On that date, plaintiff suffered from chronic obstructive lung disease, and, according to Dr. Sieker, was unable to engage in gainful employment because of chronic obstructive lung disease. In Dr. Sieker's opinion, fifty percent to sixty percent of plaintiff's incapacity for work resulting from chronic obstructive lung disease was caused by exposure to cotton dust during the course of her employment at Burlington Industries, while the balance (forty percent to fifty percent) of her incapacity for work resulting from chronic obstructive lung disease was due to diseases and conditions which were not caused, aggravated, or accelerated by exposure to cotton dust during the course of her employment at Burlington Industries. The plaintiff was also examined by Dr. Mario C. Battigelli, who is of the opinion that the plaintiff is only slightly incapacitated for work, if at all. In Dr. Battigelli's opinion, the plaintiff, is at most, only twenty percent incapacitated for work and that the plaintiff's exposure to cotton dust during the course of her employment at Burlington Industries could have caused, aggravated, or accelerated as little as none or as much as all of her twenty percent incapacity for work.
>
> 6. In addition to her chronic obstructive lung disease, plaintiff suffers and has suffered from time to time with phlebitis, varicose veins and diabetes. Such conditions constitute an added factor in causing her incapacity for work, and were not caused, aggravated, or accelerated by exposure to cotton dust during the course of her employment at Burlington Industries.
>
> 7. Plaintiff suffers from chronic obstructive lung disease, due, in part, to causes and conditions characteristic of and peculiar to her particular trade, occupation or employment in the textile industry. That part of her lung disease which is related to her employment is not an ordinary disease of life to which the general public is equally exposed outside of such employment.

8. Due to the chronic obstructive lung disease suffered by plaintiff, and due to her other physical infirmities, including bronchitis, phlebitis, varicose veins and diabetes, plaintiff has no earning capacity in any employment for which she can qualify in the labor market.

9. The claimant is only partially incapacitated for work as a result of conditions which were caused, aggravated, or accelerated by exposure to cotton dust during the course of her employment at Burlington Industries. Although the plaintiff is totally incapacitated for work, only fifty-five percent of her incapacity was caused, aggravated, or accelerated by exposure to cotton dust during the course of her employment at Burlington Industries. The remaining forty-five percent of the plaintiff's incapacity for work was not caused by an occupational disease, and was not caused, aggravated, or accelerated by an occupational disease or by exposure to cotton dust during the course of her employment at Burlington Industries.

10. A wage chart submitted by the defendant without plaintiff's objection and hereby made a part of the record shows plaintiff's average annual weekly wage to have been $119.77.

11. As a result of the chronic obstructive pulmonary disease caused by her exposure to cotton dust, plaintiff has only a partial incapacity for work. She has sustained a fifty-five percent loss of wage-earning capacity or ability to earn wages by reason of her cotton dust exposure. Her average weekly wage-earning capacity has been reduced by fifty-five percent of $119.77 or $65.87 per week. The balance of her wage loss was not caused by an occupational disease, and was not caused, aggravated, or accelerated by an occupational disease or exposure to cotton dust during the course of her employment at Burlington Industries.

The Commission, again, entered an award for 55 percent partial disability.

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Smith, Moore, Smith, Schell & Hunter, by McNeill Smith, J. Donald Cowan, Jr., and William L. Young, Attorneys for defendant appellants.

Maupin, Taylor & Ellis, P.A., by Richard M. Lewis, Attorneys for National Association of Manufacturers of the United States of America, amicus curiae.

Johnson, Gamble & Shearon by Samuel H. Johnson, Attorneys for North Carolina Associated Industries, North Carolina Merchants Association, North Carolina Association of Plumbing-Heating-Cooling Contractors, Incorporated, amicus curiae.

HUSKINS, Justice.

The sole question posed by this appeal is as follows: When the Industrial Commission finds as fact, supported by competent evidence, that a claimant is totally incapacitated for work and 55 percent of that incapacity is caused, accelerated or aggravated by an occupational disease and the remaining 45 percent of that incapacity for work was not caused, accelerated or aggravated by an occupational disease, must the Commission, under the Workers' Compensation Act of North Carolina, award compensation for 55 percent disability or 100 percent disability? Upon such findings of fact, our Act mandates an award for 55 percent partial disability.

Except as to questions of jurisdiction, the rule is that the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. This is so even though there is evidence to support a contrary finding of fact. *Morrison v. Burlington Industries*, 301 N.C. 226, 271 S.E. 2d 364 (1980); *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977); *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965); *Rice v. Chair Co.*, 238 N.C. 121, 76 S.E. 2d 311 (1953); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950). The appellate court does not retry the facts. It merely determines from the proceedings before the Commission whether sufficient competent evidence exists to support its findings of fact. *Moses v. Bartholomew*, 238 N.C. 714, 78 S.E. 2d 923 (1953).

The evidence in this case, especially the medical evidence, overwhelmingly supports the Industrial Commission's findings

that 55 percent of Mrs. Morrison's inability to work and earn wages is caused by "chronic obstructive lung disease, due in part, to causes and conditions characteristic of and peculiar to her particular . . . employment in the textile industry," and the remaining 45 percent is caused independently by her other physical infirmities, including chronic obstructive lung disease not caused, aggravated or accelerated by an occupational disease, as well as bronchitis, phlebitis, varicose veins and diabetes, none of which are job related and none of which have been aggravated or accelerated by her occupational disease. This Court must accept such findings as final factual truth.[2] The Commission has found as

2. The following is some, but by no means all, of the evidence in the record of this appeal which supports the findings of the Commission on rehearing. It is unnecessary to recite contrary, confusing or ambiguous evidence.

Finding of Fact 5: The answer of each of the three doctors to our questions on remand demonstrates support for this finding:

Dr. Sieker:

Q. What percentage, if any, of the plaintiff's disablement, that is, incapacity to earn wages, results from an occupational disease?

A. Well, this lady, in my opinion from the information available, is disabled for all but the most sedentary types of occupation, so from a physical standpoint, except to set at a desk or sit at a job, she is totally disabled. My opinion from the history is that 50 to 60 percent of that disability can be related to her cotton dust exposure. That's a clinical judgment based on information from the history.

Q. What percentage, if any, of plaintiff's disablement results from diseases or infirmities unrelated to plaintiff's occupation which were accelerated or aggravated by plaintiff's occupational disease?

A. Again my testimony before was that by clinical judgment that the history of cigarette smoking as a related factor has to be assigned an etiologic contribution to her total chronic obstructive lung disease, and that assignment was 40 to 50 percent.

Q. What percentge, if any, of plaintiff's disablement is due to diseases or infirmities unrelated to plaintiff's occupation which were not accelerated or aggravated by the plaintiff's occupational disease?

A. Her disability is due to chronic obstructive lung disease that has several etiologic factors, so that for all intents and purposes is a hundred percent disability except for sedentary work. There is no contribution from her phlebitis or her diabetes or sinusitis or rhinitis to her disability. Now if you look at the reasons for her having chronic obstructive lung disease and make me assign percentages, I have to come back to what I did before and make the same assignments I did.

fact that Mrs. Morrison's infirmities other than "chronic obstructive lung disease due in part to cotton dust exposure" *were*

Dr. Battigelli:

Q. What percentage, if any, of plaintiff's disablement, that is, incapacity to earn wages, results from an occupational disease?

A. And my answer would be, again, what I think I have offered beforehand; something between zero, meaning no disability, no consequence, no effect from her occupation, up to twenty percent of a whole-man assessment.

Q. What percentage, if any, of plaintiff's disablement results from diseases or infirmities unrelated to plaintiff's occupation which were accelerated or aggravated by plaintiff's occupational disease?

A. Namely, there was no acceleration of any significant process that I could identify and justify on medical grounds that I could shore up and buttress on the basis of the evidence that I have gathered in examining this patient and what I know of available data and information which could lead me to believe that anything has been accelerated by exposure to cotton dust. So the answer is negative to the acceleration. For the aggravation, when the patient tells me "I feel worse when dust is there," I cannot interpret that; I have to report it. I have to accept it as a fact. I can only qualify, saying that that aggravation is restored by removal from exposure, and therefore there is no clinical meaningful change in the natural course of that patient's problems, or disorder, or disease, if you wish.

Q. What percentage, if any, of plaintiff's disablement is due to diseases or infirmities unrelated to plaintiff's occupation which were not accelerated or aggravated by plaintiff's occupational disease?

A. And my answer is from twenty percent downward, in the sense that it may be responsible for all or part of that.

Dr. Mabe:

Q. Is it fair to say that you cannot give the percentages that were requested by the Supreme Court?

A. Well, you know, really, by not being—I think Dr. Battigelli and Dr. Sieker or the other pulmonary specialists, if they're going to take something—you know, I'm really not sure. We do not have any—I have Dr. Sieker's letter and probably Dr. Battigelli's letter at the office. I don't have it in her file here. I'm sure they got respiratory function tests on her and know the degree. We did not get respiratory function tests on her at the time, because we didn't have the capability, then that would still require some expertise in, certainly, interpreting it. And I think the percentage certainly should be left up to Dr. Battigelli and Dr. Sieker, who both, I understand, have seen the patient and have been over the patient.

disabling in and of themselves. *See* Findings of Fact 5, 6, 8, 9 and 11. We are bound by these findings though there is evidence to the contrary.

Finding of Fact 6: Mrs. Morrison testified she suffers from diabetes and phlebitis. Medical reports in evidence reflect all of the infirmities found by the Commission and more including depression, sinusitis and hysterectomy. On a proof of total disability form filed 26 January 1976 with a private insurer Mrs. Morrison listed the "origin and nature of disability" as "chronic bronchitis, diabetes mellitus, early pulmonary fibrosis, phlebitis of left leg, emphysema."

Mrs. Morrison was placed in a dust-free environment by her employer to alleviate her breathing problems. She left this position because the standing aggravated her phlebitis. Dr. Mabe testified:

> Q. Well, assuming that the record would support such a finding, that is, that when she was switched from one job to another and that job required her to stand, and that she was not able to tolerate that because of her leg problem, would you agree that in that circumstance that the leg problems would have to be considered an additive factor in maintaining that type of a job and in her disability?
>
> A. If she complained, you know, that in changing jobs, that she had one that was more walking and she complained of the leg and attributed this to her old phlebitis, then, you know, that would have to be an additive part.
>
> Q. In her disability? Or—for that particular—her ability to earn wages in that particular job?
>
> A. In that particular job.
>
> Q. So, then, your answer to my question would be, yes, with the explanation you gave?
>
> A. Well, in reading it, the first thing I see, you know, that I—in the previous testimony, "it would have to be a self-employed thing where, you know, she could work at will. In other words, she could not have been a satisfactory employee."
>
> I meant the lung disease. Now, later on down here, "she could not work this type of thing or could not stand. She had a leg problem, too," which was at that time a problem evidently. And I'd certainly have to stand by that. Yes. That would be an added disability.

Again, this is only part of the evidence which supports the Commission finding. *See* in particular, the testimony of Dr. Battigelli as supporting finding of fact 5.

Finding of Fact 7: Mrs. Morrison testified to her continuous exposure to cotton dust since 1948 until she left work in April 1975. The finding that Mrs. Morrison's chronic obstructive lung disease is "*due, in part*" to an occupational disease is supported by testimony by claimant and the doctors about the extent and effect of her smoking and the fact she has bronchitis. Dr. Battigelli noted in an April 1975 report in the record: "She does not present convincing cyclic disorder which would allow

The doctors expressed varied opinions on the extent of the medical disability of Mrs. Morrison. There is a distinction between medical and legal disability. It is up to the Commission to determine the degree of legal disability under the Act. To ignore the distinction between the legal and medical concepts of disability confuses the ultimate issue and obscures the function of the fact finder. We must now determine the proper degree of legal disability for workers' compensation purposes.

In the field of workers' compensation law, the statutes control. We must follow the dictates of our legislature on what is or is not compensable.

The parties agree that the evidence is sufficient to sustain the Commission's finding that Mrs. Morrison contracted an occupational disease while employed by Burlington Industries; that she is totally incapacitated for work; and that the occupational disease caused only part of her total incapacity.

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the diagnosis of byssinosis. However in view of her substantial chronic respiratory impairment additional exposure to lint may conceivably deteriorate her situation. I suggest to relocate this patient to a similar activity in a more sheltered environment. If impossible the patient has enough justification to apply for Social Security and I'll be happy to support her in her claim on the grounds of severe venous insufficiency, chronic obstructive lung disorder, depression, status post op. hysterectomy."

Finding of Fact 8: Mrs. Morrison testified she is unable to walk up steps or any distance or lift anything without shortness of breath. All the medical testimony supports the finding that she is totally unable to earn wages "except at the most sedentary type of work." In a letter written 4 March 1976 Dr. Battigelli stated, "I have examined Mrs. Morrison on 8 April 1975 for dyspnea on light exertion and on exposure to dust and fumes. At that time, she presented severe obstructive lung disorder, documented by pronounced deficit in spirometry . . . by hypoxemia . . . and by decreased diffusion parameter . . . . She also had evidence of pulmonary shunt . . . . I conclude that she is totally disabled to gainful employment. She is therefore entitled to . . . benefits . . . under Social Security . . . . I must add that she has additional sources of physical impairment, inclusive of severe venous insufficiency of lower extremities, diabetes and borderline left ventricular enlargement, all associated to dyspnea on exertion."

Finding of Fact 9: This finding is supported by the doctors' testimony. The doctors' testimony would support any finding from 0% to 60% occupational disease. The Commission was within its fact finding jurisdiction when it found within this range.

Finding of Fact 10: There is no dispute about the compensation figures.

Finding of Fact 11: The evidence cited under findings 6 through 10 support this as an ultimate finding of fact.

Defendants contend that the "resulting from the injury" language in both G.S. 97-29 and 97-30 means that she is entitled to compensation *only to the extent of* the occupational disease's contribution. Hence, she is entitled to compensation for partial disability, not total disability, because the occupational disease caused only part of the disability. Therefore G.S. 97-30, not G.S. 97-29, governs the compensation that should be paid in this case. Those statutes in pertinent part read as follows:

> § 97-29. *Compensation rates for total incapacity.*—Except as hereinafter otherwise provided, where the incapacity for work *resulting from the injury* is total, the employer shall pay . . . .
>
> § 97-30. *Partial incapacity.*—Except as otherwise provided in G.S. 97-31, where the incapacity for work *resulting from the injury* is partial, the employer shall pay . . . . (Emphasis added.)

Mrs. Morrison contends that our Workers' Compensation Act permits no such apportionment of an award in a case of total incapacity. She argues that if an occupational disease acting together with non-job-related infirmities causes total disability the employee is entitled to compensation for total disability.

The North Carolina Workers' Compensation Act was enacted in 1929. It is not, and was never intended to be, a general accident and health insurance act. "We should not overstep the bounds of legislative intent, and make by judicial legislation our Compensation Act an Accident and Health Insurance Act." *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 403, 82 S.E. 2d 410, 414 (1954); *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266 (1930).

G.S. 97-2(6) defines "injury" to mean "only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

G.S. 97-2(9) defines the term "disability" to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Disablement resulting from all occupational diseases (except asbestosis and silicosis) is "equivalent to 'disability' as defined in G.S. 97-2(9)." G.S. 97-54.

When it became apparent that the Act should include a provision for payment of compensation to employees disabled by diseases or abnormal conditions of human beings *the causative origin of which was occupational in nature*, the legislature adopted in 1935 what is now codified as G.S. 97-52 and -53.

The words "arising out of" refer to the origin or cause of the accidental injury or occupational disease. *Bartlett v. Duke University*, 284 N.C. 230, 200 S.E. 2d 193 (1973); *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E. 2d 350 (1972); *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963); *Guest v. Iron and Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955); *Duncan v. Charlotte*, 234 N.C. 86, 66 S.E. 2d 22 (1951); G.S. 97-52; G.S. 97-54.

The words "in the course of" refer to the time, place and circumstances under which the injury by accident, or disablement resulting from an occupational disease, occurred. *Bartlett v. Duke University, supra; Robbins v. Nicholson, supra.*

The foregoing legal principles demonstrate that the inquiry here is to determine whether, and to what extent, plaintiff is incapacitated by that part of her chronic obstructive lung disease caused by her occupation to earn, in the same or any other employment, the wages she was receiving at the time she became disabled. It is overwhelmingly apparent that disability resulting from an accidental injury, or disablement resulting from an occupational disease, as the case may be, must arise out of and in the course of the employment, *i.e.*, there must be some causal relation between the injury and the employment before the resulting disability or disablement can be said to "arise out of" the employment.

What, then, must a plaintiff show to be entitled to compensation for disablement resulting from an occupational disease covered by G.S. 97-53(13)? The answer is: She must establish (1) that her disablement *results from an occupational disease* encompassed by G.S. 97-53(13), *i.e.*, an occupational disease due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment; and (2) the extent of the disablement *resulting from* said occupational disease, *i.e.*, whether she is totally or partially disabled *as a result of the disease.* If the

disablement resulting from the occupational disease is total, the claimant is entitled to compensation as provided in G.S. 97-29 for total disability. If the disablement resulting from the occupational disease is partial, the claimant is entitled to compensation as provided in G.S. 97-30 for partial disability. To be compensable under the Workers' Compensation Act, an injury must result from an accident arising out of and in the course of the employment. G.S. 97-2(6). Claimant has the burden of showing such injury. *Henry v. Leather Co., supra.* That means, in occupational disease cases, that disablement of an employee resulting from an occupational disease which arises out of and in the course of the employment, G.S. 97-52 and G.S. 97-2(6), is compensable and claimant has the burden of proof "to show not only . . . disability, but also its degree." *Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E. 2d 857, 861 (1965).

When the statutory law of North Carolina is applied to the evidence in this case, the conclusion is inescapable that claimant's disablement resulting from the occupational disease does not exceed 50 to 60 percent and that the remaining 40 to 50 percent of her disability results from bronchitis, phlebitis, varicose veins, diabetes, and that part of her chronic lung disease not caused by her occupation. These ailments were in no way caused, aggravated or accelerated by the occupational disease. The Industrial Commission so found, with overwhelming evidence to support the findings. The Commission did precisely what the law of this State required it to do. It had no legal authority to award the claimant compensation for total disability when 40 to 50 percent of her disablement was not occupational in origin and was not aggravated or accelerated by any occupational disease.

To be compensable, any incapacity to earn wages, resulting either from an injury by accident arising out of and in the course of the employment or from an occupational disease, must spring from the employment. "This rule of causal relation is the very sheet anchor of the Workmen's Compensation Act. It has kept the Act within the limits of its intended scope,—that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits." *Duncan v. Charlotte*, 234 N.C. 86, 91, 66 S.E. 2d 22, 25 (1951).

When the General Assembly, by the amendment in 1935, extended the scope of the Act to include a specified list of occupa-

tional diseases which are the usual and natural incidents of particular types of employment, the amendment "in nowise relaxed the fundamental principle which requires proof of causal relation between injury and employment. And nonetheless, since the adoption of the amendment, may an award for an occupational disease be sanctioned unless it be shown that the disease was incident to or the result of the particular employment in which the workman was engaged." *Duncan v. Charlotte, supra*, 234 N.C. at 91, 66 S.E. 2d at 25; *accord, Blassingame v. Asbestos Co.*, 217 N.C. 223, 7 S.E. 2d 478 (1940); *Tindall v. Furniture Co.*, 216 N.C. 306, 4 S.E. 2d 894 (1939). Proof of causation required to establish a compensable claim under G.S. 97-53(13) is a limitation "which protects our Workmen's Compensation Act from being converted into a general health and insurance benefit act." *Booker v. Medical Center*, 297 N.C. 458, 475, 256 S.E. 2d 189, 200 (1979). Additionally, to be compensable under G.S. 97-53(13), an occupational disease must be "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment," and it cannot be "ordinary diseases of life to which the general public is equally exposed outside of the employment." These requirements are specified by the statute itself. *Accord, Booker v. Medical Center, supra.*

The findings of the Commission are supported by competent evidence and are therefore conclusive. They establish the necessary causal relationship of only 55 percent of Mrs. Morrison's inability to work and earn wages. This was the extent of her disability *resulting from* an occupational disease. The incapacity for work resulting from the occupational disease is therefore partial and compensation should be awarded pursuant to G.S. 97-30. The remaining 45 percent of her incapacity is not the responsibility of nor a compensation obligation of her employer under our Workers' Compensation Act which compels industry "to take care of its own wreckage." *Barber v. Minges*, 223 N.C. 213, 216, 25 S.E. 2d 837, 839 (1943). Mrs. Morrison's chronic obstructive lung disease *not* due to cotton dust exposure is not "industry's wreckage." Neither is her phlebitis, varicose veins nor diabetes.[3]

3. Alternate sources of benefits exist for those infirmities which are totally unrelated to employment. An employer or employee or both together may obtain private long- or short-term disability insurance programs to cover these illnesses

The law we apply today departs from neither statute nor case precedent. *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951), first adopted for North Carolina the principle of compensation for aggravation and acceleration of a pre-existing infirmity. It mandates a causal connection between the injury or disease and the employment. In *Anderson*, we held:

> While there seems to be no case on the specific point in this State, courts in other jurisdictions hold with virtual uniformity that when an employee afflicted with a pre-existing disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the pre-existing disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person.

233 N.C. at 374, 64 S.E. 2d at 267. In *Anderson*, the employee slipped and fell under compensable conditions wrenching his back. The employee suffered from a congenital infirmity of the spine which impaired his back's normal functioning and subjected it to injury more easily. The employee's physician was of the opinion that he had a "permanent physical disability" of 10 percent and that his disability "could be the result of the last injury received [on the job] or could have arisen before that time." The Commis-

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not caused, aggravated or accelerated by occupational conditions. Such terms are standard in group life and accident insurance policies. Also, disability benefits are available under the Social Security System. The record indicates application by Mrs. Morrison for benefits from both of these sources. The Social Security disability benefits which Mrs. Morrison receives would be substantially reduced by a workers' compensation award. The Social Security Act requires an offset of Social Security benefits for workers' compensation benefits received. 42 U.S.C. § 424a (1976), 20 C.F.R. §§ 404-408. A reduction in Mrs. Morrison's Social Security benefits must be made for any month before she attains age 62 to fully or partially offset a periodic workers' compensation benefit received for the same month. The amount of the reduction is the amount by which the total Social Security benefits plus the workers' compensation exceeds the higher of two limits: 80 percent of "average current earning" as defined for Social Security purposes, or the family's total Social Security benefits. *See* McCormick, Social Security Claims and Procedures § 403 (1978). The offset applies even where the benefits under Social Security and workers' compensation are paid for different disabilities. *Kananen v. Matthews*, 555 F. 2d 667 (8th Cir.), *cert. den.*, 434 U.S. 939, 54 L.Ed. 2d 298, 98 S.Ct. 429 (1977). Social Security disability is supposed to provide compensation for disabilities not caused, aggravated or accelerated by the work environment. Workers' compensation benefits are not so designed.

sion denied the employee any award on the basis that he had not suffered a compensable injury by accident. On appeal the employee contended that the Commission improperly rejected his argument that if his back injury accelerated or aggravated his pre-existing spinal infirmity in such a way that proximately contributed to his permanent partial disability he would be entitled to compensation. This Court recognized the validity of the employee's argument. It concluded, however, that the Commission did not reject the argument but simply found that plaintiff had not sustained a compensable injury. In the present case, Mrs. Morrison's argument that the work environment caused her lung disease was accepted *in part* by the Commission. The Commission did not accept her contention that it caused all of her lung disease or that her occupation in any way affected her other infirmities. In fact, the Commission specifically found that her occupation did not cause, aggravate or accelerate her other diseases and infirmities which cause 45 percent of her incapacity to work and earn wages.

To like effect is *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). In that case we said:

> The relevant inquiry under G.S. 97-29 is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity. In *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951), Justice Ervin, writing for the Court, noted: "While there seems to be no case on the specific point in this State, courts in other jurisdictions hold with virtual uniformity that when an employee afflicted with a pre-existing disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the pre-existing disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person." Similarly, if other pre-existing conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the incapacity which he or she suffers, and not for the degree

> of disability which would be suffered by someone with superior education or work experience or who is younger or in better health.

295 N.C. at 531-32, 246 S.E. 2d at 746.

In *Little*, the evidence shows that plaintiff, an over-fifty, obese, uneducated woman, tripped over a mop and fell in a sitting position, resulting in injury to her spinal cord. One doctor rated her physical disability at 50 percent and was of the opinion that she was wholly incapable of resuming her former employment as a laborer. A second doctor was of the opinion that she had suffered an injury to her spinal cord in the neck area; that she had a pre-existing arthritic condition in her neck which was activated by her fall; and that she had suffered a 40 percent disability to the neurological system. The medical evidence further indicated that the injury to Mrs. Little's spinal cord had resulted in weakness "in all of her extremities" and numbness or loss of sensation "throughout her body"; that she had suffered diminished mobility and had difficulty recognizing objects by feeling of them.

The Industrial Commission found that Mrs. Little had suffered "a permanent partial disability of 45 percent . . . loss of use of her back" and awarded compensation for 135 weeks pursuant to G.S. 97-31(23). The Court of Appeals affirmed. We reversed, holding that the Commission could not limit plaintiff to an award under G.S. 97-31(23) because the fall had apparently caused some unspecified loss of use of both arms and both legs and possibly disabling impairments compensable under other sections of the Act. We remanded for further proceedings saying: "The injured employee is entitled to an award which encompasses all injuries received in the accident." 295 N.C. at 531, 246 S.E. 2d at 746.

The *Little* decision mandates the payment of compensation for all disability *caused by the work-related accident*. Our holding in *Little* is sound and does not support claimant's contention in this case. Mrs. Little had no pre-existing, nonoccupational diseases or infirmities that caused any percentage of her incapacity for work. We *know* that all of Mrs. Little's incapacity for work, whether total or partial, *was caused by the fall*. With respect to Mrs. Morrison, we know that 45 percent of her incapacity for work was not caused, aggravated, or accelerated by an occupational disease or by her exposure to cotton dust during the course

of her employment because the Commission so found upon overwhelming evidence to that effect.

It would serve no useful purpose to engage in a detailed discussion of many confusing and conflicting decisions from other jurisdictions because, for the most part, they are based on statutes and interpretations thereof quite different from our own. It suffices to say that we are not bound by the law of other states. "The decisions from other jurisdictions, while helpful in construing the provisions of our statute, are not controlling; neither is the interpretation placed upon a statute similar to ours, binding on this Court." *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 266, 22 S.E. 2d 570, 576 (1942). The result we reach is consistent with the principle that our Workers' Compensation Act is not, and was never intended to be, a general accident and health insurance law. Such was not the legislative intent and we should not, by judicial legislation, convert our compensation law into a system of compulsory general health insurance.

In summary: (1) an employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses. (2) When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent. (3) On the other hand, when a pre-existing, nondisabling, non-job-related disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration of it by a compensable accident or by an occupational disease, the resulting incapacity so caused is not compensable. (4) When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not caused, accelerated or aggravated by an occupational disease, the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated or aggravated by the occupational disease.

Our Workers' Compensation Act, as enacted by the legislature and interpreted and applied by this Court, will not support a recovery by Mrs. Morrison for total disability. It is our

duty to interpret the Act as it exists. This Court is not philosophically opposed to the result sought by Mrs. Morrison, but expansion of the law to permit such recovery is the legislature's prerogative, not ours.

For the reasons stated the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Industrial Commission for reinstatement of its award based on its findings and conclusions following our remand order dated 23 October 1980 and appearing in 301 N.C. 226, 271 S.E. 2d 364 (1980).

Reversed and remanded.

Justice EXUM dissenting.

Believing that the majority has misunderstood the evidence and refused to recognize the appropriate legal principles which govern this case, I dissent. The Court of Appeals' majority reached the right result and I vote to affirm its decision that Mrs. Morrison is entitled to an award for total incapacity for work.

The evidence, properly understood, shows that although Mrs. Morrison suffered from several physical infirmities unrelated to her job[1] before the onset of her chronic obstructive lung disease (hereinafter "lung disease"), none of these infirmities standing alone had ever kept her from working. She continued to work despite these infirmities until her lung disease progressed to such a severe state that because of it she was no longer able to work. Her incapacity for work, therefore, was caused entirely by her lung disease.[2]

1. These were found by the Commission in Finding 6 to be "phlebitis, varicose veins and diabetes" and in Finding 8 to be "bronchitis, phlebitis, varicose veins and diabetes."

2. All three physicians so testified at the hearings conducted after our remand order: Dr. Sieker testified, "Mrs. Morrison, in my opinion, is totally disabled, physically disabled for all but the most sedentary type of work. . . . The chronic obstructive lung disease is the reason this lady is disabled. Her diabetes, varicose veins, sinusitis, rhinitis, none of these would disable her in any way."

Dr. Battigelli said that plaintiff's infirmities other than her chronic pulmonary lung disease could "possibly" have contributed to her disability. He did, however,

There is some evidence adduced at the hearing *before* our remand order that Mrs. Morrison's total incapacity for work was due to the combined effects of, or interaction between, her lung disease and those physical infirmities which pre-existed the onset of this disease. All the evidence shows, however, that before the onset of her lung disease those pre-existing infirmities had caused no incapacity for work whatever.

There is no evidence that these physical infirmities contributed to her incapacity for work, even in combination with her lung disease, to the extent of 45 percent of her incapacity. No physician or lay witness so testified. The only evidence of a 45 percent-55 percent dichotomy comes from the testimony of Dr. Sieker. Dr. Sieker testified that there were "two identifiable etiologic factors" which contributed to Mrs. Morrison's chronic obstructive lung disease. "One is cotton dust exposure, the other is her cigarette consumption." He said, "[I]n a somewhat arbitrary way but with clinical judgment I assigned the etiologic factors about 50 percent—50 to 60 percent for the cotton dust exposure and 40 to 50 percent for the cigarette smoking and any attendant problems with that. . . . At the present time there is no laboratory type of test that would do this. This [assignment of etiological factors] had to be based on the judgment, one's judgment of the effects of these agents on the respiratory system. . . . In general cigarette smoking will make an individual more susceptible to any other air pollutant and one would expect that cigarette smoking and cotton dust exposure would have the synergistic effect."

The majority claims additional testimony by Dr. Sieker supports the Commission's Finding 5. The Commission found that:

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concede, on cross-examination "that to the extent [Mrs. Morrison] is disabled at all, it is exclusively as a result of her lung disease and cotton dust exposure to a total of 20 percent."

Dr. Mabe testified that "the reason for [Mrs. Morrison's] medical disability was . . . her pulmonary disease . . . it was not influenced by her phlebitis. . . . She had had a phlebitis. She got over it. She had some more problems with it. But that would have been a short term type thing. She could have worked on with the phlebitis."

Indeed the Commission's Finding 5 states: "Dr. Sieker examined plaintiff January 18, 1977. On that date, plaintiff suffered from chronic obstructive lung disease, and, according to Dr. Sieker, was unable to engage in gainful employment *because of chronic obstructive lung disease.*"

> "In Dr. Sieker's opinion, fifty percent to sixty percent of plaintiff's incapacity for work resulting from chronic obstructive lung disease was caused by exposure to cotton dust during the course of her employment at Burlington Industries, while the balance (forty percent to fifty percent) of her incapacity for work resulting from chronic obstructive lung disease was due to diseases and conditions which were not caused, aggravated, or accelerated by exposure to cotton dust during the course of her employment at Burlington Industries."

It is true that Dr. Sieker stated in one portion of his testimony that it was his clinical judgment "that 50 to 60 percent of that disability can be related to her cotton dust exposure." It is clear, however, when this bit of testimony is read in context, that Dr. Sieker meant 50 to 60 percent of Mrs. Morrison's lung disease, not her total incapacity, is attributable to cotton dust exposure and 40 to 50 percent to cigarette smoking. Similarly, no testimony by any other physician or lay witness supports the finding that 45 percent of Mrs. Morrison's total incapacity for work was caused by her physical infirmities apart from or together with her lung disease. This point is worthy of repetition because it is crucial for a proper analysis of this case. Dr. Sieker testified that *all of Mrs. Morrison's incapacity for work was caused by her lung disease.* It was the *lung disease*, not her incapacity, that had two causes. These causes were her exposure to cotton dust and cigarette smoking, and their proportionate contribution to her lung disease were: (1) 50-60 percent caused by her exposure to cotton dust, and (2) 40-50 percent caused by her cigarette smoking.

The legal issue in this case is obfuscated because of ambiguity in the Commission's findings. This ambiguity persists in the majority opinion. One interpretation of both the findings and the majority opinion is that Mrs. Morrison's physical infirmities other than her lung disease have, when combined or after interacting with her lung disease, contributed to the extent of 45 percent to her incapacity for work, and the lung disease itself to the extent of 55 percent.[3] Findings 6 and 8 seem to establish this dichotomy

3. I do not understand either the majority or the Commission to say that these other physical infirmities *standing alone* had or would have produced any incapacity for work. There is, as I have already noted, no evidence to support this notion of the case.

between the lung disease on one hand and her other physical infirmities on the other:

> "6. In addition to her chronic obstructive lung disease, plaintiff suffers and has suffered from time to time with phlebitis, varicose veins and diabetes. Such conditions constitute an added factor in causing her incapacity for work, and were not caused, aggravated, or accelerated by exposure to cotton dust during the course of her employment at Burlington Industries.
>
> . . . .
>
> "8. *Due to the chronic obstructive lung disease suffered by plaintiff, and due to her other physical infirmities, including bronchitis, phlebitis, varicose veins and diabetes, plaintiff has no earning capacity in any employment for which she can qualify in the labor market.*"

Another interpretation is that only 55 percent of Mrs. Morrison's lung disease is caused by her exposure to cotton dust and 45 percent by cigarette smoking.[4] Therefore even though the lung disease has caused Mrs. Morrison to be totally incapacitated for work, she is entitled to an award as if she were only 55 percent incapacitated, the percentage being based on the extent to which

4. Although it is not entirely clear I assume this is what the Commission and the majority mean when they refer to "that part" of Mrs. Morrison's lung disease which is not related to her employment. I find nothing else in the evidence, other than the cigarette smoking, which could constitute "that part" of Mrs. Morrison's lung disease unrelated to her employment. The only possible candidate would be Mrs. Morrison's bronchitis. The Commission, however, did not find the bronchitis to be a component of the chronic obstructive lung disease. It found it to be one of Mrs. Morrison's physical infirmities *other than* her lung disease. *See* Finding 8. The majority so treats the bronchitis when it says, "When the statutory law of North Carolina is applied to the evidence in this case, the conclusion is inescapable that claimant's disablement resulting from the occupational disease does not exceed 50 to 60 percent and that the remaining 40 to 50 percent of her disability results from bronchitis, phlebitis, varicose veins, diabetes, and that part of her chronic lung disease not caused by her occupation." Even if the bronchitis were a component of her lung disease, her award should not be diminished because of it. Because it would then be a pre-existing condition clearly aggravated by her occupational exposure to cotton dust under the "aggravation" principle recognized by the majority.

the cotton dust exposure contributed to, or was an etiological factor in, the development of her lung disease.[5]

If the first interpretation of the Commission's finding is the basis for its award and the majority's decision, then both are in error simply because, as I have already shown, there is no evidence to support this interpretation. Even if there were such evidence, then under either interpretation Mrs. Morrison is legally entitled to an award compensating her for the total incapacity for work from which she actually suffers. The fundamental legal errors committed by the majority are: first, its position that unless an occupational disease medically aggravates or accelerates some pre-existing condition, it must be the *sole* cause of a worker's incapacity for work in order for the worker to be compensated for the full extent of the incapacity, and second, its position that occupational conditions must be the *sole* cause of an occupational disease in order for a worker to be compensated for the full extent of the incapacity for work caused by the disease. Part I of this dissent will address the majority's first position and Part II, its second.

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5. Interestingly, this ambiguity did not find its way into the Commission's findings until after the hearings and evidence adduced pursuant to our remand order. In the Commission's pre-remand order it found:

> "6. In addition to her chronic obstructive lung disease, plaintiff suffers and has suffered for some time from phlebitis, varicose veins and diabetes. Such conditions constitute an added factor in causing her disability.
>
> "7. *Plaintiff suffers from chronic obstructive lung disease, an occupational disease due to causes and conditions characteristic of and peculiar to her particular trade, occupation or employment in the textile industry. Her disease is not an ordinary disease of life to which the general public is equally exposed outside of such employment.*
>
> "8. Due to the occupational disease suffered by plaintiff and due to her other physical infirmities, including bronchitis, phlebitis, varicose veins and diabetes, plaintiff has no earning capacity in any employment for which she can qualify in the labor market. *Fifty-five percent of such disability is due to her occupational disease and 45 percent of such disability is due to her physical infirmities not related to her employment with defendant-employer.*" (Emphasis supplied.)

After hearing further evidence pursuant to our remand order, all of which tended to show that whatever incapacity for work Mrs. Morrison suffered, it was entirely due to her lung disease, *see* note 2, *supra*, the Commission then couched its findings and conclusions in terms of a chronic obstructive lung disease which was caused only "in part" by Mrs. Morrison's exposure to cotton dust.

I

An occupational disease need not be the sole cause of a worker's incapacity for work in order for the worker to be compensated to the full extent of such incapacity. If an occupational disease combines or interacts with certain pre-existing physical infirmities so as to render the worker totally incapacitated for work, our statutes permit an award for total incapacity where, as here, the pre-existing, non-job-related physical infirmities *in themselves* and absent the occupational disease, are insufficient to cause any incapacity for work. Typically, in these kinds of cases the worker suffers from various physical or other kinds of infirmities but, despite them, is able to and does continue to work. He is not at this point disabled in the compensation sense.[6] The worker then contracts an occupational disease or suffers a compensable injury[7] which renders him incapacitated for work. If the worker had been perfectly healthy, the disease may have rendered him only partially incapacitated. Because, however, of certain infirmities which pre-existed the onset of the disease, the disease in combination or interaction with these infirmities produces total incapacity for work. In such cases the law in this and all other jurisdictions with statutes like ours is and should be that the worker receives an award for total incapacity. Because in such cases the occupational disease is truly the precipitating cause of the worker's entire incapacity for work; it is the cause without which the incapacity would not have occurred. Said another way, it is the cause without which the worker would have had full capacity for work.

Neither must the worker in such cases, contrary to the majority's assertion, show that the occupational disease is medically related to his pre-existing infirmities or that these infirmities have somehow been medically aggravated by the disease. The question is not how the occupational disease and the other infir-

6. Disability in the compensation sense is defined in G.S. 97-2(9) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Furthermore compensation under G.S. 97-29 and G.S. 97-30 is awarded not for disability but for "the incapacity for work."

7. "Disablement . . . resulting from an occupational disease" is treated the same for compensation purposes as the happening of an injury by accident. G.S. 97-52; *Woods v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979).

mities are medically connected. The question is how they are connected vis-a-vis the worker's capacity to work. This is the true meaning of the aggravation principle, recognized but wrongly restricted by the majority to aggravation in a medical sense. The aggravation principle means, as the cases demonstrate, that if the occupational disease, in combination or interaction with pre-existing infirmities not in themselves sufficient to cause any incapacity for work, so aggravates the worker's physical condition that he is then totally incapacitated for work, he is entitled to an award for total incapacity.

It is this principle, not the majority's restricted understanding of the aggravation principle, that governs this case under the interpretation of the Commission's findings now being discussed. Professor Larson notes that "[n]othing is better established in compensation law" than this principle. He says, 2 Larson, Workmen's Compensation Law § 59.22 (1981) (herein "Larson"):

> "Apart from special statute, apportionable 'disability' does not include a prior non-disabling defect or disease that contributes to the end result. Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and except in states having special statutes on aggravation of disease, no attempt is made to weigh the relative contribution of the accident and the pre-existing condition to the final disability or death. Apportionment does not apply in such cases, nor in any case in which the prior condition was not a disability in the compensation sense. . . . Of course, the matter is entirely different if the degenerative condition is itself the cause of the disability for which compensation is claimed, quite apart from the effect of the industrial accident. Thus, it may be found on the facts of a particular case that after the period of temporary disability caused by the accident was completed, any subsequent long-range disability stemmed entirely from a pre-existing infirmity.
>
> "The essential distinction at stake here is between a pre-existing disability that independently produces all or part of the final disability, and the pre-existing condition that in

> some way combines with or is acted upon by the industrial injury. . . . It will be observed that the courts in these cases define pre-existing disability, not as a functional disability, but as a disability in the compensation sense of impairment of earning capacity.
>
> "To be apportionable, then, an impairment must have been independently producing some degree of disability before the accident, it must be continuing to operate as a source of disability after the accident."

Our cases support these principles. In *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951), the employee slipped and fell under compensable conditions wrenching his back. The employee suffered from a congenital infirmity of the spine which impaired his back's normal function and subjected it to injury more easily. The employee's physician was of the opinion that he had a "permanent physical disability" of 10 percent and that his disability "could be the result of the last injury received [on the job] or could have arisen before that time." The Commission denied the employee any award on the basis that he had not suffered a compensable injury by accident. On appeal the employee contended that the Commission improperly rejected his argument that if his work-related back injury aggravated his pre-existing spinal infirmity in such a way that it contributed to his permanent partial disability he would be entitled to compensation. This Court recognized the validity of the employee's argument. It concluded, however, that the Commission did not reject the argument but simply found that plaintiff had not sustained a compensable injury. The Court interpreted the findings of the Full Commission to mean, *id.* at 375, 64 S.E. 2d at 267:

> "Although the plaintiff suffered a personal injury by accident arising out of and in the course of his employment on 7 March, 1949, such injury was inconsequential in nature, and did not, either of itself or *in combination with* the pre-existing infirmity of the plaintiff, cause any disability, i.e., loss of wage-earning power, to the plaintiff." (Emphasis supplied.)

As noted by the majority, *Anderson* also adopted for the first time in North Carolina the aggravation principle in the following language, *id.* at 374, 64 S.E. 2d at 267:

> "While there seems to be no case on the specific point in this State, courts in other jurisdictions hold with virtual uniformity that when an employee afflicted with a pre-existing disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the pre-existing disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person."

Even if the occupational injury did medically aggravate a pre-existing spinal infirmity in *Anderson*, there is no suggestion in the opinion that the aggravation principle should be limited to this kind of connection. Indeed the Court in *Anderson* denied the worker any award not only because it concluded there was no aggravation of the pre-existing condition, but also because the work-related fall "did not, either of itself *or in combination with* the pre-existing infirmity . . . cause any . . . loss of wage-earning power." *Id.* at 375, 64 S.E. 2d at 267. (Emphasis supplied.)

Little v. Food Service, 295 N.C. 527, 246 S.E. 2d 743 (1978), strongly supports the proposition that under our Workers' Compensation Act an employee who is totally incapacitated for work must be compensated, if at all, for total incapacity under G.S. 97-29 notwithstanding that the total incapacity might be due to the combined effects of non-job-related infirmities and an industrial accident. Ms. Little was injured under compensable circumstances by a fall over a mop bucket which resulted in significant injury to her spinal cord in the mid-cervical region. Medical evidence showed that she had a fifty percent disability with reference to her "total life function" and a "40 percent disability to the neurological system." The Full Commission found that Ms. Little suffered "an average permanent partial disability of 45% or loss of use of her back." Accordingly, it awarded compensation for 135 weeks pursuant to G.S. 97-31(23).[8]

The evidence, however, also tended to show that Ms. Little was over fifty years old, obese, with an eighth grade education,

8. Under this section of the Workers' Compensation Act, Ms. Little would have been entitled to compensation for 300 weeks "for the total loss of use of" her back.

and had been working as a laborer earning less than $2.00 per hour. The injury to her spinal cord resulted in weakness in her extremities and numbness throughout her body. Noting that this additional evidence was uncontradicted, this Court reversed and remanded for further proceedings on the ground that Ms. Little's injury on the job combined with her non-job-related infirmities might well qualify her for an award of total incapacity under G.S. 97-29. This Court said, in an opinion by Justice Huskins, 295 N.C. at 531-32, 246 S.E. 2d at 746:

> "*The relevant inquiry under G.S. 97-29 is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity.* In *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951), Justice Ervin, writing for the Court, noted: 'While there seems to be no case on the specific point in this State, courts in other jurisdictions hold with virtual uniformity that when an employee afflicted with a pre-existing disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the pre-existing disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person.' *Similarly, if other pre-existing conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health. See* A. Larson, Workmen's Compensation § 57.52, at nn. 96-97 (1976), and cases collected therein." (Emphasis supplied.)

The Court also said, 295 N.C. at 533, 246 S.E. 2d at 747:

> "So the ultimate question remains: To what extent is plaintiff now able to earn, in the same or any other employment, the wages she was receiving at the time of her injury? If she is unable to work and earn *any* wages, she is totally

disabled. G.S. 97-2(9). In that event, unless all her injuries are included in the schedule set out in G.S. 97-31, she is entitled to an award for permanent total disability under G.S. 97-29.

. . . .

"If she is able to work and earn *some* wages, but less than she was receiving at the time of her injury, she is partially disabled. G.S. 97-2(9). In that event she is entitled to an award under G.S. 97-31 for such of her injuries as are listed in that section, and to an additional award under G.S. 97-30 for the impairment of wage earning capacity which is caused by any injuries *not listed* in the schedule in G.S. 97-31." (Emphasis original.)

There was, of course, no medical connection between the injuries Ms. Little suffered in her work-related fall and her pre-existing advanced age, obesity, and limited education. Yet this Court, expressly employing the aggravation principle announced in *Anderson*, concluded that Ms. Little was entitled to be compensated for whatever incapacity for work she suffered by reason of the combined effects of her injuries suffered in her work-related fall and these other pre-existing conditions.

The Court of Appeals has expressly so held in *Mabe v. Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d 804 (1972), a case involving an occupational disease. Mabe had worked as a stonecutter for defendant for 30 to 35 years. He left work in 1968 and subsequently filed claim for disability caused by silicosis. The Advisory Medical Committee for the Industrial Commission was of the opinion that the employee was "40% disabled from employment in his previous or any other occupation." The employee's own testimony tended to show that because of shortness of breath and lack of strength he could not perform hard labor and that because of his lack of education and illiteracy he was qualified to do nothing but hard labor. He had not, therefore, had regular employment since 1968 when he left his stonecutter's job. The Full Commission awarded the employee compensation for total disability in accordance with G.S. 97-61.6 and G.S. 97-29.[9]

9. G.S. 97-61.6 provides that "where the incapacity for work resulting from asbestosis or silicosis is found to be total, the employer shall pay . . . compensation in accordance with G.S. 97-29."

The Court of Appeals affirmed against defendant's contention that the employee would not be totally disabled to work were it not for the contributing factors of his age and poor education, both of which were beyond the employer's control. The Court of Appeals answered this contention by saying, 15 N.C. App. at 255-56, 189 S.E. 2d at 806-07:

> "The question is what effect has the disease had upon the earning capacity of this particular plaintiff; not what effect a like physical impairment would have upon an employee of average age and intelligence.
>
> "The answer [to defendant's contention] is that an employer accepts an employee as he is. If a compensable injury precipitates a latent physical condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable and no attempt is made to weigh the relative contribution of the accident and the pre-existing condition. 2 Larson, Workmen's Compensation Law, § 59.20, p. 88.109. By the same token, *if an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor learning on the grounds that if it were not for these factors he might still retain some earning capacity.*" (Emphasis supplied.)

The principle governing this case was applied in *Pruitt v. Knight Publishing Co.*, 27 N.C. App. 254, 218 S.E. 2d 876 (1975), *rev'd on other grounds*, 289 N.C. 254, 221 S.E. 2d 355 (1979). There a worker had suffered a work-related back injury on 30 November 1972. In 1961 he had also suffered a back injury in an automobile accident. Dr. J. L. Goldner had treated him for both injuries. At the compensation hearing, Dr. Goldner testified that plaintiff had a 35 percent permanent partial disability of the spine with 25 percent attributable to the pre-existing automobile injury and 10 percent attributable to the later work-related injury. The Commission gave Mr. Pruitt an award based on a 10 percent permanent disability of his back. The Court of Appeals reversed and held that Mr. Pruitt was entitled to an award based on a 35 percent disability of his back. The Court of Appeals, in an opinion by Judge, now Justice, Britt, 27 N.C. App. at 256-59, 218 S.E. 2d at 878-80, correctly set out the governing principles as follows:

"In cases covered by our Workmen's Compensation Act, disability is not a term of art but a creature of statute. G.S. 97-2(9) provides: 'The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' Thus we see that disability is defined in terms of a diminution in earning power. It is more than mere physical injury and is markedly different from technical or functional disability. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). Our Supreme Court has described disability as the event of being incapacitated from the performance of normal labor. *Watkins v. Central Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971); *Hall v. Chevrolet, Inc.*, 263 N.C. 569, 139 S.E. 2d 857 (1965).

"An employer takes his employees as he finds them. *Mabe v. North Carolina Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d 804 (1972). *See, e.g., Edwards v. Publishing Co.*, 227 N.C. 184, 191, 41 S.E. 2d 592, 594 (1947) (Concurring opinion of Seawell, J.). *Each employee brings to the job his own particular set of strengths and weaknesses. That one employee is peculiarly disposed to injury because of an infirmity or disease incurred prior to his employment affords no sound basis for a reduction in the employer's liability.* The fact that a person of normal faculties working under the same conditions might not have sustained the same injury to the same degree is immaterial. *Plaintiff was putting forth a full day's work for a full day's pay. There is no evidence that plaintiff's capacity to earn in the course of employment at defendant's printing plant was at all impaired by after-effects of the 1961 automobile accident.*

"The record reveals the 1972 injury as the causal force which transformed latent infirmity into disability within the contemplation of the Workmen's Compensation Act. The force of the earlier injury was spent; the after-effects, both long and short term, had abated to the extent that plaintiff regularly performed heavy manual labor—lifting lead plates —at defendant employer's printing plant. The vulnerative force of the 1972 accident acted directly upon the situs of the earlier injury and surgery, causing, '. . . the impingement of the old fusion on L3 spinous process.' By invading theretofore

unoffending aspects of the earlier injury the accident of defendant's printing plant became the prime cause of plaintiff's disability.

. . . .

"Our act contains no special statute which would authorize apportionment in the instant case.

"*There is a distinction between a preexisting impairment independently producing all or part of a final disability, and a preexisting condition acted upon by a subsequent aggravating injury which precipitates disability. Plaintiff's claim falls in the latter category.*

"Our decision is in accord with the majority, and we think the better, view of those jurisdictions which have spoken on the subject of preexisting infirmities aggravated by subsequent industrial injury. . . . So long as an individual is capable of doing that for which he was hired, then the employer's liability for injury due to industrial accident ought not be reduced due to the existence of a nonincapacitating infirmity.

"There are limited provisions for apportionment of disability under our Workmen's Compensation Law. Pursuant to G.S. 97-33 disability may be apportioned between injuries connected with military service and those sustained in the course of other employment. The Supreme Court has held the policy evinced by this statute is designed to thwart double recoveries. *Schrum v. Upholstering Co.*, 214 N.C. 353, 355, 199 S.E. 385, 387 (1938). G.S. 97-35 also has limited provision for apportionment. Its application is restricted to successive injuries arising out of the same employment, and certain other cases. Neither of these statutes is applicable to the facts of this case where plaintiff received no compensation for his earlier back injury which arose out of a noncompensable automobile accident separate and apart from any employment." (Emphasis supplied.)

On defendant's appeal in *Pruitt* by virtue of Judge Clark's dissent in the Court of Appeals, this Court in an opinion by Justice Huskins agreed with the Court of Appeals' conclusion that our apportionment statutes, G.S. 97-33 through G.S. 97-35, were

inapplicable. This Court viewed the appeal as presenting two determinative questions, 289 N.C. at 257, 221 S.E. 2d at 357:

> "1. Is plaintiff bound by the written agreement on I. C. Form 26 dated 6 June 1974, and approved by the Commission, wherein defendants agreed to pay and plaintiff agreed to accept compensation based on a 10 percent partial disability of his back?
>
> "2. Where an employee is paid compensation for a period of temporary total disability caused by a compensable injury which materially aggravated a preexisting 25 percent permanent partial loss of use of the back so that the employee had a 35 percent permanent partial loss of use of the back at the end of the healing period, is the employee entitled to compensation under G.S. 97-31(23) for 10 percent or 35 percent permanent partial loss of use of the back?"

The Court answered the first question in the affirmative and did not consider the second.

Our apportionment statutes have no application to this case. Defendants make no argument based on them.

As with Mr. Pruitt, Mrs. Morrison's infirmities which preexisted the onset of her occupational diseases, while medically significant, physically debilitating, and perhaps functionally disabling, were *not* disabling in the compensation sense because they had not resulted in any incapacity for work. Mrs. Morrison like Mr. Pruitt suffered no incapacity for work until the onset of her chronic obstructive lung disease. It was this lung disease which, in the words of *Pruitt*, "transformed latent infirmity into disability within the contemplation of the Workmen's Compensation Act." 27 N.C. App. at 257, 218 S.E. 2d at 879. The lung disease then was the effective cause, or the precipitating cause, of Mrs. Morrison's total incapacity for work. It was the cause without which Mrs. Morrison would have had no incapacity for work at all. Although there is no medical connection and no medical aggravation between Mrs. Morrison's lung disease and her preexisting physical infirmities, she is totally incapacitated as a result of the combined effects of or the interaction between the disease and these other infirmities. Therefore, under the principles recognized in *Anderson* and applied in *Little*, *Mabe*, and

Pruitt, Mrs. Morrison is entitled to an award for her total incapacity.

Cases throughout the country in jurisdictions with total and partial incapacity statutes similar to G.S. 97-29 and 97-30 and in the absence of special apportionment statutes are in accord with our cases.

In *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 584, 83 N.W. 2d 614, 616 (1957), the Court said:

> "Nothing is better settled in compensation law than that the act takes the workmen as they arrive at the plant gate. Some are weak and some are strong. Some, particularly as age advances, have a pre-existing 'disease or condition' and some have not. No matter. All must work. They share equally the hazards of the press and their families the stringencies of want, and they all, in our opinion, share equally in the protection of the act in the event of an accident, regardless of their prior condition of health."[10]

In *Wadleigh v. Higgins*, 358 A. 2d 531 (Me. 1976), the employee suffered a back injury under compensable circumstances. He also suffered from carcinoma of the larynx, gout, and osteoarthritis of the spinal column. The Maine Industrial Commission found as a fact that the employee "is totally disabled." The Commission, however, also found that only 90 percent of his total disability was attributable to his back injury. It made an award for compensation as in a case of 90 percent partial disability. The Supreme Judicial Court of Maine sustained the employee's appeal and held that he was entitled to compensation for total disability notwithstanding the Commission's finding that 10 percent of his total disability was attributable to conditions other than his back injury. The Maine Court said, 358 A. 2d at 532-33:

> "An employer [must] compensate an employee who is disabled *as a result of the interaction between* a work related

10. Michigan statutes provide for payments for "total" incapacity for work and for "partial" incapacity for work where the respective incapacity is one "resulting from" an industrial injury. Mich. Comp. Laws Ann. §§ 418.351 and 418.361. Michigan does, however, *by statute* seem to apportion awards for occupational diseases which aggravate pre-existing non-compensable disabilities. Mich. Comp. Laws Ann. §§ 418.431, 418.535.

> injury and a preexisting but non-disabling injury or disease to the full extent of his incapacity even though the injury would not have so extensively disabled a healthy individual. The principle may be seen as a corollary of the oft-stated maxim that the employer takes his employee as he finds him."[11] (Emphasis supplied.)

In *Reynolds v. Ruidoso Racing Ass'n, Inc.*, 69 N.M. 248, 365 P. 2d 671 (1961), the employee suffered a compression fracture of a spinal vertebra under compensable circumstances. Before this injury he had suffered two other fractured vertebra which had satisfactorily healed. He also suffered from osteoporosis, or unusually porous and supple bones. The factfinder found that the employee was totally and permanently disabled "from doing gainful and useful work that he is capable of performing" but that only 10 percent of this disability was due to his compensable back injury, the rest being due to his osteoporosis, the cause of which was unknown. The factfinder, therefore, awarded the employee as if he had been only 10 percent totally disabled. The Supreme Court of New Mexico held that the employee was entitled to compensation for total disability. It recognized that there was no evidence that the compensable back injury aggravated his preexisting bone disease in a medical sense. Rather the physical combination of the back injury and the bone disease resulted in total disability. The Court quoted with approval from 1 Larson § 12.20 (1952), as follows:

> "Pre-existing disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, *or combined with* the disease or infirmity to produce the death or disability for which compensation is sought." (Emphasis supplied.)[12]

The court also cited with approval *National Homeopathic Hospital Association of District of Columbia v. Britton*, 147 F. 2d 561 (D.C.

11. Maine's compensation statutes also employ the "resulting from" language in its total and partial incapacity statutes. Me. Rev. Stat. tit. 39, §§ 54 and 55.

12. New Mexico defines the causal relation between an industrial "injury" and total or partial "disability," respectively, as meaning a "condition" whereby a workman, by reason of an [industrial injury] is "wholly unable" or "unable to some percentage-extent" to work. N.M. Stat. Ann. §§ 52-1-24, 52-1-25.

Cir. 1945), where total disability compensation was allowed when a knee-cap fracture incurred under compensable circumstances "combined with" previous fractures and amputations to produce total disability. The New Mexico Court quoted with approval the following language from the District of Columbia Court of Appeals, *Reynolds v. Ruidoso Racing Ass'n, Inc.*, 69 N.M. at 257, 365 P. 2d at 677:

> "In a negligence case, the question is not what the accident would have done to a different man but what it actually did to its victim. This is equally true in compensation cases. Therefore the employer must, in general, compensate the workman for the consequences of an accident although his previous defects *cooperated in producing them.*" (Emphasis original.)

The New Mexico Court also noted that "44 states have second injury funds as a means of answering the dilemma presented by dissatisfaction with rules of full responsibility and the rule of apportionment, New Mexico is one of the six that has never established such a fund." *Id.* at 257-58, 365 P. 2d at 678. This statement referred to states which provide by statute for apportionment of compensation between disability caused in part by industrial accident or disease and in part by other non-job-related conditions, and to states which have special funds established so that these funds together with workers' compensation insurance fully compensate the worker, in any event, under such circumstances.[13]

In *National Zinc Co. v. Hainline*, 360 P. 2d 236 (Okla. 1961), the employee suffered from emphysema. He worked for 21 years in close proximity to zinc processing equipment. The evidence tended to show that breathing fumes from the zinc processing equipment in combination with his pre-existing emphysema had resulted in total disability. The Supreme Court of Oklahoma, however, rejected defendant's argument that the employee should recover only for that part of his disability resulting from

13. *See* 2 Larson §§ 59.21, 59.30 (1981). North Carolina has a second injury fund statute, G.S. 97-40.1. Its application is quite limited. The point has not been argued but it would not appear that the statute has any application in Mrs. Morrison's case.

breathing fumes from the zinc processing equipment. The Court said, 360 P. 2d at 239:

> "It is settled law in this jurisdiction that disability from an accidental injury which aggravates or accelerates a dormant disease is compensable, even though the physical condition of employee pre-disposes him to, or increases, the harm of a particular injury. We can perceive of no valid reason why a different rule should govern a situation, where, as in the instant case, the morbidity from compensable exposure to toxic substances as defined by statute, rather than an accident, augments or accelerates a disease upon which it is superimposed, so as to ultimately produce disability. In both instances *the entire disability arising from the cumulative effect of a compensable harm combined with a non-occupational illness, interacting upon each other and operating together, furnishes the proper basis for an award.*[14] (Emphasis supplied.)

These cases establish the following principles applicable in compensation cases: An employer takes his workers as he finds them with all of their infirmities and weaknesses. In terms of their causal relationship to incapacity for work occupational diseases are treated like industrial accidents. The industrial accident or occupational disease need not be the sole cause of the incapacity for work. It need only be a contributing factor in the sense that it is the effective, or precipitating, cause of the incapacity for work, or a cause without which the incapacity for work would not have occurred. Neither is it necessary that the industrial accident or occupational disease be medically related to, or medically aggravate, the worker's pre-existing infirmities. It is enough if the industrial accident or occupational disease physically combines or interacts with the worker's pre-existing infirmities to produce incapacity for work so long as these pre-existing infirmities are themselves insufficient to cause any incapacity for work. In such cases the award may not be made as if the worker were incapacitated only to the extent of the industrial accident's or occupational disease's contribution. The worker in such cases

14. Oklahoma employs the "resulting from" language in its compensation statutes. Okla. Stat. Ann. tit. 85, § 11 (West).

must be compensated to the full extent of his incapacity to work, be it partial or total.

Applying these principles to the Commission's findings under the interpretation now being discussed, the decision of the Court of Appeals should be affirmed. The evidence shows *at most* that the combined effects of, or the interaction between, Mrs. Morrison's occupational lung disease and her other physical infirmities produced total incapacity for work. There is no evidence that these other physical infirmities *in and of themselves* were sufficient to cause any incapacity for work. The Commission has found that Mrs. Morrison is totally incapacitated for work due to the combined effects of her lung disease and certain other pre-existing infirmities. It has not found that any of the pre-existing infirmities were sufficient in themselves to cause Mrs. Morrison to have any incapacity for work. Therefore the award must be made for Mrs. Morrison's total incapacity.

II

An occupational cause or condition need not be the sole cause of an occupational disease in order for the worker to be compensated for the full extent of the incapacity for work caused by the disease.

For a disease to be occupational and therefore compensable under G.S. 97-53(13) "two conditions must be met: (1) It must be 'proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment'; and (2) It cannot be an 'ordinary disease of life to which the general public is equally exposed outside of the employment.' " *Booker v. Medical Center*, 297 N.C. 458, 468, 256 S.E. 2d 189, 196 (1979). If there is a greater risk of contracting the disease by workers in a given occupation because of conditions "characteristic of and peculiar" to the occupation, the "nexus between the disease and the employment which" makes the disease occupational and therefore compensable is provided. *Id.* at 475, 256 S.E. 2d at 200.[15] The statute thus insures by its terms that a

15. The disease need not be one which originates exclusively from or is unique to the particular occupation in question. *Booker v. Medical Center, supra.* Nor is the fact that the disease is an ordinary disease of life to which members of the general public also succumb fatal to an occupational disease claim if the "greater

disease, in order to be compensable, must have the requisite causal connection to the occupation out of which it allegedly arose.

The statute, however, does not require that the disease be caused *solely* by occupational conditions in order that the worker be compensated for the full effects of the disease on the worker's capacity to work. Not only is this position supported by authorities from other jurisdictions which have considered the precise question now before this Court, it is also supported by this Court's analysis of a strongly analogous situation in *Vause v. Vause Farm Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951).

In *Vause* the worker suffered from epilepsy. He was driving a truck in the course of his employment. Apparently sensing the onset of an epileptic seizure, the worker was able to pull the truck off the road and bring it to a complete stop. He then lay down on the seat of the truck when he suffered an epileptic seizure that caused him to lose consciousness. When he regained consciousness he was hanging onto the steering wheel with his hands. His body was outside the truck with one foot on the running board and the other dangling beside it. The Industrial Commission found that the worker "as soon as he lay down, became unconscious and on account of his illness or seizure moved on the seat of the truck while in an unconscious condition and fell from the seat of the truck to the running board or ground [and] . . . that as a result of the fall . . . suffered a fracture and dislocation of the hip and socket and also a fracture of . . . the pelvis." *Id.* at 90, 63 S.E. 2d at 174. This Court reversed an award of compensation made by the Commission on the ground that there was "no causal connection between the operation of the truck and the injury. The evidence here shows that the plaintiff felt the epileptic seizure coming on. He pulled the truck off the road, parked it, and lay down on the seat in a place of apparent safety, with all of the ordinary dangers of his employment suspended and in repose. We perceive in this evidence no showing that any hazard of the

risk" nexus is present; for in such cases the public is not exposed to the disease equally with those engaged in the particular employment in question. *Id.* Thus diseases of life such as serum hepatitis, tuberculosis and contact dermatitis may be occupational diseases notwithstanding that they are ordinary diseases of life provided that the employee because of his employment has a greater risk of contracting them than does the public generally. *Id.*, and cases cited therein.

employment contributed in any degree to the unfortunate occurrence. The evidence affirmatively shows that it was solely the force of his unfortunate seizure that moved him from his position of safety to his injury. The cause of the fall is not in doubt. It is not subject to dual inferences." *Id.* at 98, 63 S.E. 2d at 180.

The result in *Vause* was based on the Court's conclusion that *no* causal relationship existed between the worker's employment and his fall. In its opinion, however, the Court was careful to point out that had the evidence demonstrated that a condition of the worker's employment contributed to his fall he would have been entitled to compensation for all of the incapacity caused by the fall notwithstanding that an epileptic seizure was also a contributing factor. The Court said, *id.* at 92-93, 63 S.E. 2d at 176:

> "The hazards of employment do not have to set in motion *the sole causative* force of an injury in order to make it compensable. By the weight of authority it is held that where a workman by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation *if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury.* But in such case 'the employment must have some definite, discernible relation to the accident.' (Citation omitted.)
>
> "Similarly, it is generally held that where an employee is seized with an epileptic fit . . . and falls due to such . . . causes, even so compensation will be awarded if a particular hazard inherent in the working conditions also contributes to the fall and consequent injury. (Citation omitted.)
>
> . . . .
>
> "It appears . . . that the better considered decisions adhere to the rule that *where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable.* But not so where the idiopathic condition is the sole cause of the injury." (Emphasis supplied.)

The Commission in *Vause* took the same legal position as the Court. The Commission concluded, however, that because both the worker's epilepsy and a condition of his employment contributed to his fall, he was entitled to be compensated for the full extent of his incapacity caused by the fall. The Commission did not reduce the award on the ground that his fall was due, in part at least, to a condition unrelated to the worker's employment. This Court in its opinion expressly recognized that if any aspect of the worker's employment had contributed "in some reasonable degree" or had his injuries been the result both of his epileptic seizure and some hazard inherent in his working conditions, the worker would have been entitled to compensation to the full extent of any incapacity suffered in the fall. *Vause* clearly states that the conditions of employment need not be the sole cause of an employee's injury in order for the employee to be compensated for all incapacity for work caused by the injury, even though our compensation statutes require that the incapacity for work must "result from" an "injury by accident arising out of and in the course of the employment." *Compare* G.S. 97-29 and G.S. 97-30 *with* G.S. 97-2(6).

The recognition in *Vause* that occupational hazards need not be the sole cause of an injury in order for the incapacity for work caused by the injury to be fully compensable strongly calls for the same proposition to be applied in occupational disease cases. "Disablement . . . resulting from an occupational disease" is treated the same for compensation purposes as the happening of an injury by accident. G.S. 97-52; *Woods v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). The occupational "causes and conditions," in other words, need not be the sole cause of the disease in order that all incapacity for work caused by the disease be fully compensable. It is enough if these occupational causes and conditions "reasonably contribute," in the words of *Vause*, to the development of the disease.

All cases from other jurisdictions with statutes like ours apply this rule. *Newport New Shipbuilding & Dry Dock Co. v. Director*, 583 F. 2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Pullman Kellogg v. Workmen's Compensation Appeals Bd.*, 26 Cal. 3d 450, 605 P. 2d 422, 161 Cal. Rptr. 783 (1980); *McAllister v. Workmen's Compensation Appeals Bd.*, 69 Cal. 2d 408, 445 P. 2d 313, 71 Cal. Rptr. 697 (1968); *Thornton Chevrolet, Inc. v.*

Morgan, 148 Ga. App. 711, 252 S.E. 2d 178 (1979); *Riley v. Avondale Shipyards*, 305 So. 2d 742 (La. App. 1975); *Langlais v. Superior Plating, Inc.*, 226 N.W. 2d 891 (Minn. 1975); *Bolger v. Chris Anderson Roofing Co.*, 112 N.J. Super. 383, 271 A. 2d 451 (1970), *aff'd* 117 N.J. Super. 497, 285 A. 2d 228 (1971); *Mueller v. State Accident Ins. Fund*, 33 Or. App. 31, 575 P. 2d 673 (1978). *See generally* 1B Larson, § 41.64(a)(c) (1980).

In all these cases cigarette smoking together with the inhalation of occupational substances produced lung disease (*Newport News Shipbuilding, Pullman Kellogg, Thornton Chevrolet, Riley, Langlais* and *Mueller*) or lung cancer (*McAllister* and *Bolger*). The courts, however, in all cases concluded that because there was evidence that inhalation of occupational substances contributed to the diseases, the diseases were occupational diseases. The courts, therefore, either affirmed compensation awards (*Newport News Shipbuilding, Pullman Kellogg, Thornton Chevrolet, Riley, Langlais* and *Bolger*) or reversed denials of awards by administrative agencies (*McAllister* and *Mueller*).

In *Pullman Kellogg* the worker was totally disabled by lung disease caused in part by his cigarette smoking habit and his exposure to industrial fumes and dust. The medical testimony was that "the probable cause for this patient's pulmonary pathology is due 50 percent to his smoking history and 50 percent to the various fumes over a forty year period." The worker's compensation judge, under a California statute permitting apportionment where an occupational disease aggravated some prior condition or disease, awarded the employee 50 percent of what he would otherwise have been entitled to for total incapacity. The Worker's Compensation Appeals Board, however, reversed the apportionment ruling and the California Supreme Court affirmed the judgment of the appeals board. The Court said, 26 Cal. 3d at 454-55, 605 P. 2d at 424, 161 Cal. Rptr. at 785:

> "We come, then, to the application of the foregoing principles. Dr. Sills' opinion that 50 percent of [claimant's] pathology was caused by exposure to harmful substances and the remainder to his smoking habit does not provide a basis for apportionment. It is disability resulting from, rather than a cause of, a disease which is the proper subject of apportionment; 'pathology' may not be apportioned. (Citations omitted.)

> The Sills report does not attribute any part of the disability to [claimant's] smoking of cigarettes; rather, it purports to make an apportionment of 'pathology.' Moreover, it does not state whether [claimant] would have been disabled as the result of the smoking in the absence of the work-related inhalation of harmful substances. For all that appears in the record, he would not have suffered any disability whatever because of his smoking habit if he had not been exposed to damaging substances in his work. In the absence of such evidence, apportionment was not justified."

In *McAllister*, the California Supreme Court said, 69 Cal. 2d at 418, 445 P. 2d at 318-19, 71 Cal. Rptr. at 702-03:

> "We cannot doubt that the more smoke decedent inhaled —from whatever source—the greater the danger of his contracting lung cancer. His smoking increased that danger, just as did his employment. *Given the present state of medical knowledge, we cannot say whether it was the employment or the cigarettes which 'actually' caused the disease; we can only recognize that both contributed substantially to the likelihood of his contracting lung cancer. . . . [T]he decedent's employment need only be a 'contributing cause' of his injury.*" (Emphasis supplied.)

The notion of "reasonable" or "substantial" contribution referred to in these cases is better expressed by the term "significant." The occupational conditions, in other words, must have significantly contributed to the disease's development in order for the disease to be occupational. Significant means "having or likely to have influence or effect: deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE." Webster's Third New International Dictionary (Merriam-Webster 1971). Significant is to be contrasted with negligible, unimportant, present but not worthy of note, miniscule, of little moment. The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would either (1) not have developed or (2) not have developed to such an extent as to result in the employee's incapacity for work for which he claims benefits.

In this case, of course, the Commission need not have found that Mrs. Morrison's cotton dust exposure significantly con-

tributed to the development of her occupational disease. There was testimony from Dr. Battigelli that Mrs. Morrison's exposure to cotton dust played an insignificant or miniscule role in the development of her lung disease. This evidence would have supported a finding by the Commission that Mrs. Morrison did not have an occupational disease.

The Commission, however, found in accordance with the medical evidence favorable to Mrs. Morrison on this question, that is, that her cotton dust exposure had contributed to the extent of 50 to 60 percent to her lung disease. This is a finding, in effect, that the cotton dust exposure significantly contributed to the development of her lung disease. Under applicable law, consequently, the Commission should not have reduced Mrs. Morrison's award on the ground that some non-occupational factor also contributed to the development of her disease.

Justice CARLTON joins in this dissent.

PAULINE C. HANSEL, EMPLOYEE-PLAINTIFF v. SHERMAN TEXTILES, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER-DEFENDANTS

No. 107

(Filed 6 October 1981)

1. **Master and Servant § 96— workers' compensation—conclusiveness of findings supported by evidence**

The findings of fact made by the Industrial Commission in a workers' compensation proceeding are conclusive on appeal if supported by competent evidence even though there is evidence which would support findings to the contrary.

2. **Master and Servant § 68— workers' compensation—occupational disease**

In order for any disease, other than those specifically named in G.S. 97-53, to be deemed an "occupational disease," it must be "proven to be due to" causes and conditions as specified in that statute.

3. **Master and Servant § 68— workers' compensation—occupational disease**

The three elements necessary to prove the existence of a compensable "occupational disease" are: (1) the disease must be characteristic of a trade or occupation; (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there must be

proof of causation, *i.e.*, proof of a causal connection between the disease and the employment.

4. Master and Servant § 68— workers' compensation—non-occupational diseases of respiratory system—aggravation from conditions of employment

In cases in which a claimant for workers' compensation has non-occupational infirmities related solely to the lungs or respiratory system, the Industrial Commission should, as a matter of course, consider whether claimant's disablement (*i.e.* inability to work and earn wages) results from aggravation of those non-occupational diseases or infirmities by causes and conditions peculiar to claimant's employment.

5. Master and Servant § 68— workers' compensation—non-occupational disease—aggravation by conditions of employment

If there is no aggravation or acceleration, a disease or condition which is non-occupational in its incipience is non-compensable as a matter of law notwithstanding the intervention of years of occupational exposure to hazardous conditions between the time the disease was contracted and the time it became disabling; if, however, a disease or condition which is non-occupational in its incipience is in fact aggravated or accelerated by causes and conditions peculiar to the claimant's employment, disability resulting therefrom is compensable.

6. Master and Servant § 68— workers' compensation—occupational disease—necessary findings

Where the Industrial Commission awards compensation for disablement due to an occupational disease encompassed by G.S. 97-53(13), the opinion and award must contain findings as to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers as well as a conclusion of law as to whether the disease falls within the statutory provision; however, such findings are not necessary when the Commission finds that the disease, whatever its manifestations and symptoms, was not due to causes or conditions characteristic of the particular employment in which the employee was engaged.

7. Master and Servant § 68— workers' compensation—byssinosis as partial cause of disability

Where the Industrial Commission found that plaintiff's byssinosis was "partly responsible for her disability" and the evidence indicated that plaintiff suffered from other diseases or infirmities, including asthma, chronic bronchitis, emphysema, and certain allergies, the Commission should have determined what percentage of plaintiff's disability was due to her occupational disease.

8. Master and Servant § 68— workers' compensation—occupational disease—cause of disability—remand for further evidence and findings

Where, in a proceeding brought by plaintiff to recover workers' compensation for disability allegedly resulting from the occupational disease byssinosis, the medical evidence in the record was not sufficiently definite as to the cause of plaintiff's disability to permit effective appellate review, the case must be

remanded for further medical testimony and findings as to the following questions: (1) whether plaintiff is totally or partially incapacitated to work and earn wages, and if partially incapacitated, the percentage of her disability; (2) what disease or diseases caused this disability; (3) which of the plaintiff's disabling diseases are occupational in origin; (4) whether plaintiff suffers from disabling diseases or infirmities which are not occupational in origin; (5) whether plaintiff's non-occupational diseases or infirmities aggravated or accelerated her occupational disease; (6) the percentage of plaintiff's incapacity to work and earn wages which results from (a) her occupational disease or (b) her non-occupational diseases which were aggravated or accelerated by her occupational disease; and (7) the percentage of plaintiff's incapacity to work and earn wages which results from non-occupational diseases or infirmities.

Justice EXUM concurring in result.

Justice CARLTON joins in this concurring opinion.

ON appeal by defendant as of right pursuant to G.S. 7A-30(2), 49 N.C. App. 1, 270 S.E. 2d 585 (1980) (opinion by *Erwin, J.* with *Hedrick, J.* concurring and *Wells, J.* dissenting). The Court of Appeals vacated an opinion and award of the North Carolina Industrial Commission in plaintiff's favor filed 17 December 1979. This case was docketed and argued as No. 2, Spring Term 1981.

This proceeding was begun before the Industrial Commission as a compensation claim by plaintiff, a woman fifty-one years of age, seeking recovery on the grounds that she contracted byssinosis as a result of exposure to cotton dust in the course of her employment as a textile worker in defendant's plant. The matter was first heard before Deputy Commissioner Lawrence B. Shuping, Jr., in Shelby on 10 April 1979 at which time, by agreement of the parties, the hearing was limited to the taking of testimony of Dr. T. Reginald Harris. After taking Dr. Harris's testimony, the matter was reset for hearing in Gastonia. The matter subsequently came on for hearing before Deputy Commissioner Christine Y. Denson on 16 July 1979. The parties stipulated in pertinent part that the plaintiff last worked for defendant on 5 May 1977 at which time the employee-employer relationship existed between plaintiff and defendant; that the parties were subject to the provisions of the Workers' Compensation Act; and that plaintiff's average weekly wage was $140.90. The following FINDINGS OF FACT, CONCLUSION OF LAW, and AWARD were entered by Deputy Commissioner Denson:

FINDINGS OF FACT

1. Plaintiff was born on January 8, 1928. At the age of 16 she began working in a textile mill and has worked in a textile mill up to May 5, 1977, except for six months in a paper mill.

2. Most recently, plaintiff worked from 1955 to 1965 in the Gamble Melville mill in Bessemer City. She worked in weaving, but her station was next to the door to the card room which was opened frequently. Cotton dust was visible in the air.

In 1966 plaintiff worked in the Osage mill in Bessemer City as a weaver. Very little cotton was processed but the air was very dusty none-the-less.

In 1967 plaintiff began working for defendant-employer as a weaver. Except for a six month's absence in 1971, plaintiff worked continuously until May 5, 1977. The air was very dusty from the cotton that was processed.

Plaintiff in about 1972, began to notice that when she began the work week on Sunday night, she would have chest tightness and some coughing after being there two or three hours. In about 1974 or 1975, plaintiff felt that way all the time at work with no particular time being worse.

3. Because of shortness of breath and other respiratory problems and some blackout spells, plaintiff moved to the cloth room during the last six months of her employment by defendant. This took her out of dust but her respiratory problems had reached the irreversible stage, and she could hardly exert herself. She quit on May 5, 1977 because of respiratory problems.

4. Plaintiff has both asthma and byssinosis which are causing her respiratory impairment. Her impairment is severe and irreversible.

5. Plaintiff has byssinosis as a result of her exposure to cotton dust in her employment with defendant-employer and this is partly responsible for her disability.

6. Plaintiff has not worked since May 5, 1977.

* * *

The foregoing findings of fact and conclusions of law engender the following additional

CONCLUSION OF LAW

1. Plaintiff has contracted the disease byssinosis as a result of exposure to cotton dust in her employment with defendant-employer. This disease is compensable under the provisions of G.S. 97-53(13).

2. Defendants owe plaintiff compensation for permanent, partial disability from May 5, 1977 for her period of disability not to exceed 300 weeks. G.S. 97-30.

* * *

Based upon the foregoing findings of fact and conclusions of law, the undersigned enters the following

AWARD

1. Subject to counsel fee, defendants shall pay plaintiff compensation in the amount of $99.94 per week from May 5, 1977 for the period of plaintiff's disability but for a period not to exceed 300 weeks.

2. An attorney fee in the sum of $5,000.00 is awarded plaintiff's counsel and shall be deducted from accured compensation.

3. Defendants shall pay all medical expenses incurred as a result of the occupational disease giving rise hereto.

4. Defendants shall pay the costs.

This the 30th day of July, 1979.

Upon entry of the foregoing opinion and award, the defendants appealed to the full Commission. On 17 December 1979 the full Commission, with Commissioner Robert S. Brown dissenting, entered its opinion and award adopting as its own the decision by Deputy Commissioner Denson in its entirety and affirming her award in all respects. Defendants appealed to the North Carolina Court of Appeals pursuant to G.S. 97-88. The case was heard by the Court of Appeals on 28 August 1980 and that court on 7 October 1980 filed its opinion vacating the award of the full Commission upon its conclusion that the Commission's finding that the

plaintiff contracted byssinosis as a result of her exposure to cotton dust in her employment with defendant was unsupported by sufficient competent evidence. Wells, J. dissented. Plaintiff appealed as of right pursuant to G.S. 7A-30(2).

Frederick R. Stann for plaintiff-appellant.

Hollowell, Stott, Hollowell, Palmer & Windham, by James C. Windham for defendant-appellee.

MEYER, Justice.

Pursuant to Rule 16 of the Rules of Appellate Procedure, review by the Supreme Court after a determination by the Court of Appeals, is to determine whether there is error of law in the decision of the Court of Appeals.

Even though the record in the case before us may support a finding that plaintiff did not contract an occupational disease as a result of exposure to cotton dust in her employment with the defendant, if, upon review, this Court finds that the decision of the full commission in its opinion and award is supported by competent evidence, we must conclude that there is error as a matter of law in the decision of the Court of Appeals.

[1] Under the provisions of G.S. 97-86, the Industrial Commission is the fact finding body and the rule under the uniform decisions of this Court is that the findings of fact made by the Commission are conclusive on appeal, both before the Court of Appeals and in this Court, if supported by competent evidence. This is so even though there is evidence which would support a finding to the contrary. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977); *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963); *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951); 8 Strong's N.C. Index 3d, Master and Servant § 96, and cases there cited.

> In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision.

Inscoe v. Industries, Inc., 292 N.C. 210, 216, 232 S.E. 2d 449, 452 (1977); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950).

As demonstrated by the majority of the Court of Appeals, there was evidence before the Commission in this case which would have supported a finding that the plaintiff did not contract byssinosis as a result of her exposure to cotton dust in her employment with defendant. It is apparent upon review of the evidence in the record before us that there is substantial and convincing evidence that the plaintiff's symptoms could just as likely have been the result of her asthma and chronic bronchitis conditions as of byssinosis resulting from prolonged exposure to cotton dust. However, that is not the test. The test, as indicated above, is whether there is, in the record that was before the Court of Appeals and which is now before us, competent evidence which would support the Commission's finding that plaintiff contracted byssinosis as a result of her exposure to cotton dust in her employment with the defendant-employer.

It is not the role of the Court of Appeals or of this Court to substitute its judgment for that of the finder of fact.

> When the aggrieved party appeals to an appellate court from a decision of the Full Commission on the theory that the underlying findings of fact of the Full Commission are not supported by competent evidence, the appellate courts do not retry the facts. *Moses v. Bartholomew*, 238 N.C. 714, 78 S.E. 2d 923 (1953). It is the duty of the appellate court to determine whether, in any reasonable view of the evidence before the Commission, it is sufficient to support the critical findings necessary for a compensation award. *Keller v. Electric Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342 (1963).

Inscoe v. Industries, Inc., 292 N.C. 210, 217, 232 S.E. 2d 449, 453 (1977).

In his dissent, Judge Wells examined the record and found substantial competent evidence to support the full Commission's findings and conclusions. We likewise find competent evidence to support the findings of the Commission, but we are unable to say that the findings justify the Commission's conclusion as to causation and its award. While the two-judge majority of the panel at the Court of Appeals failed to find sufficient evidence in the

record before the Commission to support the opinion and award, and the dissenting judge reviewing the same record found ample evidence to support it, our comprehensive review of that same record leads us to an entirely different conclusion. We conclude that the medical evidence in the record is not sufficiently definite as to the cause of plaintiff's disability to permit effective appellate review.

For a disability to be compensable under our Workers' Compensation Act, it must be either the result of an accident arising out of and in the course of employment or an "occupational disease."

G.S. 97-52 provides in effect that disablement of an employee resulting from an "occupational disease" described in G.S. 97-53 shall be treated as the happening of an injury by accident. This section provides specifically:

> The word 'accident' . . . shall not be construed to mean a series of events in employment of a similar or like nature occurring regularly, continuously . . . whether such events may or may not be attributable to the fault of the employer and *disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this article.* (Emphasis added.)

G.S. 97-53 contains the comprehensive list of occupational diseases for which compensation is provided in the Act.

By the express language of G.S. 97-53, only the diseases and conditions enumerated therein shall be deemed to be occupational diseases within the meaning of the Act.

Byssinosis is not "mentioned in and compensable under" the Act, except by virtue of G.S. 97-53, which provides in pertinent part as follows:

> Section 97-53. Occupational diseases enumerated; . . . the following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:
>
> . . .
>
> (13) Any disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all or-

dinary diseases of life to which the general public is equally exposed outside of the employment.

[2, 3] In *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979), Chief Justice Sharp exhaustively examined the true meaning of the term "occupational disease" as that term is used in our Workers' Compensation Act. It is unnecessary for us to repeat the results of that examination here. The clear language of G.S. 97-53 is that for any disease, other than those specifically named, to be deemed an "occupational disease" within the meaning of the Article, it must be "proven to be due to," causes and conditions as specified in that statute. This Court held in *Booker* that there are three elements necessary to prove the existence of a compensable "occupational disease": (1) the disease must be characteristic of a trade or occupation, (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment, and (3) there must be proof of causation, *i.e.*, proof of a causal connection between the disease and the employment. *Id.* at 468, 475, 256 S.E. 2d at 196, 200.

With regard to the third element, this Court further said in *Booker:*

> It is this limitation which protects our Workmen's Compensation Act from being converted into a general health and insurance benefit act. *Bryan v. Church*, 267 N.C. 111, 115, 147 S.E. 2d 633, 635 (1966). In *Duncan v. Charlotte*, 234 N.C. 86, 91, 66 S.E. 2d 22, 25 (1951) we held that the addition of G.S. 97-53 to the Act 'in nowise relaxed the fundamental principle which requires proof of causal relation between injury and employment. And nonetheless [sic], since the adoption of the amendment, may an award for an occupational disease be sanctioned unless it be shown that the disease was incident to or the result of the particular employment in which the workman was engaged.'

297 N.C. at 475, 256 S.E. 2d at 200.

In workers' compensation actions the rule of causation is that where the right to recover is based on injury by accident, the employment need not be the sole causative force to render an injury compensable.

> [If the employee] by reason of constitutional infirmaties is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury.

Vause v. Equipment Co., 233 N.C. 88, 92, 63 S.E. 2d 173, 176 (1951).

It has on occasion been implied that a similar rule of causation should prevail in cases where compensation for occupational disease is sought; however, if a disease is produced by some extrinsic or independent agency, it may not be imputed to the occupation or the employment. *Duncan v. Charlotte*, 234 N.C. 86, 66 S.E. 2d 22 (1951); *Moore v. Stevens & Co.*, 47 N.C. App. 744, 748, 269 S.E. 2d 159, 162 (1980).

[4] It is axiomatic that neither Mrs. Hansel's asthma nor her chronic bronchitis is an "occupational disease" which standing alone is compensable under the Workers' Compensation Act, nor does either party make such a contention. The questions of *aggravation* or acceleration of these diseases or infirmities was not considered by Deputy Commissioner Denson or the full Commission, nor was it addressed in the evidence. We believe that it should have been. In cases in which a claimant has other infirmities related solely to the lungs or respiratory system, the Commission should, as a matter of course, consider whether claimant's disablement (*i.e.* inability to work and earn wages) results from aggravation of those other non-occupational diseases or infirmities by causes and conditions peculiar to claimant's employment.

[5] If there is no aggravation or acceleration, a disease or condition which is non-occupational in its incipience, is non-compensable as a matter of law notwithstanding the intervention of years of occupational exposure to hazardous conditions between the time the disease was contracted and the time it became disabling. If however a disease or condition which is non-occupational in its incipience is in fact aggravated or accelerated by causes and conditions peculiar to the claimant's employment, disability resulting therefrom is compensable.

[6] As indicated in *Booker*, a claimant's right to compensation for an occupational disease under G.S. 97-53(13) and G.S. 97-52 depends upon proper proof of causation, and the burden of proving each and every element of compensability is upon the plaintiff. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645 (1965); *Aylor v. Barnes*, 242 N.C. 223, 87 S.E. 2d 269 (1955). It is true that, where the Commission awards compensation for disablement due to an occupational disease encompassed by G.S. 97-53(13), the opinion and award must contain findings as to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers, as well as a conclusion of law as to whether the disease falls within the statutory provision. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). However, such findings should not be necessary upon the Commission's finding that the disease, whatever its manifestations and whatever its symptoms, was not due to causes or conditions characteristic of the particular employment in which the employee was engaged. The denial of compensation may be predicated upon the failure of the claimant to prove any one of the elements of compensability. *See, Moore v. Stevens & Co.*, 47 N.C. App. 744, 269 S.E. 2d 159 (1980), *pet. for disc. rev. denied*, 301 N.C. 401, 274 S.E. 2d 266 (1980).

[7] In the case before us in which the Commission made an award of compensation, there was not sufficient determination by the finders of fact, and certainly no explicit findings, upon which this Court can determine the sufficiency of the evidence to support the Commission's findings and conclusion. It is explicitly stated in the Commission's finding number 5 that plaintiff's byssinosis "is partly responsible for her disability" and thus implicit that some other disease or infirmity is likewise "partly responsible for her disability." The evidence indicates that the other disease or infirmity is probably asthma and chronic bronchitis, although plaintiff also testified that two other doctors told her previously that she had emphysema. It also appears from the evidence that she is apparently also allergic to, among other things, dust, mold, mildew, trees, grass, animals, feathers, cotton dust, nylon dust and polyester dust. Because of the presence of these other infirmities and because this is a case of partial disability as opposed to one of total disability, it must be determined what percentage of claimant's disability is due to her oc-

cupational disease. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981).

The medical evidence appearing in the record before this Court is not sufficiently definite on the cause of plaintiff's disability to permit effective appellate review. The only medical witness before the Commission, Dr. Harris, did not address the crucial medical question of interrelationship, if any, between plaintiff's occupational disease and her disability.

We deem it unnecessary to recite or recapitulate the evidence which is fairly summarized in the opinion and dissent in the Court of Appeals. However, solely for the purpose of illustrating the problems in assessing the medical evidence before us on causation, we will set forth only a part of plaintiff's evidence as it relates to the element of causation. Dr. T. Reginald Harris testified in part:

> She has an illness. In general terms, I thought it fitted the pattern of chronic obstructive lung disease . . . . She has three distinct syndromes that probably contributes (sic) to that impairment. These are asthma, byssinosis and chronic bronchitis.
>
> . . . .
>
> If she did not work in cotton, I would not have any diagnosis of byssinosis.
>
> . . . .
>
> There is a possibility that she has byssinosis and she certainly could have. . . . The answer is yes, could or might.
>
> Q. . . . Do you have an opinion satisfactory to yourself to a reasonable degree of medical certainty that the condition suffered by Pauline Hansel could or might be byssinosis? . . .
>
> A. My answer is yes, it could or might be byssinosis.
>
> . . . .
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> A. To amplify, I have difficulty in this patient for several reasons, to answer so specific a question. One of the difficulties, I'm not really aware of how much cotton dust ex-

posure this lady was involved. Your hypothetical question assumed considerable amounts of cotton dust exposure. That's why the history obtained by me is not specific enough for me to be able to evaluate over her employment, and the other problem she worked in the weaving department where there is much less dust than some of the other departments. If there was a lot of other fibers in the cotton in that department, there would be less exposure. That is one factor that would tend to add weight or less weight to consider the diagnosis. And the major difficulty is the diagnosis of asthma. I believe this lady has asthma and every person with asthma will react to cotton dust. If they have severe asthma they are not able to stay there. The milder cases, they can work in less dusty areas of the plant. So the diagnosis is more complex because this lady could have many of these same symptoms whether she worked around cotton dust because of the present asthma. She also has a history of chronic bronchitis symptoms of coughing day and night. Probably one of the major facts in her case is cigarette smoking as recorded by me. Could or might is true. I think that the possibility exists that both of the conditions are certainly present. It would be less complicated if she didn't have other problems, but she does have.

. . . .

Yes sir, I did say I had some difficulty in arriving at a diagnosis in this case due to the other conditions that I found that existed in this lady. I suspect the biggest difficulty was the history of asthma because the presence of asthma would lead you to anticipate as individuals would react with symptoms when they go to a textile plant. Because asthmatics react to all manners of dust. I said the symptoms of coughing, tightness of the chest could result or could be caused by the asthmatic condition rather than the breathing of dust. Yes, in the history that she gave me, she stated that she had a cough, or a dry hacking cough, as much as 30 years ago.

. . . .

That fact that she had chronic bronchitis since 1948 or 1950 indicated to me that she had chronic lung disease and probably chronic bronchitis, that is a proper term for that, as

long as that period of time. Let me tell you what my opinion was at the time of my examination and history and I think still is. This lady has chronic bronchitis and this lady likely and probably has asthma. There is a possibility that she could have a reaction known as byssinosis syndrome, but I am not able to determine the extent of that condition nor add much weight to its presence, because I do not have the ability to separate out any specific symptoms related to byssinosis that this lady has that cannot be explained by the other two conditions that are present. It is more difficult, also, because I do not know what her work exposure, history to cotton dust, is here.

. . . .

It's true, that the asthmatic condition and the other, chronic bronchitis, could be the cause of this lady's condition that I found upon examination, as well as the other findings, the syndrome findings that I made.

. . . .

People who have byssinosis for many years, have a lung disease that is indistinguishable from chronic bronchitis.

The following is excerpted from Dr. Harris's medical report of his examination of Mrs. Hansel on 10 August 1978 which was admitted into evidence as Exhibit "A":

Comment:

This patient has a lengthy history of obstructive pulmonary disease. She is a cigarette smoker and has had considerable textile work exposure. I do not have information which describes her dust exposure over the years. She has had considerable exposure to textile environment but this has been in the weaving department where traditionally, there has been less dust than in the earlier stages of processing cotton in a textile plant. This patient has a history suggesting chronic bronchitis with cough and sputum production. She also has a history of increased symptoms upon work exposure and has a typical history of increased symptoms on the first day of the work week after a work absence. The history she gives is similar to that of patients with byssinosis

and patients with chronic bronchitis. The picture is somewhat complicated by a history suggesting asthma and allegery in the past and by the history of vocal cord abnormalities.

. . . .

On the basis of the information available to me, this patient may well have three identifiable problems causing lung disease. She has a history compatible with and suggesting asthma. She is believed to have chronic bronchitis and to have byssinosis. The later diagnosis is made on the basis of chronic obstructive lung disease in a patient with a typical work history of byssinosis and presumably has had exposure to cotton textile dust over long enough time to permit development of this syndrome. It is true, however, that patients with asthma also react to cotton dust and have increased symptoms upon exposure—similar to those with the syndrome of byssinosis. Cigarette smoking is certainly a major contributing factor to chronic bronchitis. It is not possible to quantitate the relative contribution of the various etiological factors in her present respiratory impairment. It is likely that all are involved to some extent. It is this examiners belief that the patient probably has asthma and that she does have chronic bronchitis as well as byssinosis.

. . . .

Diagnostic Conclusion:

1) Chronic Obstruction air ways disease.
Asthma, probable.
Byssinosis syndrome.
Chronic bronchitis.

[8] In order for the Court to determine whether the Commission's findings and conclusions are supported by competent evidence, the record before us must be supplemented by medical testimony to indicate answers to the following questions:

(1) Is plaintiff totally or partially incapacitated to work and earn wages? If partial, to what extent is she disabled; *i.e.*, what is the percentage of her disability?

(2) What disease or diseases caused this disability?

(3) Which of the plaintiff's disabling diseases are occupational in origin, *i.e.*, which diseases are due to causes and conditions which are characteristic of and peculiar to plaintiff's occupation as distinguished from ordinary diseases of life to which the general public is equally exposed outside of the employment?

(4) Does plaintiff suffer from a disabling disease or infirmity which is not *occupational* in origin, *i.e.*, which is not due to causes and conditions characteristic of and peculiar to plaintiff's occupation as distinguished from ordinary diseases of life to which the general public is equally exposed outside of the employment?

If so, specify the non-occupational disease(s) or infirmities?

(5) Was plaintiff's non-occupational disease(s) or infirmity aggravated or accelerated by her occupational disease(s)?

(6) What percentage of plaintiff's incapacity to work and earn wages results from (a) her occupational disease(s) or (b) her non-occupational disease(s) which were aggravated or accelerated by her occupational disease(s)?

(7) What percentage of plaintiff's incapacity to work and earn wages results from diseases or infirmities which are non-occupational in origin?

We conclude that the Court of Appeals acted prematurely in vacating the award of the full Commission. In our discretion, we remand for further findings of fact.

The Industrial Commission must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979); *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952). If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the cause must be remanded to the Commission for proper findings of fact. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948); *Moore v. Stevens & Co.*, 47 N.C. App. 744, 749, 269 S.E. 2d 159, 162 (1980); *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977). *See* also 1 Strong's N.C. Index 3d, Appeal and Error § 57.3.

Since we cannot evaluate the testimony quoted above and correctly determine whether the findings made by the Commission are supported by the evidence, this case must be remanded to the Commission to re-examine the medical witnesses to elicit definite answers to the questions noted above. Upon the hearing on remand, the parties are not prohibited from offering additional evidence. After re-examination of the medical witnesses, the Commission will make findings of fact, enter its conclusions of law and issue its opinion and award based thereon.

For the reasons stated, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals with directions that it be remanded to the North Carolina Industrial Commission for further proceedings consistent with this opinion.

Reversed and remanded.

Justice EXUM concurring in result.

I concur in the majority's decision to remand this case to the Industrial Commission for further proceedings. Since I disagree with much of the majority's reasoning, I deem it necessary to set out my own views of the case.

First, I disagree with the majority's apparent notions that Hansel's occupational disease is simply byssinosis and that she is limited on remand to showing only that her exposure to cotton dust medically aggravated her bronchitis or asthma in order to recover for whatever incapacity for work was caused by the combined effect of all of her pulmonary problems.

As I understand the medical testimony, Hansel actually suffers from chronic obstructive pulmonary, or lung, disease to which several etiological factors could have contributed, *i.e.*, cigarette smoking, bronchitis, asthma, and cotton dust exposure. Dr. Harris testified that Mrs. Hansel "has an illness. In general terms, I thought it fitted the pattern of chronic obstructive lung disease . . . . She has three distinct syndromes that probably contributes [sic] to that impairment. These are asthma, byssinosis, and chronic bronchitis." Later Dr. Harris also identified cigarette smoking as a possible contributing factor.

In addition to this case, we have considered three other so-called "byssinosis" cases. *Morrison v. Burlington Industries,* 304 N.C. 1, 282 S.E. 2d 458 (1981); *Walston v. Burlington Industries,* (No. 116, Fall Term 1981); and *Wood v. Stevens & Co.,* 297 N.C. 636, 256 S.E. 2d 692 (1979). The medical etiology of the disease was the primary focus of all the cases except *Wood.*

Although Morrison claimed benefits for "an occupational disease, to wit: byssinosis . . . caused by exposure to cotton dust," the medical testimony, the Commission's findings, and this Court identified her occupational disease as chronic obstructive lung disease. Morrison also suffered from bronchitis, was a cigarette smoker, and could have had emphysema. The Commission found ultimately, however, that her chronic obstructive lung disease was caused at least in part by her cotton dust exposure, a finding which this Court concluded was supported by the evidence.

Walston also claimed benefits for "byssinosis . . . caused by exposure to cotton dust." The medical testimony again, however, referred to the cause of Walston's incapacity for work as "pulmonary disease" and "pulmonary problems." The medical testimony identified the components of his pulmonary disease as "chronic bronchitis, pulmonary emphysema, [and] possible byssinosis." Dr. Mabe testified, "It is correct as a matter of terminology, to regard the term 'chronic obstructive lung disease' as broader in its complications than, say, fibrosis, which can be a localized situation, or emphysema, which can only be general. Chronic obstructive lung disease is the broadest of these terms. It will take them all in. That encompasses all of them in the chronic bronchitis or segmental pulmonary fibrosis."

It is clear from the medical testimony in *Morrison, Walston* and this case, and from medical literature on the subject[1] that the term "byssinosis" refers simply to the effect, if any, of a worker's

1. *See generally* Bouhuys, Schoenberg, Beck and Schilling, *Epidemiology of Chronic Lung Disease in a Cotton Mill Community,* 5 Traumatic Medicine and Surgery for the Attorney 607, reprinted from *Lung*—An International Journal on Lungs, Airways, and Breathing, 154(3): 167-186 (1977). The article concludes with the following paragraph:

"There is continuing discussion about the definition of the term 'byssinosis,' and confusion about the presumed co-existence of chronic bronchitis and of

exposure to cotton dust on the worker's overall pulmonary function. The disease, however, which ultimately causes a worker to be incapacitated for work is consistently referred to by the medical witnesses in these cases as chronic obstructive lung disease.[2] This disease in its ultimate disabling form may have several components such as bronchitis, asthma, emphysema, and byssinosis. It may, in turn, be caused by one or more environmental factors such as cotton dust exposure or cigarette smoking, or both. The crucial difference between byssinosis, or the effect of cotton dust exposure on the lungs, and other conditions caused by industrial exposures, such as silicosis and asbestosis, is this: The effects of cotton dust exposure (byssinosis) are indistinguishable from the effects of other kinds of lung problems such as bronchitis, or the effects of cigarette smoking; whereas the effects of silicosis and asbestosis are identifiable by biopsy or an autopsy.[3]

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byssinosis among textile workers. To a large extent this debate is one of semantics. Cotton and other textile workers are at risk of acute as well as chronic respiratory symptoms and lung function loss. There can be little doubt that both are caused by exposure to respirable dust in textile mills. The progression from repeated acute insults to the chronic disease has not been traced with certainty, but there is no good evidence against—and much evidence for—such a train of events. It seems most logical to define byssinosis as a dust-induced disease with initial acute responses followed by a stage of chronic lung disease characterized by chronic airway obstruction. This definition is implicit in the description of the clinical stages of byssinosis given by Schilling. For purposes of compensation and prevention, acute responses to textile dust as well as chronic airway obstruction in textile workers should be considered as two stages of one disease syndrome, byssinosis."

2. This is also the term used throughout the Bouhuys article to describe the disabling condition in its ultimate form. *Id.*

3. In *Walston*, for example, Dr. Williams testified, "There is not specifically any objective finding to say that a man does or doesn't have byssinosis . . . such as a biopsy or autopsy, such as with silicosis and asbestosis, although in the early stages one can demonstrate a reactivity to the dust by doing pulmonary function studies before and after six hours exposure to the work environment. But in the latter stages, such as one might see with chronic obstructive pulmonary disease, this is no longer valid and these are not specific diagnostic criteria."

In *Morrison*, Dr. Sieker testified that there were "two identifiable etiological factors" which contributed to Morrison's chronic obstructive lung disease. "One is cotton dust exposure, the other is her cigarette consumption." He said, "[I]n a somewhat arbitrary way but with clinical judgment I assign the etiological factors about 50 percent—50 to 60 percent for the cotton dust exposure and 40-50 percent for the cigarette smoking and any attendant problems with that. . . . At the present time there is no laboratory type of test that would do this. This [assignment of

Hansel's claim, therefore, like those of Morrison and Walston, is for the incapacitating effects, if any, of her chronic obstructive lung disease. In this case, therefore, as others in which the worker claims benefits for incapacity to work caused by chronic obstructive pulmonary disease, the central factual inquiry should be first, whether the effects on the pulmonary function caused by cotton dust exposure (byssinosis) significantly contributed to the ultimate medical problem, *i.e.*, chronic obstructive lung disease and second, whether and to what extent the chronic obstructive lung disease caused incapacity for work.

I further disagree with the majority's position that questions three and four can be answered by medical witnesses, for these questions are really conclusions of law to be made by the Commission after it determines certain preliminary factual questions. Whether a particular disease is an occupational disease is ultimately a question of law, for it requires the application of the legal standards set out in G.S. 97-53(13) to the facts. In an occupational disease claim, "[h]aving made appropriate findings of fact, the next question the Commission must answer is whether . . . the illness plaintiff has contracted falls within the definition set out in the statute. This latter judgment requires a conclusion of law." *Wood v. Stevens & Co., supra*, 297 N.C. at 640, 256 S.E. 2d at 695-96.

For a disease to be occupational and therefore compensable under G.S. 97-53(13) "two conditions must be met: (1) It must be 'proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment'; and (2) It cannot be an 'ordinary disease of life to which the general public is equally exposed outside of the employment.' " *Booker v. Medical Center*, 297 N.C. 458, 468, 256 S.E. 2d 189, 196 (1979). If there is a greater risk of contracting the disease by workers in a given occupation because of conditions "characteristic of and peculiar" to the occupation, the "nexus between the disease and the employment which" makes the disease occupational and therefore compensable is provided and the sec-

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etiological factors] had to be based on . . . one's judgment of the effects of these agents on the respiratory system."

In the present case Dr. Harris testified that the effects of byssinosis were "indistinguishable from chronic bronchitis."

ond condition set out above is satisfied. *Id.* at 475, 256 S.E. 2d at 200.[4] The statute thus insures by its terms that a disease, in order to be compensable, must have the requisite causal connection to the occupation out of which it allegedly arose.

As the majority correctly notes, however, it is not necessary that the occupational "causes and conditions" be the sole cause of the disease. It is enough if these occupational "causes and conditions" are factors which significantly contribute to the development of the disease.[5] If occupational "causes and conditions" as defined by G.S. 97-53(13) significantly contribute to a disease's development, and if the disease itself is not one to which the general public is exposed equally with those engaged in the employment in question, the disease is an occupational disease even though non-occupational causes and conditions also contribute to it. Conversely, a disease is not an occupational disease if the occupational causes and conditions do not contribute to its development in a significant way.

Whether the contribution of occupational "causes and conditions" has been significant or insignificant must largely be determined by evidence relating to the extent and nature of the exposure to the occupational conditions and expert medical opinion relating to the significance of this exposure in light of other factors which may also have contributed to the disease's development. Significant means, "having or likely to have influence or effect: deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE." Webster's Third New International Dictionary 2116 (Merriam-Webster 1971). "Significant" as we are using it is to be

4. The disease need not be one which originates exclusively from or is unique to the particular occupation in question. *Booker v. Medical Center, supra.* Nor is the fact that the disease is an ordinary disease of life to which members of the general public also succumb fatal to an occupational disease claim if the "greater risk" nexus is present; for in such cases the public is not exposed to the disease equally with those engaged in the particular employment in question. *Id.* Thus ordinary diseases of life such as serum hepatitis, tuberculosis and contact dermatitis may be occupational diseases provided that the employee because of his employment has a greater risk of contracting them than does the public generally. *Id.*, and cases cited therein.

5. For a full discussion of the significant contribution concept and the authorities upon which it is based *see Morrison v. Burlington Industries,* 304 N.C. 1, 282 S.E. 2d 458 (1981) (Exum, J., dissenting).

contrasted with "negligible," "unimportant," "present but not worthy of note," "miniscule," "of little moment." The word has reference not so much to the quantity, in terms of percentage of contribution made by occupational exposure, but more to the quality of its contribution. The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would either (1) not have developed or (2) not have developed to such an extent that it results in the incapacity for work for which the worker claims benefits.

To say that occupational causes and conditions must be the *sole* cause of a disease before it can be considered occupational and therefore compensable is too harsh a principle from the standpoint of the purposes and policies of our Workers' Compensation Act. This Act "should be liberally construed so that the benefits under the Act will not be denied by narrow, technical or strict interpretation." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972).

To say on the other hand that if occupational causes and conditions contribute to the slightest extent, however miniscule or insignificant, to the etiology of a disease, the causation requirement is satisfied places too heavy a burden on industry and tends to compromise the valid principle that our Workers' Compensation Act should not be transformed into a general accident and health insurance law.

Neither should a disease to which occupational conditions have significantly but not entirely contributed be considered as some kind of *pro tanto* occupational disease in which an award is made not for the incapacity for work actually caused by the disease but only for so much of such incapacity as corresponds mathematically to the extent of contribution of the occupational conditions. First, the cases in which the point has been considered do not support this view. They either support the significant contribution principle or some less rigorous principle from the worker's standpoint.[6] Second, G.S. 97-52 provides that "[d]isablement or death . . . resulting from *an occupational disease* de-

6. These cases are collected in my dissent in *Morrison v. Burlington Industries, supra.*

scribed in G.S. 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workers' Compensation Act . . . . " (Emphasis supplied.) General Statute 97-53(13) provides a generic definition of diseases which may be considered occupational. I believe our legislature intended that a disease either be an occupational disease or that it not be. If it is an occupational disease it is treated like an industrial accident. There is no suggestion in the statutes that a worker could have an occupational disease *pro tanto*, *i.e.*, only to the extent of the contribution of an occupational condition. Third, as I point out below, and as cases from other jurisdictions demonstrate,[7] some of these diseases which have dual or multiple causes such as chronic obstructive lung disease, present difficult medical questions regarding the extent to which various causative factors respectively contributed. We ask too much of the medical profession if we require it to assess in terms of mathematical percentages the relative contributions of the various possible causes of such diseases.[8] At most the physicians should be asked to determine only whether the occupational conditions, such as cotton

7. These cases are collected in my dissent in *Morrison v. Burlington Industries*, *supra*.

8. Dr. Harris, for example, testified, "I do not have the ability to separate out any specific symptoms related to byssinosis that this lady has that cannot be explained by the other two conditions that are present." In his medical report he stated, "It is not possible to quantitate the relative contribution of the various etiological factors in her present respiratory impairment. It is likely that all are involved to some extent." In *Walston v. Burlington Industries*, *supra*, Dr. Williams was unable to testify regarding the relative contributions to Walston's lung disease made, respectively, by his exposure to cotton dust and his cigarette smoking. He said, "I find it very difficult to answer the question as to . . . what percentage would the cotton dust exposure represent to the pulmonary condition. On the one hand, we have had the opportunity to treat hundreds of patients with this same type of syndrome and findings, in which case it is almost certain the primary etiological agent was cigarette smoking, and this fellow was a smoker. On the other hand, there are figures beginning to emerge to show that it is possible for workers exposed to cotton dust to develop chronic obstructive lung disease even in some instances in non-smokers even though the incident is definitely greater in smokers which accounts for the reason I said it might be a contributory factor, but this is about as close as I can come. I cannot give a percentage. I don't have an opinion on a specific percentage."

Although in *Morrison*, Dr. Sieker did testify to the relative contribution of cigarette smoking and cotton dust exposure in terms of percentages, he conceded that this assessment was made "in a somewhat arbitrary way but with clinical judgment . . . there is no laboratory . . . test that would do this . . . ."

dust exposure, were or were not in the particular case a significantly contributing factor in the disease's etiology.

Thus in addressing this industrial disease claim I would require the Commission to consider and resolve several crucial factual issues. The first is whether the employee has a disease and, if so, what is it. "The Commission must determine first the nature of the disease from which the plaintiff is suffering—that is, its characteristics, symptoms and manifestations." *Wood v. Stevens & Co., supra*, 297 N.C. at 640, 256 S.E. 2d at 695. Second, the Commission must determine whether any causes and conditions 'characteristic of and peculiar to' the occupation in question significantly contributed to, or were significant causative factors in, the disease's development. Finally, the Commission must determine whether the disease is an ordinary disease of life to which the general public is exposed in the same degree as the worker in question or, in other words, whether the worker is, because of his occupation, exposed to a greater risk of contracting the disease than members of the public generally.

If all of these crucial factual issues are answered favorably to the worker, then the Commission must conclude as a matter of law that the worker has an occupational disease. If any one of them, however, is answered unfavorably to the worker, then the Commission must conclude as a matter of law that there is no occupational disease.

I recognize that we are dealing with a relatively new occupational disease statute which reasonably has been the source of some confusion regarding occupational disease law in this state. This confusion is compounded by the medical complexities involved in chronic lung disease cases. "The causes and development of byssinosis, and the structural and functional changes produced by the disease, are still the subject of scientific debate." *Wood v. Stevens & Co., supra*, 297 N.C. at 641, 256 S.E. 2d at 696. A recent carefully controlled study cited in *Wood* concluded, however, that although the "pathology of the chronic lung disease of textile workers remains unclear," textile workers, "not only . . . carders and spinners . . . but also . . . yarn preparers and weavers . . ." suffer from "an excess of chronic lung disease" and it "is almost

certain" that this excess "is caused by dust exposure of the workers in the mills."[9]

In view, therefore, of the legal and medical complexities involved, we should remand this matter to the Commission for the taking of further evidence and a new determination of whether Hansel has an occupational disease. I believe there is enough evidence already adduced to indicate that Hansel may be able to prove that her cotton dust exposure significantly contributed to her ultimate chronic obstructive lung disease and that it was this lung disease which ultimately caused her to be incapacitated for work, either partially or totally. I, however, would direct the Commission to proceed in accordance with the principles to which I have referred in this concurring opinion rather than those announced by the majority.

Justice CARLTON joins in this concurring opinion.

IN THE MATTER OF: THE APPEAL OF WILLIAM H. McELWEE, JR., WILLIAM H. McELWEE, III, ELIZABETH McELWEE CANNON, DOROTHY PLONK McELWEE AND JOHN PLONK McELWEE; R. B. JOHNSTON AND SONS; AND PAUL OSBORNE AND PRESLEY E. BROWN LUMBER COMPANY FROM THE VALUATION OF CERTAIN OF THEIR PROPERTIES BY WILKES COUNTY FOR 1977

No. 118

(Filed 6 October 1981)

1. **Taxation § 25.11—appeals from the Property Tax Commission**

G.S. 105-345.2 is the controlling judicial review statute for appeals from the Property Tax Commission.

2. **Taxation § 25.4— ad valorem taxation—schedule of values—insufficient notice**

Notice of the 1977 schedules of values used by Wilkes County in appraising property for ad valorem property tax purposes was found insufficient to fulfill the due process requirement and to bar an attack against the revaluation schedules themselves where a public newspaper of general circulation in Wilkes County printed a notice pertaining to the revaluation only once, it was printed in the smallest possible print, was buried in a page containing two

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9. Bouhuys, Schoenberg, Beck and Schilling, op. cit., *supra* n. 1. *See also* 1B Larson, *supra*, § 41.64(b), n. 83.1.

large pictures taken at a football game, three general news articles, a notice of public hearing and an advertisement for a local drive-in theater, and was printed some twenty-seven months before the effective date of the revaluation. Therefore, the actions of the Property Tax Commission in affirming the procedure employed by Wilkes County was in violation of constitutional provisions and made upon unlawful proceedings within the meaning of G.S. 105-345.2(b)(1) and (3).

3. Taxation § 25.4— ad valorem taxation—on-site visits of property

All property being reappraised by a county must receive an on-site visit and observation by the appraiser; therefore, where the record in an appeal by taxpayers concerning the revaluation of property in Wilkes County in 1977 indicated on-site visits of all the property in Wilkes County could not have been made, the revaluation of taxpayer's properties was illegally done by virtue of the county's failure to comply with G.S. 105-317(b)(2).

4. Taxation § 25.4— county wide reappraisal of property—arbitrariness

A decision to conduct a county wide reappraisal of property in a time of less than two months, and to complete it some twenty-seven months prior to its effective date, does not comport with the realities of the economic world and is plainly arbitrary under G.S. 105-317.

5. Taxation § 25.4— ad valorem taxation—rebuttal of regularity—burden upon county

When a taxpayer has rebutted the presumption of regularity in property valuation in favor of the county, the burden then shifts to the county to demonstrate to the Property Tax Commission that the values determined in the revaluation process were not substantially higher than that called for by the statutory formula, and the county must demonstrate the reasonableness of its valuation "by competent, material and substantial evidence." G.S. § 105-345.2(b)(5).

6. Taxation § 25.4— ad valorem taxation—use of comparable sales to establish present use valuation improper

In order for a county to use sales of similarly used lands in establishing present use valuation, the county must demonstrate that the buyers and sellers involved in the comparable sales transactions had knowledge of the property's capability to produce income in its present use, that the present use is the highest and best use and that the purchaser intended to continue to use the property in its present use.

7. Taxation §§ 25.4; 25.11— findings of Property Tax Commission—not supported by evidence

In a suit by landowners questioning the procedures used by Wilkes County authorities for establishing present use values for agricultural, horticultural, and forest land for ad valorem property tax purposes, the findings and conclusions of the Property Tax Commission were found to be without support by competent, material and substantial evidence in view of the entire record as all evidence with respect to comparable sales was irrelevant and other testimony in support of the valuation was improperly based upon market value sales.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 51 N.C. App. 163, 275 S.E. 2d 865 (1981), one judge dissenting, affirming a final decision of the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review, entered 26 October 1979.

On this appeal we consider the statutory procedures for establishing present use values for agricultural, horticultural and forest lands for ad valorem property tax purposes.

McElwee, Hall, McElwee & Cannon, by W. H. McElwee, William H. McElwee III, and William C. Warden, Jr., for appellants.

Brewer and Freeman, by Joe O. Brewer and Paul W. Freeman, Jr., for appellee Wilkes County.

This case was argued as No. 134 at the Spring Term 1981.

CARLTON, Justice.

The issue on this appeal is whether the governing officials of Wilkes County followed prescribed statutory procedures in establishing a present use value schedule for 1977, a revaluation year, which was used by the county in establishing a valuation for ad valorem property tax purposes on forest lands owned by appellants.

I.

In the summer of 1974 the Wilkes County Board of Commissioners contracted with Allen Appraisal Company for a reappraisal of all real property in the county as required by G.S. 105-286, the reappraisal to become effective 1 January 1977. Over a period of seven or eight weeks Allen developed schedules of values to be used in appraising individual properties. The schedules were approved and adopted by the Board of Commissioners on 24 September 1974. The schedules adopted included a document entitled "1977 Use Value Schedule for Wilkes County." This schedule appears in the record as follows:

1977

USE VALUE SCHEDULE FOR WILKES COUNTY

Agricultural and Horticultural Land

Soil Classification				Use Value
I	Good	(+)		$500/ac
	Good			450/ac
	Good	(−)		400/ac
II	Fair	(+)		$350/ac
	Fair			300/ac
	Fair	(−)		250/ac
III	Poor	(+)		$200/ac
	Poor			150/ac
	Poor	(−)	(Waste-land)	50/ac

Orchard

Classification	
A Class	$800/ac
B Class	600/ac
C Class	400/ac
D Class	200/ac

Forest

Classification				
I	Good			$300/ac
	Fair			200/ac
	Poor			100/ac
	Poor	(−)	(Waste-land or non-productive land)	50/ac

All land will be classified according to the productivity of crops normally grown

EXAMPLE

Crop	Land	Yield	Net Income	Cat-Rate (sic)	Use Value
Corn	Good +	100 bu	$40.00	8%	$500/ac

This schedule was used for the determination of present use valuations for the property which is the subject matter of this appeal.

On 26 September 1974, *The Journal-Patriot*, a public newspaper of general circulation in Wilkes County, printed a notice pertaining to the revaluation. No other public notice appeared with reference to the adoption of schedules, standards and rules for the 1 January 1977 revaluation of Wilkes County property. The only reference to the schedules, standards and rules adopted by the County Commissioners relating to the reappraisal of real property in Wilkes County was a short statement which appeared in the minutes of the Commissioners in minutes dated 24 September 1974.

Appellants owned approximately 22,584 acres of forestland in Wilkes County in 1977 and appealed its valuation. On 31 March 1977 each of the appellants made proper application for present use valuation as provided in G.S. 105-277.4 (1979). Wilkes County valued the appellants' property at $100 per acre according to the schedule set out above. The parties stipulated that Wilkes County's use value assessment and its market value assessment of the property are the same. Thereafter, each of the appellants filed with Wilkes County a complaint regarding the valuation of their respective properties. The matter came on for hearing before the Wilkes County Board of Equalization and Review and, in each instance, that Board ruled on each appellant's complaint as follows:

(1) The above-mentioned land was appraised as timber land only.

(2) It was appraised at the lowest value on our schedule.

(3) This schedule was adopted as required by North Carolina state law before the appraisal work began in 1974.

(4) The use value schedule was duly adopted by the Wilkes County Board of County Commissioners and that this Board sitting as a Board of Equalization and Review has no authority to change this schedule of values. The Board can only change the application or misapplication as applied by the appraising officials.

(5) Based on the above facts the Board ruled no change in value.

As a result of these rulings, appellants made application to the North Carolina Property Tax Commission on 14 July 1977. That Commission, sitting as the State Board of Equalization and Review, conducted a hearing on 11 June 1979 and entered a final decision affirming the county's action on 26 October 1979. Appellants appealed to the Court of Appeals and that court affirmed. Judge Wells dissented and appellants appealed to this Court as a matter of right. Other facts pertinent to our decision are noted below.

II.

[1] We first determine the appropriate standard for judicial review of this appeal from the Property Tax Commission, a state administrative agency. We first note that the Court of Appeals erred in holding that the Administrative Procedure Act (APA) controls the scope of review on this appeal.

G.S. 150A-43, a part of the APA, provides in pertinent part that "[a]ny person who is aggrieved by a final agency decision . . . is entitled to judicial review of such decision under this Article, *unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute.*" (Emphasis added.) The question, therefore, is whether "some other statute" provides "adequate procedure for judicial review" such that the APA review statutes become inapplicable.

In determining what is "adequate procedure for judicial review," as those words appear in G.S. 150A-43, we held in State ex rel. *Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 395, 269 S.E. 2d 547, 559 (1980), that adequate procedure for judicial review exists under some other statute only if the scope of review is equal to that provided for by the APA.

Here, there is "some other statute" providing for judicial review of decisions of the Property Tax Commission. G.S. 105-345.2 governs the extent of review for appeals from the Property Tax Commission and its provisions are remarkably identical to those found in G.S. 150A. Subsection (a) provides that the appellate court shall review the record and exception and assignments of error in accordance with the Rules of Appellate Procedure. Subsection (b) provides that the appellate court shall

(1) decide all relevant questions of law, (2) interpret constitutional and statutory provisions, and (3) determine the meaning and applicability of the terms of any Commission action.

More importantly, with respect to this appeal, G.S. 105-345.2(b) provides that the court may (1) affirm, (2) reverse, (3) declare null and void, (4) remand for further proceedings, or (5) reverse or modify the decision of the Property Tax Commission if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

G.S. 105-345.2(c) provides that the court shall review the whole record and due account shall be taken of the rule of prejudicial error.

In *Commissioner of Insurance v. Rate Bureau*, 300 N.C. at 395, 269 S.E. 2d at 559, we held that, in the interest of uniformity and judicial review of administrative decisions, G.S. 150A-51 was the controlling judicial review statute in insurance ratemaking cases even though Chapter 58, dealing with the North Carolina insurance laws, contained virtually identical review provisions. There, however, the provisions of Chapter 58 had been enacted by our General Assembly in 1971, prior to the enactment of the APA in 1973. Here, the review provisions for appeals from the Property Tax Commission, found in G.S. 105-345.2, were enacted by our Legislature in 1979, six years *after* the enactment of the APA. Therefore, we hold (1) that the procedure for judicial review provided by G.S. 105-345.2 is equal to that under the APA and (2) that G.S. 105-345.2 is the controlling judicial review statute for appeals from the Property Tax Commission.

Although it incorrectly identified the appropriate statutory standard for review on this appeal, the Court of Appeals correctly noted that the principles established by this Court in *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975), are relevant to the decision of this case. There, Justice Copeland enunciated several well-established principles concerning appellate review of administrative agency decisions: (1) a reviewing court is not free to weigh the evidence presented to an administrative agency and substitute its evaluation of the evidence for that of the agency, citing *Clark Equipment Co. v. Johnson*, 261 N.C. 269, 134 S.E. 2d 327 (1964); (2) ad valorem tax assessments are presumed to be correct, citing *Albemarle Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811 (1972); (3) the correctness of tax assestments, the good faith of tax assessors and the validity of their actions are presumed, citing 72 Am. Jur. 2d State and Local Taxation § 713 (1974); and (4) the taxpayer has the burden of showing that the assessment was erroneous, citing *Albemarle Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811.

We also noted in *Amp* that the presumption of correctness by the county officials is, of course, rebuttable:

> [I]n order for the taxpayer to rebut the presumption [of correctness] he must produce "competent, material and substantial" evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of evaluation; AND (3) the assessment *substantially* exceeded the true value in money of the property. [Citation omitted.] Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high.*

287 N.C. at 563, 215 S.E. 2d at 762 (emphasis in original). We agree with the Court of Appeals that the foregoing statement continues to be the law of this state. As noted below, however, our application of these principles to the record before us leads to a conclusion different from that reached by the Court of Appeals. In our discussion of the substantive merits of this controversy

below, we will, in each instance, identify the appropriate standard of review from the foregoing discussion.

III.

In order to address properly the arguments presented by this appeal, it is necessary to review the mechanical statutory provisions which outline the methods and procedures for the appraisal of property for purposes of ad valorem property taxtation.

The provisions governing the listing, appraisal, and assessment of property and collection of property taxes are found in the Machinery Act, G.S. §§ 105-271 to 395 (1979). The purpose of the Machinery Act is "to provide the machinery for the listing, appraisal, and assessment of property and the levy and collection of taxes on property by counties and municipalities." G.S. § 105-272 (1979).

Under the Machinery Act, all property in the state, both real and personal, is subject to taxation unless it is (1) excluded by a statute of statewide application enacted under the classification power given the General Assembly by Article V, Section 2(2), of the North Carolina Constitution, or (2) exempted from taxation by the constitution or by a statute of statewide application enacted under the authority given the General Assembly by Article V, Section 2(3) of the North Carolina Constitution. G.S. § 105-274 (1979). Contained in the Machinery Act are numerous provisions which exclude or exempt certain types of property from taxation. Pertinent to this appeal is the special treatment accorded certain agricultural, horticultural and forest land as "special classes" of property under authority of Article V, Section 2(2) of the North Carolina Constitution by virtue of G.S. 105-277.3 (1979). In order to qualify for the special treatment, the agricultural, horticultural or forest land must meet certain land size, use, and ownership requirements. *Id.*

Present use valuation is available for the types of property described in G.S. 105-277.3 if that property has a greater value for other uses and if a timely and proper application for the special treatment is filed with the county tax supervisor. G.S. § 105-277.4(a) (1979). The application must show that the property is of a class eligible for the special treatment and must give any relevant information needed to appraise the property at its pres-

ent use value. *Id.* The county supervisor, at the time of each octennial reappraisal, is required to prepare a schedule of land values, standards and rules which, when properly applied, result in the appraisal of qualified property at its present use. G.S. § 105-277.6(c) (1979). The purpose of this requirement is to ensure uniform appraisal of qualified property in each county. *Id.* When the tax supervisor receives a timely and proper application for present use valuation, the property, if qualified, is appraised according to the most recently adopted schedule of values. G.S. § 105-277.4(b) (1979). In every case, the burden of establishing entitlement to present use valuation is on the property owner. *See* G.S. § 105-282.1 (1979).

The standards and factors used in appraising real property at its market value vary greatly from those used in determining present use value. The "Uniform Appraisal Standards," which apply to all real and personal property not entitled to an exemption or exclusion, provide, in part:

> All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any complusion to buy or to sell and *both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.*

G.S. § 105-283 (1979) (emphasis added). In contrast, the standards for appraisal of agricultural, horticultural and forest land[1] at its present use value provide for appraisal at:

> the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell, *assuming that both of them have reasonable knowledge of the capability of the property to*

1. The definitions of the terms agricultural land, forestland and horticultural land are found in G.S. § 105-277.2(1) - (3).

produce income in its present use and that the present use of the property is its highest and best use.

G.S. § 105-277.2(5) (1979) (emphasis added).

Comparison of the two standards reveals this clear distinction: In appraising property not eligible for present use valuation, the hypothetical buyer and seller have reasonable knowledge of all uses to which the property is adapted, while for the purposes of the present use valuation the hypothetical buyer and seller have reasonable knowledge *only* of the property's capability to produce income in its present use and it is assumed that the present use is the highest and best use. That the valuation of property not eligible for present use valuation is made according to a far broader standard than property eligible for the special treatment is made even clearer by the provisions of G.S. 105-317, which applies to real property in general. That statute provides that:

> Whenever any real property is appraised it shall be the duty of the persons making the appraisals: (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature.
>
> . . . .

G.S. § 105-317(a).

Certain provisions of the Machinery Act apply to both market and present use appraisals. For instance, all property being appraised must "be actually visited, observed, and appraised by a competent appraiser." G.S. § 105-317(b)(2) (1979). Moreover, G.S. 105-317(c) provides that the schedules of values, standards and rules for all types of valuation must be reviewed and approved by the Board of County Commissioners before they are used. After such approval the board must issue an order adopting the schedules, standards and rules and:

> shall cause a copy of the order to be published in the form of a notice in a newspaper having general circulation in the

> county, stating in the notice that the schedules, standards and rules to be used in the next scheduled reappraisal of real property have been adopted and that they are open to examination by any property owner . . . for a period of 10 days from the date of publication of the notice.

G.S. § 105-317(c) (1979). Any property owner who believes that the schedules, standards and rules fail to meet the appraisal standard may except to the order and appeal to the Property Tax Commission within thirty days after the date of publication by filing a written notice of the appeal, accompanied by a written statement of the grounds of appeal, with the clerk of the board of county commissioners and with the Property Tax Commission. *Id.*

With both the scope of review and the statutory scheme in mind, we now address the issues presented on this appeal. For reasons discussed in detail below, we conclude that the county failed to comply with the statutory procedures to appellants' prejudice.

IV.

[2] We first consider appellants' argument that Wilkes County failed to comply with the requirements of G.S. 105-317(c) and, in failing to give adequate notice of the schedules, standards and rules to be employed by the county in the reappraisal of real property, denied them due process of law. We note with interest that both the Property Tax Commission and the Court of Appeals concluded that the county made only a token effort to inform property owners that the schedule in question had been adopted. Both, however, held that the county had complied with statutory and due process notice requirements. We disagree and hold that the token effort made by the county was insufficient to fulfill the due process requirement of adequate notice.

The record discloses that the schedule in question was approved by the Wilkes County Board of Commissioners on 24 September 1974. On 26 September 1974 the following notice was published in a county newspaper, *The Journal-Patriot:*

NOTICE

> Schedules, standards and rules for the next revaluation of Wilkes County were approved by the Board of County Com-

missioners in regular meeting, September 24, 1974. They are open to examination by any property owner of the County at the office of the Tax Supervisor for a period of 10 days.

Contained in the record is a photocopy of the page of the newspaper on which the stated notice was printed. It is obvious from our review that the notice was printed in the smallest possible print and was buried in a page containing two large pictures taken at a football game, three general news articles, a notice of public hearing and an advertisement for a local drive-in theater. More significantly, however, the notice was printed some twenty-seven months before the effective date of the revaluation. While the Court of Appeals was correct in noting that the statute does not set a time frame or a minimum size for the required notice, by no stretch of the imagination can we believe that the notice disclosed by this record comports with the fundamental notions of due process.

The County asserts, however, that the case of *Brock v. Property Tax Commission*, 290 N.C. 731, 228 S.E. 2d 254 (1976), is dispositive of this issue and requires that we find the notice given in this case sufficient. In *Brock*, the property owners contested the valuation of their farmland. There, as here, no objection to the schedules was made by the appellants within ten days after the publication of the notice. Unlike the appellants here, however, the taxpayers in *Brock* contested only the application of the schedules to their land and not the schedules themselves. In discussing the adequacy of the notice, Justice Huskins, writing for the Court, stated:

> Other questions posed in appellants' brief need not be discussed. It suffices to say that the notice of the adoption of the schedules was published in newspapers having general circulation in Jones County, and the publication complied in all respects with G.S. 105-317(c). Questions raised regarding the adequacy of the notice are now moot since petitioners are not attacking the schedules.

290 N.C. at 740, 228 S.E. 2d at 260. From this passage it is obvious that the Court in *Brock* did not consider the *constitutional* adequacy of the notice. Additionally, we note that the notice in *Brock* was more specific than that given here and that it was

published less than four months prior to the effective date of the revaluation.

G.S. 105-286(1) requires Wilkes County to re-appraise all real property as of January 1, 1977. The statute does not set a time period in which the revaluation process must begin; it merely provides that revaluation must be completed by January 1, 1977, and every eighth year thereafter. The decision when to begin the revaluation process is left to the wisdom of the individual counties, limited only by practical considerations. Wisdom would dictate that, in times of rampant inflation or widely fluctuating real estate values, the revaluation would take place as close as possible to the effective date.

Here, the reappraisal process began in late June of 1974 and lasted, at best, two months, concluding some twenty-seven months prior to the effective date. Such a lengthy period between appraisal and the effective date seems highly questionable. Moreover, when the notice of the adoption of new schedules is given far in advance of the effective date of the schedules, it becomes even more unlikely that the affected taxpayers will be looking for or will see a public notice buried in the back pages of a local newspaper among the classified advertisements and obituaries.

The timing of the notice, its size, the generalities of wording and its single publication lead us to conclude that it was not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950); *accord, Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 13, 98 S.Ct. 1554, 1562, 56 L.Ed. 2d 30, 41 (1978). As such, the notice is insufficient to fulfill the due process requirement and to bar an attack against the revaluation schedules themselves. The action of the Property Tax Commission in affirming the procedure employed by Wilkes County was in violation of constitutional provisions and made upon unlawful proceedings within the meaning of G.S. 105-345.2(b)(1) and (3).

V.

[3] We next turn to appellants' contention that Wilkes County violated the provision of G.S. 105-317(b)(2) which provides that

"*every* lot, parcel, tract, building, structure, and improvement being appraised be *actually visited, observed* and *appraised* by a competent appraiser, either one appointed under the provisions of G.S. 105-296 or one employed under the provisions of G.S. 105-299." (Emphasis added.) The legislative directive is crystal clear: all property being reappraised by a county must receive an on-site visit and observation by the appraiser.

The record before us discloses that Wilkes County flagrantly violated this legislative directive. First, the short time span in which the revaluation process took place clearly indicates that on-site visits and observations of all the property in Wilkes County could not have been made. Moreover, the testimony before the Property Tax Commission indicated that no such visits took place. Appellant Osborne testified, "I was present at both Board of Equalization hearings. We asked Mr. Allen if he or any of his appraisers had personally viewed any of this property and he said, 'No.' "

While not presented to us by either party, we would be remiss not to mention our awareness that the requirement of this section of our statute might well be, in some instances, impractical, if not virtually impossible. The answer, of course, is that this directive to county officials is one from our General Assembly and any changes in that directive must be made by the legislative body. This Court cannot, on the record before us, proceed on any basis other than a literal reading of the clear statutory language.

We hold, therefore, that the revaluation of appellants' properties was illegally done by virtue of the county's failure to comply with G.S. 105-317(b)(2), and the Court of Appeals erred in affirming the Property Tax Commission's decision. The decision of the Property Tax Commission upholding the determination of the Wilkes County Board of Equalization and Review is affected by error of law, G.S. § 105-345.2(b)(4), in that it failed to find that the county's revaluation violated statutory directives.

VI.

[4] We also conclude from a review of the record before us that the appraisal process employed by Wilkes County of appellants' properties in 1974 failed to comply with other statutory requirements so as to render the process arbitrary.

The record discloses failure to comply with other statutory directives contained in G.S. 105-317. Most of these failures, we think, result from the county's decision to revalue the property nearly two and one-half years before the effective date of the revaluation and the short time period in which the county's entire revaluation process took place. As noted above, Mr. Allen testified that he was retained by the county in the summer of 1974 to conduct the reappraisal and that the county commissioners adopted his recommendations on 24 September 1974. The appraisers could not have considered the statutory considerations for determining property values during this short time period. The record does not demonstrate, and in no way can we imagine, that such factors as "quality of soil . . . ; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income . . . ," G.S. § 105-317(a)(1), could have received any consideration whatsoever by the appraisers in the short time period they were on the job. Testimony of Mr. Allen on deposition is illustrative of the arbitrary nature of the revaluation process and his failure to comply with the statutory scheme set out in Section III of this opinion. He testified that:

> We built the schedule based on comparables. . . .
>
> . . . .
>
> . . . It's utterly impossible at the beginning of an appraisal program to establish values county-wide, without making a county-wide appraisal. A classification made after we've been here three to five weeks is not of much value. We're building a rural land schedule in 1974 to use in January of 1977 primarily because the law requires us to do it.
>
> . . . .
>
> . . . This use value schedule is basically the same thing as the market value schedule, all the way through, with respect to everything. Other than just the schedule itself, there is nothing else in the book here that refers to use value at all. That's all there is. I told the County Commissioners on that night that I have a land use schedule. It's identical to the rural land market value schedule. I also said that I had

> the same support for the use value schedule as I had for the market value schedule. I wasn't asked any questions particularly about the use value schedule.

Based on the foregoing, and our review of the entire record, we are compelled to agree with appellants' assertion that the appraisal process was done primarily in the office of the Register of Deeds. Clearly, the complete consideration of all factors enunciated by G.S. 105-317(a)(1) was not given.

There is no statutory proscription against Wilkes County's conducting a revaluation process some two and one-half years prior to the effective date and completing the process within a short time frame. However, this Court lives in the same economic world as does our Legislature and the Board of County Commissioners of Wilkes County. We do not think it requires citation of legal authority to observe that a decision to conduct an appraisal in a time of less than two months, and to complete it some twenty-seven months prior to its effective date, does not comport with the realities of the economic world and is plainly arbitrary. Our view in this respect is buttressed by G.S. 105-317(a)(3) which requires that partially completed buildings be appraised "in accordance with the degree of completion on January 1." Clearly, that statute contemplates a revaluation process in closer proximity to the effective date than that employed by Wilkes County in the case before us.

We also note the requirements of G.S. 105-317(b)(1) that:

> There be developed and compiled uniform schedules of values, standards, and rules to be used in appraising real property in the county. (The schedules of values, standards and rules shall be prepared in sufficient detail to enable those making appraisals to adhere to them in appraising the kinds of real proberty commonly found in the county; they shall be:
>
> a. Prepared prior to each revaluation required by G.S. 105-286;
>
> b. In written or printed form; and
>
> c. Available for public inspection upon request.)

We are unable to find any reference to standards and rules for use in the revaluation process in those portions of the minutes of the meetings of the Wilkes County Board of Commissioners contained in the record. The notice run in *The Journal-Patriot* did state that "Schedules, standards and rules for the next revaluation . . ." had been approved by the county commissioners and were open for public examination. Perhaps such required standards and rules were adopted. We are unable, however, on the record before us, to find any reference to them.

While only one of the failures discussed above, standing alone, might be insufficient to compel our conclusion of arbitrariness, we are unable to ignore the collective impact of these failures here. Indeed, they compel the conclusion that the county approached the revaluation process in an almost casual way and in clear disregard for numerous statutory requirements.

Failure of the Property Tax Commission to recognize the arbitrary and capricious approach taken by the county in this instance was, in itself, arbitrary within the meaning of G.S. 105-345.2(b)(6).

VII.

[5] We now turn to the contention of appellee that, even assuming irregularity in the revaluation process, this Court is without authority to disturb the Property Tax Commission's decision in light of the review provisions set out by this Court in *Amp*, 287 N.C. 547, 215 S.E. 2d 752, discussed in Section II of this opinion. The Court of Appeals agreed with the appellee, stating that, "the second prong of the test—*i.e.*, whether the assessment substantially exceeded the true value in money of the property—is not violated." We think that both appellee and the Court of Appeals misunderstand *Amp* as it relates to the standards of judicial review set forth in G.S. 105-345.2.

In Section II of this opinion, we set out the judicial review standards of G.S. 105-345.2 and those enunciated by this Court in *Amp*. We will not repeat that section here. Here, our purpose is merely to relate and summarize the statutory provisions with the provisions set forward in *Amp* and apply it to the facts before us.

As we understand appellee's contention, it is basically that this Court, under *Amp*, is powerless to overturn the Property

Tax Commission in this case because of the rule that no court can weigh the evidence presented to a state administrative agency and substitute its evaluation of the evidence for that of the agency. Put another way, appellee argues that a court is without authority to make findings at variance with the findings of the board when the findings of the board are supported by competent, material and substantial evidence. We have no quarrel with these basic, general statements of black letter administrative law. They are, however, taken out of context in relation to the record before us.

As noted in *Amp*, the presumption is that the county acted with regularity in the valuation process, and the burden is upon the taxpayer to show otherwise. At this point, the taxpayer must show by competent, material and substantial evidence that one of the first two tests enunciated in *Amp* has not been met, *i.e.*, either that the county employed an arbitrary or an illegal method of valuation. Here, appellants have clearly carried that burden. Our discussion in the preceding three sections of this opinion indicates the illegality and arbitrariness of the county's valuation process. G.S. 105-345.2(b) provides that in order for a court to reverse or modify the decision of the Property Tax Commission the "substantial rights" of appellants must "*have been prejudiced*" because of the illegality or arbitrariness. To show this prejudice of substantial rights, we turn back to the rule enunciated in *Amp* which requires that, in addition to showing illegality and arbitrariness, the taxpayer must also show that the assessment substantially exceeded the accurate valuation, *i.e.*, that the valuation was unreasonably high. Put another way, the second prong of the test set out in *Amp* explains what the substantial prejudice required by G.S. 105-345.2 is: substantial prejudice is a substantially higher valuation than one which would have been reached under a legal valuation process. Here, appellants have clearly carried their burden on this point as well. They have shown by competent, material and substantial evidence that the present use value of their property is thirty to forty dollars per acre.

When a taxpayer has rebutted the presumption of regularity in favor of the county, as appellants have here, the burden then shifts to the county to demonstrate to the Property Tax Commission that the values determined in the revaluation process were

not substantially higher than that called for by the statutory formula, and the county must demonstrate the reasonableness of its valuation "by competent, material and substantial evidence," G.S. § 105-345.2(b)(5).

At this juncture, we reiterate that it is the function of the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. We cannot substitute our judgment for that of the agency when the evidence is conflicting. *Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547. However, when evidence is conflicting, as here, the standard for judicial review of administrative decisions in North Carolina is that of the "whole record" test. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977); *In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979). As Justice Exum stated in *Rogers*: "The 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Id.* at 65, 253 S.E. 2d at 922. In Thompson, Justice Copeland clearly explained the "whole record" test:

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C.L. Rev. 635, 668-74 (1971); Hanft, *Administrative Law*, 45 N.C.L. Rev. 816, 816-19 (1967). The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, Universal Camera Corp., *supra*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence

> which in and of itself justifies the Board's result, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn. Universal Camera Corp., *supra.*

292 N.C. at 410, 233 S.E. 2d at 541; *accord, In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912; *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E. 2d 24 (1981).

We will, in the succeeding section of this opinion, proceed to review the evidence disclosed by the record before us to determine whether it is sufficient to support the commission's findings and conclusion upholding the actions of the Wilkes County Commissioners in revaluing appellants' properties.

VIII.

[6] Before reviewing the substantiality of the evidence under the "whole record" test as discussed in the preceding section, we first address appellants' contention that use of comparable sales in determining a present use valuation schedule is improper. For reasons explained below, we agree that use of comparable sales in the manner described by the record to determine present use valuation is improper and that the Property Tax Commission's failure to so find constituted an error of law as contemplated by G.S. 105-345.2.

As discussed in Section III of this opinion, the statutory provisions for determining "true value" (or market value) and "present use value" are clearly different. There is a common denominator: the price at which the property in either case would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell. Beyond this common denominator, however, the valuation standards differ drastically. In the case of property not subject to present use valuation, G.S. 105-283 provides that both buyer and seller shall have knowledge "of all the uses to which the property is adapted and for which it is capable of being used." Moreover, G.S. 105-317(a) lists numerous factors to be used in determining the true value of land not subject to present use valuation. Where *all uses* to which property may be adapted is the criterion, the use of comparable sales as *one factor* in determining the true value of property is both reasonable and acceptable. Even in the

free market the use of comparable sales is a commonly accepted practice.

Such is not the case, however, in determining the *present use value* of agricultural, horticultural and forest land as contemplated by G.S. 105-277.2(5). Here, the criterion is that both buyer and seller shall "have reasonable knowledge of the capability of the property to produce income *in its present use* . . . ." (Emphasis added.) In this instance, the clear legislative intent is that property be valued on the basis of its ability to produce income in the manner of its present use. All other uses for which the property might be employed and the many factors enunciated in G.S. 105-317(a) are irrelevant and immaterial. The focus of the appraisal is a narrow one: If the use of the property subject to present use valuation continues as at present what income will the property produce?

We think the use of sales of similarly used land by Wilkes County was clearly improper. To allow the indiscriminate use of sales of similarly used land in establishing present use valuation without knowing whether buyers and sellers intended to continue the use of the property in its present form contravenes the clear intent of the statute. It is well known that people buy property for various purposes;[2] this present use valuation requires that there be only one purpose, the continuation of the use of the property as at present.

2. Indeed, Paul Osborne, a real estate agent specializing in sales of timberland and one of the property owners contesting the valuation of his land, testified before the Property Tax Commission:

> The factors which influence the sales price of property similar to [petitioner Johnston's land] in Wilkes County are the location, access, what kind of roads to it, what it could be used for, and if it could be subdivided into smaller tracts, recreation purposes, and various things like that. A recreational purpose for a portion of this land could be campgrounds. There are none in the vicinity of this property. Stone Mountain Park is the closest and it is a State Park. Powder Horn Mountain is all around Mr. Johnston's property. The KOA Campground is all round the McElwee property, right in it. These are factors which figure into a transaction when property is bought and sold in Wilkes County, mountain property or boundary property such as this we are discussing. Some people want to buy some land. Out-of-state people come in and want to buy land. We sold 136 acres over in Walnut Grove last year to a pilot who flies in Arabia. He is an American, just wanted to own some land. He liked the looks of it and bought it. One of the big factors is that people buy land and hope it will go up and sell it and make some money. Some bought it and now

This is not to say, however, that sales of similarly used lands may never be used to establish present use valuation. Sales of such land may be used if they are sales of land actually comparable to the land whose present use value is being determined. In order for a county to use sales of similarly used land in establishing present use valuation, the county must demonstrate that the buyers and sellers involved in the comparable sales transactions had knowledge of the property's capability to produce income in its present use, that the present use is the highest and best use and that the purchaser intended to continue to use the property in its present use.[3] If a truly comparable sale can be found—one of land of the same quality, used for the same purposes and whose present use is its highest and best use—the sale price received does reflect the present use value. Here, there was no attempt to qualify the sales on which the valuation was based as truly comparable sales. We know only that those sales were of forestland and that the new owners presently use it as such. We know nothing of its intended future use or what was in the minds of the buyer and seller.

Here, the record discloses that the appraisers employed comparable sales in establishing the special use valuation schedule for Wilkes County, and Mr. Allen so testified. The County Tax Supervisor testified that the comparable sales were used in arriving at the valuation schedule. Indeed, the Property Tax Commission concluded: "The $100 is also supported by sales of comparable property introduced by the county."

We hold, therefore, that the Court of Appeals erred in its conclusion that the Property Tax Commission had not committed

are trying to sell it. Factors like investment purposes and recreational purposes drive the price of property up. If the property were restricted for growing timber only, the price would be lower. If a man had to buy property and sold it to grow timber, it would be altogether different than comparable sales for other uses.

3. We acknowledge that the principle discussed above cannot be applied to determine the present use value of useless land, *i.e.*, land which has no present income-producing capability. In such a case, however, the land, by definition, would not qualify for present use valuation for the very reasons that it produces no income and that it has no higher and better use. *See* G.S. § 105-277.4. Hence, the valuation of such land is determined under the true or market value method, G.S. § 105-283, and the use of comparable sales in determining ad valorem tax value is permissible.

an error of law as contemplated by G.S. 105-345.2 by upholding the use of sales of similarly used land as a factor upon which a present use valuation was based.

[7] With the foregoing in mind, we now review the evidence before the Property Tax Commission to determine if that body's findings and conclusions are supported by competent, material and substantial evidence in view of the whole record. G.S. 105-345.2. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538.

On the basis of our review of the entire record we are compelled to conclude that the findings and conclusions of the Property Tax Commission with respect to the present use valuation of appellants' properties are not supported by competent, material and substantial evidence in view of the entire record. All evidence with respect to comparable sales was irrelevant for the reasons stated above. The only remaining evidence which supports the $100 per acre present use valuation came from the witness Edwin McGee. He testified that his opinion, as a county forester, was that the use value per acre would be "in the neighborhood of $100." Later, however, he qualified his answer by stating that this valuation would be based on a 25% increase in timber production on the property. County Tax Supervisor, John Hoots, testified that, "My opinion dollar-wise as to the use value per acre is $100 per acre." However, Mr. Hoots qualified his answer with this addendum: "I based that opinion on the market and the production of the timber land in Wilkes County—the market value and what the timber will bring on the stump." Clearly, Mr. Hoots was using market value sales as a criterion for his opinion, a basis we have rejected above.

Appellants, on the other hand, presented abundant evidence to support their contention that their property was worth, for present use purposes, $30 to $40 per acre. Several witnesses testified that the average annual growth for the timber on appellants' land would be from 200 to 210 board feet and that the 200 to 210 board feet annual growth would produce a gross annual yield of $30 to $40 and a net yield after expenses of $3 to $4 per acre. Indeed, the Property Tax Commission included these figures in its findings of fact. In support of their contention that these figures substantiate a present use valuation of $30 to $40

per acre, appellants also presented witnesses who testified that a 10% capitalization rate was justified. Typical is the testimony of Roy Carter, a member of the faculty of the School of Forestry at North Carolina State University:

> The average capitalization rate used in the forestry industry for net return per year has been up until the last five years. It has been in the neighborhood of five to six percent. Since our general interest rates have increased, the forest lands have increased in their rates, also. It is around 10 percent now.

Application of the capitalization theory was also explained by Carter:

> You have management expenses and taxes and personnel expenses and other things that are involved which you deduct from the total income that you receive . . . and arrive at a net return for the land. If you had a net return over the period of 60, 70 or 80 years, you might have maybe $30 or $40 per acre per year net return. If you had a net return of $30 and you expected ten percent return on your investment, you would then have $30 actual return per acre per year. That is capitalizing.

We think appellants' contention that the capitalization approach is appropriate for present use valuation is entirely proper. While our statutes nowhere incorporate that precise terminology, we think the intent of our Legislature in approving such an approach is clear from the language in G.S. 105-277.2(5) that both buyer and seller have reasonable knowledge "*of the capability of the property to produce income in its present use*" (emphasis added). Moreover, Wilkes County itself apparently places credence in the capitalization approach. Tax Supervisor Hoots testified, "Well, to get the use value, you have to get the yield and compute it on some kind of cap[italization] rate to get the use value. You have got to have a net income."

Applying the rules stated by this Court in *Thompson* that we may not consider the evidence justifying the Commission's result without taking into account contradictory evidence and whatever in the record fairly detracts from the weight of the Board's evidence, we hold that the Commission's findings and conclusions

are not supported by competent, material and substantial evidence in view of the entire record as submitted, G.S. 105-345.2(b)(5).

IX.

For the reasons stated above, the decision of the Court of Appeals is reversed. This cause is remanded to that court with instructions that it remand to the North Carolina Property Tax Commission to determine the present use value of appellants' property as of 1 January 1977 in a manner not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. LAVERNE RAY IRWIN

No. 26

(Filed 6 October 1981)

1. **Homicide § 21.6— felony murder—sufficiency of evidence**

The State's evidence was sufficient to support findings by the jury that deceased died from a gunshot wound received during the course of an attempted armed robbery, that defendant fired the fatal shot, and that defendant was thus guilty of first degree murder under the felony murder rule, where it tended to show that defendant attempted to commit an armed robbery of a drug store; two shots were fired during the attempt; just prior to the second shot, defendant was seen pointing a pistol at the deceased; immediately thereafter, the deceased ran from the store calling for help and was seen falling inside a police station located across the street; an autopsy conducted within thirteen hours after the shooting revealed that deceased had been dead several hours and that death resulted from a gunshot wound to his right chest; the wound was caused by a .357 caliber bullet; and defendant had a .357 magnum pistol in his possession at the time of his arrest.

2. **Criminal Law § 34.7— evidence of other crimes—competency to show intent and motive**

In this prosecution for attempted armed robbery and felony murder of a drug store employee, an accomplice's testimony that defendant told him that he had obtained illegal drugs in Ohio by robbing drug stores in a manner similar to the attempted armed robbery in question was competent to show that defendant had the specific intent to rob the employee and to show defendant's motive for the attempted robbery.

3. Kidnapping § 1— meaning of "remove from one place to another"

As used in the kidnapping statute, G.S. 14-39(a), the phrase "remove from one place to another" requires a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony.

4. Kidnapping § 1.2— insufficient evidence of removal

The State's evidence was insufficient for the jury on the issue of defendant's guilt of kidnapping a drug store employee where it tended to show that defendant and an accomplice attempted an armed robbery of the store owner and the employee to obtain drugs, the accomplice forced the employee at knifepoint to walk from her position near the fountain cash register to the back of the store to the area of the prescription counter and safe, two shots were fired by defendant at the front of the store, one of which struck the owner, the accomplice then fled, and the employee was not touched or further restrained, since the employee's removal to the back of the store was an inherent and integral part of the attempted armed robbery and was insufficient to support a conviction for a separate kidnapping offense.

5. Criminal Law § 135.4— first degree murder—sentencing hearing—mitigating circumstances—plea bargain between State and codefendant

Evidence of a plea bargain and sentencing agreement between the State and a codefendant was irrelevant and properly excluded from the jury's consideration as a mitigating circumstance in a sentencing hearing in a first degree murder case, since such evidence had no bearing on defendant's character, record or the nature of his participation in the offense. G.S. 15A-2000(f)(9).

6. Criminal Law § 135.4— first degree murder—sentencing hearing—voluntary intoxication—impaired capacity

Voluntary intoxication by alcohol or narcotic drugs at the time of the commission of a murder does not constitute the mitigating factor of being under the influence of mental or emotional disturbance within the meaning of G.S. 15A-2000(f)(2); rather, voluntary intoxication to a degree that it affects defendant's ability to understand and to control his actions is properly considered as relating to the impaired capacity mitigating circumstance set forth in G.S. 15A-2000(f)(6).

7. Criminal Law § 135.4— felony murder conviction—sentencing hearing—submission of aggravating circumstance as to pecuniary gain

The trial court properly submitted the aggravating circumstance as to whether a murder was committed for pecuniary gain in a trial in which defendant was convicted of first degree murder under the theory that the murder was committed in the perpetration of an attempted armed robbery, there being no merit to defendant's contention that he was entitled to an assumption that his culpability in the murder was the lowest possible to support a verdict of guilty of felony murder and that submission of the aggravating circumstance of pecuniary gain entitled the State to relitigate the question of intentional killing.

8. Criminal Law § 135.4— first degree murder—sentencing hearing—kidnapping as aggravating circumstance—prejudicial error

In a sentencing hearing in a first degree murder case, the trial court committed prejudicial error in submitting the aggravating circumstance as to whether the murder was committed while defendant was an aider or abettor in the commission of the crime of kidnapping where the evidence was insufficient to support a conviction for kidnapping, the jury recommended imposition of the death sentence upon finding the kidnapping and pecuniary gain aggravating circumstances, and the appellate court is unable to conclude that if the issue as to kidnapping had not been submitted, the jury would have found that the pecuniary gain circumstance was sufficiently substantial to justify imposition of the death penalty.

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

APPEAL by defendant from judgments of *Bruce, J.*, entered at the 24 September 1980 Criminal Session, WAYNE Superior Court.

Upon pleas of not guilty defendant was tried on bills of indictment, proper in form, charging him with first-degree murder, attempted armed robbery, conspiracy and kidnapping.

The jury returned verdicts of guilty of first-degree murder under the felony murder rule, attempted armed robbery and kidnapping. The court then conducted a sentencing hearing pursuant to G.S. 15A-2000, *et seq.* The jury recommended imposition of the death sentence.

The court entered judgment as recommended by the jury on the murder charge. On the kidnapping charge, the court entered judgment imposing a prison sentence of 25 years to begin at the expiration of the sentence on the murder charge. On motion of defendant, the verdict on the attempted armed robbery count was set aside.

Defendant appealed from the judgments. Pursuant to G.S. 7A-31(a) we allowed defendant's motion to bypass the Court of Appeals in the kidnapping case.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Isaac T. Avery, III and Assistant Attorney General Grayson G. Kelley, for the State.

Herbert B. Hulse for defendant-appellant.

BRITT, Justice.

PHASE I—GUILT DETERMINATION

A. *Felony-Murder*

[1] Defendant assigns as error the trial court's denial of his motion to dismiss the charge of first-degree murder based on the felony murder rule. He argues that the evidence was not sufficient to support a verdict based on that rule. There is no merit in this assignment.

G.S. 14-17 provides in pertinent part: "A murder . . . which shall be committed in the perpetration or attempted perpetration of any . . . robbery . . . committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, ..."

The evidence presented by the state tended to show that:

On the evening of 10 November 1980, around 8:00 p.m., defendant Laverne Irwin and an accomplice, Michael Harvey, entered the Fremont Drug Store in Fremont, N.C. The drug store is composed of one main room with a fountain counter on one side and a prescription counter at the back. Also in the rear of the store is an office and a prescription room.

Two other persons were present in the store that night: the owner, Jesse Stewart, and an employee, Ms. Sasser. Defendant and Harvey entered the store and wandered about for several minutes. Defendant then approached Mr. Stewart, who was standing near the front of the store, handed him a note and pulled out a pistol. The note instructed "do what I say and no one gets hurt." It then listed certain drugs that defendant demanded. At this point, Harvey walked over to the fountain cash register where Ms. Sasser was standing, drew a knife and forced her to walk toward the back of the store to the general area of the prescription counter. As they moved toward the back a shot was fired. Ms. Sasser testified that at the sound of the gunshot she looked in the direction of defendant and Mr. Stewart. Mr. Stewart was on his knees but apparently unhurt. Harvey, who testified for the state as part of a plea bargain arrangement, stated that Mr. Stewart was standing. After this first shot, Harvey and Ms.

Sasser proceeded to the back of the store and Harvey had Ms. Sasser sit on the step to the prescription room.

Ms. Sasser testified that shortly thereafter, the bell on the front door rang twice. Almost simultaneous with the ring of the bell Ms. Sasser heard a second gunshot which she thought came from outside the building. When she was able to look, defendant and Mr. Stewart had gone.

With respect to the second shot, Harvey testified that he saw the flash from defendant's gun and heard a bang. He noted that just before seeing the flash, defendant had the gun pointed at Mr. Stewart. After the shot, Mr. Stewart yelled for help and ran from the store with his hands in the air. At this point Harvey fled. As he ran down the street he saw Mr. Stewart enter the police station (across the street from the drug store) and fall inside. This was possible because the front of the station has double glass doors.

The medical examiner's testimony indicated that Mr. Stewart died from a gunshot wound to his right chest. When the examiner autopsied the body, around 9:00 a.m. the following morning, he determined that Mr. Stewart had been dead for some time. He estimated that the deceased lived from five to forty-five minutes after receiving the wound.

The state offered no further evidence of what happened to Mr. Stewart from 8:15 p.m. Saturday when he was seen entering the police station, until 9:00 a.m. Sunday when the autopsy was performed.

Defendant had a .357 magnum Ruger Blackhawk pistol in his possession at the time of his arrest. A ballistics expert testifying for the state said that the bullets recovered from Stewart's body came from the same class of firearms as defendant's pistol but a positive identification of that pistol as the murder weapon could not be made.

On a motion to dismiss on the grounds of insufficiency of the state's evidence, the question for the court is whether there is substantial evidence of each element of the crime charged and that defendant did in fact commit it. *State v. Riddle*, 300 N.C. 744, 268 S.E. 2d 80 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The substantial evidence test requires that the evidence

must be existing and real, not just seeming and imaginary. *State v. Powell, supra; State v. Smith,* 40 N.C. App. 72, 252 S.E. 2d 535 (1979). There must be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Fletcher,* 301 N.C. 709, 272 S.E. 2d 859 (1981); *State v. Smith,* 300 N.C. 71, 265 S.E. 2d 164 (1980).

In evaluating the motion, the trial judge must consider the evidence in the light most favorable to the state, allowing every reasonable inference to be drawn therefrom. *State v. Smith, supra; State v. Thomas,* 296 N.C. 236, 250 S.E. 2d 204 (1978). When so considered, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the defendant's perpetration thereof, the motion should be allowed. *State v. Brown,* 300 N.C. 41, 265 S.E. 2d 191 (1980); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). However, if a reasonable inference of defendant's guilt can be drawn from the evidence, then it is the jury's decision whether such evidence convinces them beyond a reasonable doubt of defendant's guilt. *State v. Powell, supra; State v. Thomas, supra.*

Applying the rules set forth above to the present case we think that substantial evidence was introduced by the state to support a reasonable inference that Mr. Stewart died from a gunshot wound received during the course of an attempted armed robbery and that defendant fired the fatal shot.

Defendant attempted to commit an armed robbery of the Fremont Drug Store. During the attempt two shots were fired. Just prior to the second shot, defendant was seen pointing a pistol at the deceased. Immediately thereafter, the deceased ran from the store calling for help, and was seen falling inside the police station located across the street. An autopsy conducted within thirteen hours of the shooting revealed that deceased had been dead several hours and that death resulted from a gunshot wound to his right chest. The wound was caused by a .357 caliber bullet and defendant had a .357 magnum pistol in his possession at the time of his arrest. The lack of the state's evidence as to exactly what time and precisely where Mr. Stewart died does not reduce the jury's finding of guilt to mere conjecture where, as here, evidence adequate to support their conclusion was presented.

B. *Attempted Armed Robbery*

[2] Defendant assigns as error the admission of evidence tending to show that he had committed other crimes. There is no merit in this assignment.

Harvey testified on redirect examination to the effect that defendant told him that he had obtained illegal drugs in Ohio by robbing drug stores in a manner similar to the attempted armed robbery in Fremont.

In North Carolina, evidence of other crimes by a defendant on trial is not admissible where its only relevancy to the crime charged is its tendency to show defendant's disposition to commit a crime of the nature of the one for which he is on trial. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); 1 Stansbury's N.C. Evidence (Brandis Rev. 1973) § 91, pg. 289. However, if such evidence tends to prove any other relevant fact it will not be excluded merely because it shows guilt of another crime. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979); *State v. Barfield, supra;* 1 Stansbury's N.C. Evidence (Brandis Rev. 1973) § 91, pp. 289-90.

The instances in which other crimes evidence is considered relevant are contained in the well-established exceptions to the general rule listed in *State v. McClain, supra.* We perceive at least two of these exceptions applicable to the case at bar.

1. "Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. (Citations omitted.)" *State v. McClain, supra,* at 175.

Defendant was charged with an attempted armed robbery in violation of G.S. 14-87. One of the elements of an attempt to commit a crime is that the defendant must have the intent to commit the substantive offense. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). An attempted armed robbery occurs when a person with the requisite intent does some overt act calculated to unlawfully deprive another of personal property by endangering or threatening his life with a firearm. *State v. May*, 292 N.C. 644,

235 S.E. 2d 178 (1977). *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971).

As part of its burden of proof, the state was required to show that defendant had the specific intent to rob Mr. Stewart. The acid test of the admissibility of other crimes evidence is its logical relevance to the particular excepted purposes for which it is sought to be introduced. *State v. McClain, supra.* Evidence that defendant had committed several previous robberies of drug stores in Ohio is clearly relevant on the issue of his intent that night at the Fremont Drug Store.

2. "Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though it discloses the commission of another offense by the accused. (Citations omitted.)" *State v. McClain, supra*, at 176.

The state's evidence tended to show that defendant was a heavy drug user. Harvey testified to the effect that defendant had obtained some of his drugs by armed robberies of stores in Ohio. This testimony was directly relevant to defendant's motive in the attempted armed robbery of the Fremont Drug Store, and therefore properly admitted into evidence.

Defendant next assigns as error the trial court's denial of his request for instructions as to the scrutiny of the testimony of an accomplice. Defendant requested that the jury be instructed that "the rule of scrutiny applies to the testimony of an accomplice whether such testimony be supported or unsupported by other evidence in the case."

An accomplice testifying for the state is generally considered an interested witness. Upon timely request, a defendant is entitled to an instruction that the testimony of the accomplice should be carefully scrutinized. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). However, the court is not required to charge in the exact language of the request but need only give the instruction in substance. *State v. Abernathy, supra; State v. Bradsher*, 49 N.C. App. 507, 271 S.E. 2d 915 (1980).

In the present case, the trial judge instructed the jury as follows:

If you find that the witness, Michael Richard Harvey was an accomplice in the commission of the crime charged in this case, or that he testified in whole or in part under an agreement with the prosecutor for a charge reduction or sentencing consideration in exchange for his testimony, or both, you should examine his testimony with great care and caution in deciding whether to believe him. If after doing so, you believe the testimony of Michael Richard Harvey in whole or in part, you should treat what you believe the same as any other believable evidence.

We think that the trial court fairly and accurately instructed the jury on the rule of scrutiny of accomplice testimony. The instruction substantially complies with defendant's request. Furthermore, the instruction given has been approved in earlier decisions of this court. *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633 (1972). We find no merit in defendant's assignment.

C. *Kidnapping*

Defendant assigns as error the trial court's denial of his motion to dismiss the charge of kidnapping. This assignment has merit.

The indictment charges defendant with kidnapping Ms. Sasser by removing her from one place to another and restraining her for the purpose of facilitating an armed robbery. The trial judge instructed the jury on the element of removal only, thus withdrawing the issue of restraint from jury consideration. Our discussion, therefore, will be limited to the meaning of the phrase "remove from one place to another" as used in G.S. 14-39(a).

G.S. 14-39(a), effective 1 July 1975, provides:

(a) Any person who shall unlawfully confine, restrain *or* remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal guardian of such person, shall be guilty of kidnapping if such confinement, restraint, *or* removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person. (Emphasis added.)

The legislature, in enacting this statute, eliminated asportation of the victim as an essential element of kidnapping. Our previous analysis of the statute led us to conclude that the intent of the legislature was "to make resort to a tape measure or stop watch unnecessary in determining whether the crime of kidnapping has been committed." *State v. Fulcher*, 294 N.C. 503, 522, 243 S.E. 2d 338 (1978).[1]

In *State v. Fulcher, supra*, we recognized that construction of the statute could present problems of constitutional magnitude; specifically, violation of the constitutional prohibition against double jeopardy. Consequently, we followed the venerable principle of statutory interpretation that if it is possible to reasonably construe a statute so as to avoid constitutional doubts, a court should adopt that construction. *Califano v. Yamasaki*, 442 U.S. 682, 61 L.Ed. 2d 176, 99 S.Ct. 2545 (1979); *U.S. v. Bradley*, 418 F. 2d 688 (4th Cir. 1969); *Matter of Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977).

Fulcher involved an interpretation of the term "restrain" as used in G.S. 14-39(a). Pursuant to the above principle of statutory construction we held that it was not the legislature's intent in enacting G.S. 14-39(a) to make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping thus permitting conviction and punishment for both crimes. To have construed the statute otherwise would allow a defendant to be punished twice for essentially the same offense, violating the constitutional prohibition against double jeopardy.

1. One commentator has noted, however, that: "Kidnapping as now defined overlaps other crimes for which the prescribed punishment is less severe. This creates a very real potential for prosecutorial abuse of discretion by allowing imposition of a more severe punishment in circumstances which do not warrant it. Slaughter, "Kidnapping in North Carolina—A Statutory Definition for the Offense", 12 Wake Forest Law Review 434 (1976).

[3] In accordance with our analysis of the term "restraint", we construe the phrase "removal from one place to another" to require a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony. To permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy. In an armed robbery, for example, punishment for two offenses would be sanctioned if the victim was forced to walk a short distance towards the cash register or to move away from it to allow defendant access. Under such circumstances the victim is not exposed to greater danger than that inherent in the armed robbery itself, nor is he subjected to the kind of danger and abuse the kidnapping statute was designed to prevent. *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897 (1972). We now turn to the application of these principles to the facts in the case at bar.

[4] The evidence for the state is sufficient to support a finding that Harvey forced Ms. Sasser at knifepoint to walk from her position near the fountain cash register to the back of the store in the general area of the prescription counter and safe. During this time two shots were fired by defendant at the front of the store, causing Harvey to flee. Ms. Sasser was not touched or further restrained. All movement occurred in the main room of the store.

Ms. Sasser's removal to the back of the store was an inherent and integral part of the attempted armed robbery. To accomplish defendant's objective of obtaining drugs it was necessary that either Mr. Stewart or Ms. Sasser go to the back of the store to the prescription counter and open the safe. Defendant was indicted for the attempted armed robbery of both individuals. Ms. Sasser's removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense.

PHASE II—SENTENCING

[5] Defendant assigns as error the trial court's exclusion at the sentencing hearing of the plea bargain and sentencing agreement between the state and co-defendant Larry Joseph Collen.

Collen pled guilty to second-degree murder and conspiracy to commit armed robbery in return for a sentence of life imprison-

ment plus five years, the sentences to run consecutively. Defendant was tried and convicted for first-degree murder, attempted armed robbery and kidnapping and received a sentence of death.

Defendant's contention raises the issue of whether the plea bargain and sentencing agreement of a co-defendant is a mitigating circumstance under G.S. 15A-2000(f)(9).

At the outset we note that disparate sentences for co-defendants are not unconstitutional. *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979). A definition of mitigating circumstance approved by this court is a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than other first-degree murders. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981).

The U.S. Supreme Court has held that any aspect of defendant's character, record or circumstance of the particular offense which defendant offers as a mitigating circumstance should be considered by the sentencer. *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973, 98 S.Ct. 2954 (1978). However, evidence irrelevant to these factors may be properly excluded by the trial court. *Lockett v. Ohio, supra*, p. 604, n. 12.

Applying the rule in *Lockett* to the present case, we hold that the evidence of the plea bargain and sentencing agreement between the state and a co-defendant was irrelevant and properly excluded from the jury's consideration as a mitigating factor. Such evidence had no bearing on defendant's character, record or the nature of his participation in the offense. In fact, defendant was himself the triggerman, and therefore the most culpable of the participants. Further, G.S. 15A-2000(d) provides for review by this court to ensure that a death sentence, when imposed, is not excessive or disproportionate to the penalty imposed in similar cases.

[6] Defendant contends by his next assignment of error that the trial court erred in its instructions to the jury on the mitigating factor of being under the influence of mental or emotional disturbance.

At the sentencing hearing, defendant offered evidence tending to show that he had intravenously injected 800 ml of Tuinol, a central nervous system depressant, approximately two hours before the attempted armed robbery. He had also consumed an undetermined quantity of beer that afternoon. There was expert medical testimony to the effect that given the ingestion of the above substances, the capacity of the defendant to conform his conduct to the requirements of the law would be impaired.

Defendant argues that the trial judge should have reviewed defendant's evidence on intoxication when he instructed the jury on the mitigating factor of being under the influence of a mental or emotional disturbance.

The North Carolina death penalty statute is substantially similar to the American Law Institute Model Penal Code.[2] We find the Code's commentary as to the pertinent mitigating factors helpful. According to the commentary, the provisions for mental or emotional disturbance deals with imperfect provocation; that situation where such disturbance is not subject to reasonable explanation as would reduce a first-degree murder charge to second-degree murder or manslaughter, but may be weighed against imposition of the death penalty. American Law Institute, Model Penal Code and Commentaries, § 210.6, p. 138 (1962).

Defendant's evidence of intoxication was more appropriately related to the law on the mitigating factor of impaired capacity. G.S. 15A-2000(f)(6).[3] The Model Penal Code Commentary on impaired capacity states that this section encompasses impairment or incapacity resulting from voluntary intoxication. Model Penal Code, *supra*, p. 138.

In the present case, defendant's evidence tended to show that he was in a state of voluntary intoxication. We hold that

2. G.S. 15A-2000(f)(2) provides as a mitigating circumstance that "The capital felony was committed while defendant was under the influence of mental or emotional disturbance." The Model Penal Code, § 210.6(4)(b) reads ". . . under the influence of *extreme* mental or emotional disturbance." (Emphasis added.)

3. G.S. 15A-2000(f)(6) provides as a mitigating circumstance that "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." The Model Penal Code § 210.6 (4)(g) would add "impaired as a result of mental disease or defect or intoxication."

voluntary intoxication by alcohol or narcotic drugs at the time of the commission of a murder is not within the meaning of a mental or emotional disturbance under G.S. 15A-2000(f)(2). Voluntary intoxication, to a degree that it affects defendant's ability to understand and to control his actions, *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), is properly considered under the provision for impaired capacity, G.S. 15A-2000(f)(6).

The trial judge in the case at bar correctly related defendant's evidence on intoxication to the law on impaired capacity. Defendant's contention is therefore without merit.

[7] Defendant next objects to the submission of the aggravating circumstance that the murder was committed for pecuniary gain.

Defendant was convicted of first-degree murder under the felony murder rule. G.S. 14-17. Defendant argues that because the jury was instructed not to answer the issues as to second-degree murder or manslaughter, he is entitled to an assumption that his culpability in the murder of Mr. Stewart was the lowest possible to support a verdict of guilty of felony murder. Based on this, he further contends that submission of the aggravating circumstance of pecuniary gain entitled the state to relitigate the question of intentional killing.

It is well-established in North Carolina that when the law and evidence justify the use of the felony murder rule, the state is not required to prove premeditation and deliberation, nor do the lesser offenses of second-degree murder or manslaughter need be submitted to the jury unless there is evidence to support such a finding. *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976).

There is no evidence in the record of the present case that would support a finding of either second-degree murder or manslaughter. Defendant went to the Fremont Drug Store with the intention of committing armed robbery. During the course of the robbery he fired his weapon twice. One of those shots inflicted a fatal wound on Mr. Stewart. Furthermore, the gun was a single action revolver and had to be cocked after each firing. We reject defendant's contention that he is entitled to an assumption of the lowest degree of culpability. Such an assumption, if allowed at all, would have to be based on evidence that the gun was accidentally fired. There is no evidence in the record to support such a theory.

Defendant's second argument is also without merit. Submission of the aggravating factor of pecuniary gain does not relitigate the question of intentional killing or any element of the offense of first-degree murder under the felony murder rule. Our decision in *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981) is on point. In *Oliver*, defendants were convicted of felony murder, with the underlying felony being armed robbery. This court held that the circumstance of pecuniary gain was not an essential element of the capital offense of felony murder. "This circumstance examines the motive of the defendant rather than his acts. While his motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence." *Id.* at 62.

In the present case, as in *Oliver*, it was the hope of pecuniary gain that provided the impetus for the killings. The aggravating circumstance of pecuniary gain will almost always be appropriately submitted to the jury where a murder is committed during the course of an armed robbery. Pecuniary gain was, therefore, properly submitted to the jury for their consideration during sentencing.

[8] The last assignment of error that we consider is that the trial court erred in submitting kidnapping as an aggravating circumstance. This assignment has merit.

Earlier in this opinion we held that the evidence was insufficient to support a conviction for kidnapping. In light of that finding, the aggravating circumstance of kidnapping should not have been submitted to the jury at the sentencing hearing. The question then arises, was the error prejudicial to defendant?

In *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), in answering this question in that case we held that the test is whether there is a *reasonable possibility* that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were "sufficiently substantial" to justify imposition of the death penalty. *Ibid.* 29.

In the case at hand issues were submitted as to whether the murder was committed (1) for the purpose of avoiding a lawful arrest, (2) while defendant was an aider or abettor in the commis-

sion of the crime of kidnapping, or (3) for pecuniary gain. The jury answered the first issue in favor of defendant and the other two issues against him. We are unable to conclude that if the issue as to kidnapping had not been submitted, the jury would have found that the "pecuniary gain" circumstance was sufficiently substantial to justify imposition of the death penalty. That being true, we conclude that there must be a new trial on the sentencing phase.

The result is: We find no error in defendant's trial for attempted armed robbery and in the guilt determination phase of his trial for first-degree murder. The judgment entered in the kidnapping case is reversed. The judgment imposing a death sentence in the murder case is vacated and the cause is remanded to the Superior Court for a new sentencing hearing and an appropriate judgment predicated thereon.

Attempted armed robbery case: No error.

Kidnapping case: Reversed.

Murder case: Partial new trial.

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

STATE OF NORTH CAROLINA v. JOHN ELWIN MISENHEIMER

No. 117

(Filed 6 October 1981)

1. Homicide § 4.3— murder committed during quarrel—intent to kill—deliberation

A killing committed during the course of a quarrel or scuffle may constitute first degree murder provided the defendant formed the intent to kill in a cool state of blood before the quarrel or scuffle began and the killing during the quarrel was the product of this earlier formed intent. If, however, the killing was the product of a specific intent to kill formed under the influence of the provocation of the quarrel or struggle itself, then there would be no deliberation and hence no murder in the first degree.

2. Homicide § 21.5— killing during struggle—prior intent to kill—first degree murder

In a prosecution of defendant for the murder of his father which occurred after defendant and his father had engaged in a struggle and his father had twice "grabbed" defendant, the jury could properly find that the killing was the product of an earlier formed specific intent to kill rather than an intent formed under the influence of the provocation of the struggle and that defendant was guilty of first degree murder where there was evidence tending to show that defendant had repeatedly told his siblings that his father was trying to poison him; defendant had threatened to kill his father on at least one previous occasion; approximately one month before the killing defendant told his sister "he'd never have peace" as long as his father was alive; on the day of the killing defendant entered a shed on his father's property, loaded a rifle, and tucked it under his belt where it was hidden by his jacket; defendant then entered his father's home, but did not confront his father until his sister had gone to work; defendant's father was unarmed and aware of previous threats made by defendant against him; the only struggle resulted from the father's efforts to disarm defendant; after the shooting defendant acted dispassionately; and when questioned by police officers later that day, defendant coherently and calmly related his actions of that day and told the officers that he carried a gun into his father's home because his father had attempted to poison him previously and because his father was involved in communist activity in the area.

3. Criminal Law § 75.14— mental capacity to confess voluntarily

The evidence on voir dire did not compel a conclusion that defendant lacked sufficient mental capacity to confess voluntarily to the murder of his father and supported the trial court's determination that defendant's confession was made freely, voluntarily and understandingly where there was evidence tending to show that, although defendant had experienced psychiatric problems in the past and apparently entertained delusions about his father, he was able to function independently of supervision by medical personnel and family members in the weeks prior to the killing and the confession; defendant was found competent to stand trial after a psychiatric evaluation conducted shortly after his arrest; defendant was informed of his *Miranda* rights and appeared to understand them; defendant appeared to be coherent at the time of questioning and not under the influence of drugs other than prescribed medication; the questioning itself was conducted in a well-lighted conference room in less than two hours; and defendant's various statements during the questioning and afterwards were consistent.

4. Criminal Law § 86.8— sibling witnesses—cross-examination about hiring a private prosecutor—exclusion of further cross-examination

In this prosecution of defendant for first degree murder of his father wherein the trial court permitted defense counsel to ask brothers and sisters of defendant on cross-examination whether they were among family members who had employed a private prosecutor, the trial court did not err in refusing to permit further cross-examination of defendant's siblings concerning their motives for hiring the private prosecutor since the jury could infer bias of the witnesses from their admissions that the family was represented by a private

prosecutor. Furthermore, even if defendant was entitled to cross-examine the sibling witnesses to show that they had a pecuniary motive for hiring a private prosecutor in that they would inherit a greater portion of their father's estate if defendant were disqualified as an heir by reason of his conviction for his father's murder, no prejudice to defendant appears because of the trial court's refusal to permit such cross-examination since the record fails to show what the witnesses would have testified in this regard, and since defendant could have read the statutes relating to this issue to the jury and argued the bias which the statutes might have engendered in the sibling witnesses.

5. Bills of Discovery § 6— defendant's statements to his brothers—noncompliance with discovery request—admission as harmless error

Even if defendant's brothers were officers of the State because they had hired a private prosecutor and statements made to them by defendant were thus discoverable under G.S. 15A-903(a)(2), there was no merit to defendant's contention that admission of the statements was erroneous on the ground that the State failed to supply the statements pursuant to defendant's request for discovery where the record shows that the prosecutor learned of the details of the statements only the night before a voir dire hearing at the beginning of the trial and that he satisfied his continuing duty to disclose by putting defense counsel on notice of the statements both before and during the voir dire hearing. Furthermore, even if the State failed to meet its obligation to disclose, defendant was not prejudiced thereby since he made no motions for relief under G.S. 15A-910, and since the decision whether to admit evidence not disclosed during discovery was discretionary with the trial court and no abuse of discretion has been shown.

6. Homicide § 27.2— instructions on involuntary manslaughter—use of "unlawful" rather than "unintentional" killing—harmless error

Defendant was not prejudiced by the court's instruction defining involuntary manslaughter as the "unlawful" rather than the "unintentional" killing of a human being by an unlawful act not amounting to a felony, or an act done in a criminally negligent way, where the court thereafter applied the correct legal standard in another portion of the charge and in the final mandate, and where there was no basis for submitting involuntary manslaughter to the jury and defendant was convicted of first degree murder.

7. Constitutional Law § 48— effective assistance of counsel—failure to renew motion to dismiss

A defendant charged with first degree murder was not denied the effective assistance of counsel by failure of his trial counsel to renew his motion to dismiss at the close of all the evidence since the failure to renew the motion to dismiss did not preclude appellate review of the sufficiency of all the evidence, G.S. 15A-1227(d), and since defendant presented no evidence and a renewal of the motion would thus have been futile.

8. Constitutional Law § 48— effective assistance of counsel—failure to present evidence in defendant's behalf

A defendant charged with the first degree murder of his father was not denied the effective assistance of counsel by the failure of his trial counsel to

present defendant as a witness where the record shows that the decision not to testify at trial was clearly defendant's own. Nor was defendant denied the effective assistance of counsel by the failure of his trial counsel to offer any psychiatric testimony about his mental condition absent some showing that evidence of defendant's insanity was available or by the exercise of due diligence could have been developed by counsel and presented in defendant's behalf.

BEFORE *Judge Claude S. Sitton*, presiding at the 13 October 1980 Criminal Session of MECKLENBURG Superior Court, and a jury, defendant was found guilty of murder in the first degree. Upon being sentenced to life imprisonment[1] defendant appeals of right pursuant to G.S. 7A-27(a). This case was argued as No. 133, Spring Term 1981.

Rufus L. Edmisten, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the state.

Hasty, Waggoner, Hasty, Kratt & McDonnell, by Robert D. McDonnell, for defendant appellant.

EXUM, Justice.

In this appeal defendant brings forth assignments of error relating to the trial court's refusal to: dismiss the charge of first degree murder for insufficient evidence, suppress defendant's incriminating statements, permit cross-examination of several witnesses on their motivation for hiring a private prosecutor. He also presents assignments relating to portions of the trial judge's substantive instructions to the jury and his contention that he suffered from ineffective assistance of counsel. After careful examination of each assignment of error we conclude that defendant's trial was free from prejudicial error.

The state's evidence tends to show the following: In the Spring of 1980 defendant was a thirty-six-year-old man who had experienced psychiatric problems and treatment over a period of

1. The state announced at the beginning of defendant's trial that there was no evidence of an aggravating circumstance as delineated in G.S. 15A-2000(e). Therefore, the state chose not to prosecute the first degree murder charge as a capital case. Because the state failed to produce evidence of any aggravating circumstance, the trial court properly imposed a sentence of life imprisonment without the intervention of the jury. *See State v. Johnson*, 298 N.C. 47, 79-80, 257 S.E. 2d 597, 620 (1979).

years. In 1976 he had been involved in a commitment proceeding for threatening to kill his father with a knife. He had expressed his belief that his father was trying to poison him a number of times over a span of four to five years. In May of 1980 he told his sister, Sylvia, that as long as his father was alive "he'd never have peace."

On 10 June 1980 defendant arrived at his father's residence about 8:00 a.m., while his father was cooking breakfast and his sister, Sharon, was preparing for work. Defendant, rather than enter the residence, went to a shed on the property and ate some food he had purchased at a local restaurant. While in the shed he took an old rifle with the stock removed, loaded it with a single cartridge, and tucked the gun under his belt in the front of his pants. A jacket covered the gun from view. He entered the trailer, remaining in a back bedroom where he was heard but not seen by Sharon before she left for work. He then went into the kitchen where his father was preparing breakfast and told his father he wished to speak with him. His father, sixty-seven years old, but somewhat larger than defendant, spotted the gun and "grabbed for it or grabbed at" defendant. Defendant pulled away. His father grabbed him again. Defendant then reached for the gun, turned, and shot his father in the forehead from a distance of one foot. Defendant left the residence and drove to his brother's home. Because his brother was not at home, he waited briefly, then decided to drive to South Carolina to help Sylvia, who was in the process of moving.

Sharon returned home shortly after 11:00 a.m. and discovered her father's body on the floor next to the kitchen table. The breakfast utensils were on the table and pans were still on the burners of the stove.

No one other than the deceased and defendant witnessed the shooting; thus the state relied on statements made by defendant to police officers and family members. Defendant met Sylvia in Dillon, South Carolina, and was subsequently detained by the Dillon County Sheriff's Department. About 7:30 p.m. defendant was questioned by two officers of the Mecklenburg County Police Department. After being informed of his *Miranda* rights, he waived his right to counsel, and gave a statement of his activities that day. During the course of questioning by the officers he told

them that he had gotten the firearm from the shed because some communists, including his father, had been causing trouble in his father's trailer park, and because his father had previously attempted to poison him. He also complained to the officers that a laser light was coming through the window of the conference room where he was being questioned, but neither officer could see any light.

In a pre-trial psychiatric evaluation defendant was found competent to stand trial. He presented no evidence at trial.

I

Defendant assigns as error the submission of first degree murder to the jury, contending that the evidence, when viewed most favorably to the state, was insufficient to constitute first degree murder. We disagree.

[1] First degree murder is the unlawful killing of a human being with malice, premeditation and deliberation. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated*, 429 U.S. 809 (1976); G.S. 14-17 (Cum. Supp. 1979). Generally, premeditation and deliberation must be proved by circumstantial evidence because they "are not susceptible of proof by direct evidence." *State v. Love*, 296 N.C. 194, 203, 250 S.E. 2d 220, 226-27 (1978). Premeditation means that defendant formed the specific intent to kill the victim for some period of time, however short, before the actual killing. Deliberation means that the intent to kill was formed while defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation. *State v. Biggs*, 292 N.C. 328, 337, 233 S.E. 2d 512, 517 (1977); *State v. Hamby*, 276 N.C. 674, 678, 174 S.E. 2d 385, 387 (1970), *death sentence vacated*, 408 U.S. 937 (1972). The term "cool state of blood" does not, in the context of determining the existence of deliberation, mean "an absence of passion and emotion. . . . '[A]lthough there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated. However, passion does not always reduce the crime since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. If the design

to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect.' " *State v. Faust*, 254 N.C. 101, 108, 118 S.E. 2d 769, 773, *cert. denied*, 368 U.S. 851 (1961), *quoting* 40 C.J.S., Homicide, s. 33(d), pp. 889, 890. Thus a killing committed during the course of a quarrel or scuffle may yet constitute first degree murder provided the defendant formed the intent to kill in a cool state of blood before the quarrel or scuffle began and the killing during the quarrel was the product of this earlier formed intent. *See State v. French*, 225 N.C. 276, 34 S.E. 2d 157 (1945). If, however, the killing was the product of a specific intent to kill formed under the influence of the provocation of the quarrel or struggle itself, then there would be no deliberation and hence no murder in the first degree. *Id.*

The critical question for the jury in this case was whether "defendant did indeed deliberate, as distinguished from premeditate, the killing or did he form the intent to kill during a sudden passion provoked by the deceased [himself] which precluded any such deliberation." *State v. Patterson*, 288 N.C. 553, 575, 220 S.E. 2d 600, 616 (1975) (Exum, J., dissenting), *death sentence vacated*, 428 U.S. 904 (1976). Factors the jury may consider in determining the existence of premeditation and deliberation include: "[C]onduct and statements of the defendant both before and after the killing, *State v. Johnson*, 294 N.C. 288, 239 S.E. 2d 829 (1978), and . . . [T]hreats made against the deceased by the defendant, *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977)." *State v. Potter*, 295 N.C. 126, 130-31, 244 S.E. 2d 397, 401 (1978).

[2] In the case at bar all the evidence showed that the killing occurred after defendant and his father had engaged in a struggle and his father had twice "grabbed" defendant. There was also, however, plenary evidence from which the jury could reasonably infer that defendant had formed in a cool state of blood, the specific intent to kill his father well before the struggle actually occurred, and that the killing itself was the product of this earlier formed specific intent to kill rather than an intent formed under the influence of the provocation of the struggle itself.

This evidence in the light most favorable to the state was: Defendant had repeatedly told his siblings that his father was trying to poison him. He had threatened to kill his father on at least one previous occasion. As recently as one month before the killing

he told his sister "he'd never have peace" as long as his father was alive. On the day of the killing defendant entered a shed on his father's property, loaded a rifle, and tucked it under his belt where it was hidden by his jacket. He then entered his father's home, but did not confront his father until his sister had gone to work. His father was unarmed and aware of previous threats made by defendant against him. The only struggle resulted from the deceased's efforts to disarm defendant. After the shooting defendant acted dispassionately. He drove to his brother's home, but when he discovered his brother was not at home he decided to drive to South Carolina to help his sister move. When questioned by police officers in Dillon, South Carolina, later that day, defendant coherently and calmly related his actions of that day. He also told them that he carried a gun into his father's home because his father had attempted to poison him previously and because his father was involved in communist activity in the area.

There was, therefore, no error in denying defendant's motion to dismiss the charge of first degree murder for insufficiency of the evidence.

II

[3] Defendant next assigns as error the refusal of the trial court to suppress his confession to police officers. Defendant argues he lacked sufficient mental capacity to competently and voluntarily confess at the time he was questioned by officers. He seeks to invoke the rule of *Blackburn v. Alabama*, 361 U.S. 199 (1960), and *State v. Ross*, 297 N.C. 137, 254 S.E. 2d 10 (1979), which held that an extra-judicial confession made while a defendant is mentally incompetent must be excluded at trial.

The indicia of incompetency found in *Blackburn v. Alabama*, *supra*, and *State v. Ross*, *supra*, are significantly different in kind and degree from those found in the present case. The defendant in *Blackburn* confessed shortly after a crime committed during an unauthorized absence from a Veterans Administration Hospital. He had been diagnosed as schizophrenic and classified as 100 percent incompetent. It was not until four years after his confession that he was declared competent to stand trial. His confession was obtained after eight or nine hours of interrogation in a tiny room with as many as three officers present. *Blackburn v. Alabama*, *supra*, 361 U.S. at 200-04.

In *Ross*, the incident and confession at issue occurred shortly after defendant had been involuntarily committed to John Umstead Hospital and subsequently released to his brother's care. Three days before the crime and confession defendant had been tentatively diagnosed as schizophrenic and given medication. His behavior surrounding the incident for which he was charged was bizarre and three days after his confession defendant was diagnosed as suffering from "chronic, undifferentiated schizophrenia." *State v. Ross, supra*, 297 N.C. at 138-42, 254 S.E. 2d at 12-13.

Defendant in this case, however, had presented significantly less compelling indicia of his incompetency. Although he had experienced psychiatric problems in the past and apparently entertained delusions about his father, he was able to function independently of supervision by medical personnel and family members in the weeks prior to the killing and the confession. He was found competent to stand trial after a psychiatric evaluation conducted shortly after his arrest. The trial court made factual findings following a *voir dire* hearing, concluding that defendant was informed of his *Miranda* rights and appeared to understand them. The court further found that defendant appeared to be coherent at the time of questioning and not under the influence of drugs other than prescribed medication. The questioning itself was conducted in a well-lighted conference room in less than two hours. Defendant's various statements during the questioning and afterwards were consistent. Thus, there was ample evidence to support the trial court's conclusion that defendant's statements to officers "were made freely and voluntarily and understandingly."

III

[4] Defendant's next assignment of error relates to the refusal of the trial court to allow cross-examination of defendant's siblings concerning their motives for hiring a private prosecutor. Several of defendant's brothers and sisters, including four who testified for the state at trial, hired a private prosecutor to represent the family. He aided in preparation and sat with the state's prosecutor at trial, but did not examine or cross-examine witnesses. Defense counsel was allowed to ask each of the testifying brothers and sisters whether they were among the family members who had employed private counsel, but was not allowed to pursue the questioning further.

Thus this case is distinguishable from prior cases in which this Court held it to be error to prevent any questioning at all on whether the witness had hired a private prosecutor. *See, e.g., State v. White,* 286 N.C. 395, 405-06, 211 S.E. 2d 445, 451 (1975). In the instant case the testifying family members admitted that the family was represented by a private prosecutor, thus the jury could infer the witnesses' biases from this information. Although the trial court characterized such employment as not unusual to one juror who questioned the arrangement, this comment did not remove the fact as indicative of interest in the case from the jury's consideration.

Defendant argues that the sibling witnesses had a pecuniary motive for hiring the private prosecutor and this should have been put before the jury. He contends they hoped to inherit a greater portion of their father's estate if defendant were to be disqualified as an heir because of a conviction for his father's murder, *see* G.S. 31A-3 *et seq.,* and that he should have been allowed to cross-examine them about this possible source of bias. Defendant's difficulty is that he made no record of what the witnesses would have testified to in this regard, so we have no basis for determining whether defendant was prejudiced by the trial court's refusal to allow further cross-examination on the issue. The failure to record the witnesses' excluded response precludes appellate review of its admissibility. *See, e.g., State v. Curry,* 288 N.C. 660, 220 S.E. 2d 545 (1975).

We note further that defendant could have read the statutes relating to this issue to the jury and argued the bias which these statutes might have engendered in the sibling witnesses. G.S. 84-14; *State v. Jones,* 296 N.C. 495, 251 S.E. 2d 425 (1979); *State v. McMorris,* 290 N.C. 286, 225 S.E. 2d 553 (1976). The witnesses' admission of bias is not a prerequisite for this kind of argument. Thus, we overrule this assignment of error.

IV

[5] Defendant further assigns as error the admission of his brothers' testimony about statements made by defendant to them. Defendant's brothers were among the family members who employed a private prosecutor to represent the family in defendant's prosecution. Defendant argues that his brothers were tantamount to officers of the state because they had employed a

private prosecutor; thus statements to them were discoverable under G.S. 15A-903(a)(2).[2] He further argues that the state failed to supply these statements pursuant to defendant's request for discovery and this failure renders their admission prejudicial error.

There are several reasons why these contentions are without merit. This Court held in *State v. Crews*, 296 N.C. 607, 619-20, 252 S.E. 2d 745, 753-54 (1979), that only statements made by defendant to agents of the government are discoverable. We doubt that the mere employment of a private prosecutor makes one an agent of the state for the purposes of G.S. 15A-903(a)(2), but that question need not be decided in this case because the prosecutor apparently complied with the discovery request. Both before and during the *voir dire* which preceded jury selection, the prosecutor put defendant's counsel on notice of statements defendant had made to his brothers. The prosecutor stated that he "was generally familiar with the fact that some family members had talked to the [d]efendant," but it was not until the night before the hearing that he knew the details of those statements. Thus, the state apparently satisfied its continuing duty to disclose under G.S. 15A-907.[3] Defendant had an opportunity to call the brothers for questioning at the *voir dire*, but failed to do so.

Assuming arguendo that the state did fail to meet its obligation to disclose, defendant made no motions for relief under G.S.

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2. This section states in pertinent part:

"*Disclosure of evidence by the State—information subject to disclosure.*—(a) Statement of Defendant.—Upon motion of a defendant, the court must order the prosecutor:

. . . .

(2) To divulge, in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at the trial."

3. General Statute 15A-907 states:

"*Continuing duty to disclose.*—If a party, subject to compliance with an order issued pursuant to this Article, discovers prior to or during trial additional evidence or decides to use additional evidence, and the evidence is or may be subject to discovery or inspection under this Article, he must promptly notify the attorney for the other party of the existence of the additional evidence."

15A-910,[4] nor did he even object to the testimony of one brother at trial. Finally, the decision whether to admit evidence which was not disclosed during discovery is discretionary with the trial court. *State v. Braxton*, 294 N.C. 446, 472, 242 S.E. 2d 769, 784-85 (1978); *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977). Absent abuse of discretion, and none is present here, the trial court's decision is not subject to appellate review. *See, e.g.*, 1 N.C. Index 3d, Appeal and Error § 54, p. 330 (1977).

V

[6] Defendant next asserts that the trial court committed reversible error when he defined involuntary manslaughter as "the unlawful killing of a human being by an unlawful act not amounting to a felony, or an act done in a criminally negligent way." Defendant contends the court should have said "unintentional killing" rather than "unlawful killing." We agree that the accepted definition of involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony nor naturally dangerous to human life, or an act or omission which is criminally negligent. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976); N.C. P.I.—Crim. 206.11. Although involuntary manslaughter is an unlawful killing, like all homicides, the unintentional nature of the killing is that characteristic which in the ordinary case best distinguishes it from the other homicides.[5] We are satisfied, however, that this deviation from the accepted definition by the trial judge was not prejudicial in this case. First, the trial court explained the elements of involuntary manslaughter in two portions of his jury charge. It was only in the first that he used the term "unlawful killing." In the second he used the accepted definition. Then in his final mandate he appropriately ap-

4. Possible remedial measures the trial court could take under G.S. 15A-910 in addition to its contempt powers include:

"(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(4) Enter other appropriate orders."

5. We recognize that under some circumstances second degree murder may also involve an unintentional killing. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978).

plied the correct legal standard in charging on this crime. Because the use of the term "unlawful killing" was not altogether incorrect and because of these later correct instructions on the point we conclude no prejudice to defendant resulted. *See State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied*, 386 U.S. 911 (1967). Second, the record reveals no basis for submitting the alternative charge of involuntary manslaughter to the jury. There is no evidence that the shooting in this case was unintentional. *See State v. Faust, supra*, 254 N.C. at 112-13, 118 S.E. 2d at 776-77; *State v. Cope*, 204 N.C. 28, 31, 167 S.E. 456, 458 (1933). Because, however, defendant was convicted of first degree murder, he was not prejudiced by the erroneous submission of involuntary manslaughter. *Compare State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978), *with State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980) (prejudicial error to submit lesser offense of involuntary manslaughter when no evidence to support charge and reasonable possibility of acquittal without it).

VI

[7] The final issue raised by defendant is whether he was afforded effective assistance of counsel at trial. Defendant points to the failure of trial counsel to renew his motion to dismiss at the close of all the evidence and to introduce evidence in defendant's behalf. Neither of these omissions by trial counsel on this record constitute ineffective representation.

Defendant's right to assistance of counsel in a non-capital felony prosecution is guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and Article I, Sections 19 and 23 of the North Carolina Constitution. The test of effective assistance of counsel has never been definitively stated by the United States Supreme Court; however, that Court has evaluated advice given a defendant who pleaded guilty by determining whether it was "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Several courts, including this one, have looked "to the ABA Standards Relating to the Defense Function as a 'reliable guide for determining the responsibilities of defense counsel.' *Marzullo v. Maryland*, 561 F. 2d 540,

547 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011, 56 L.Ed. 2d 394, 98 S.Ct. 1885 (1978)." *State v. Milano*, 297 N.C. 485, 495, 256 S.E. 2d 154, 159 (1979).

The test of effective assistance has been expressed two ways by this Court. Traditionally, the formulation has been whether "the attorney's representation is so lacking that the trial has become a farce and a mockery of justice." *State v. Sneed*, 284 N.C. 606, 612, 201 S.E. 2d 867, 871 (1974). Recently, however, we employed the *McMann* standard and the ABA Standards without mention of the "farce and mockery" standard[6] in reviewing an ineffective assistance of counsel claim in a case in which the defendant had not pleaded guilty. *State v. Milano, supra*, 297 N.C. at 494, 256 S.E. 2d at 159. Under either of these tests defendant has failed to meet the "stringent standard of proof on the question of whether an accused has been denied Constitutionally effective representation." *State v. Sneed, supra*, 284 N.C. at 613, 201 S.E. 2d at 871-72.

The failure to renew a motion to dismiss made at the close of all the evidence does not preclude appellate review of the sufficiency of all the evidence in a criminal case. G.S. 15A-1227(d). Furthermore, defendant presented no evidence so a renewal of the motion would have been futile. The failure of defense counsel to renew his motion to dismiss does not constitute ineffective assistance of counsel.

[8] Defendant next attacks the decision not to put forth any evidence in his defense at trial. The decision not to testify at trial was clearly defendant's own. He made a sworn statement at trial, in response to the court's questioning, that he understood he had the right to testify but preferred not to do so.

Defendant also asserts it was ineffective representation for his counsel to fail to offer any psychiatric testimony about his mental condition. On the basis of this record we cannot say that the failure to introduce psychiatric testimony was "so flagrant

6. For a thorough overview of various judicial articulations of standards of competency required of criminal defense attorneys, a good criticism of the "farce and mockery" standard, and an argument for a more specific standard than within the range of competence demanded of attorneys in a criminal case" *see* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 Am. Crim. L. Rev. 233 (1979).

that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation." *Marzullo v. Maryland, supra*, 561 F. 2d at 544. Defense counsel requested and received a psychiatric determination of defendant's competency to stand trial. The record shows the court ordered as part of that report an evaluation of defendant's mental state on 10 June 1980. Absent some showing that evidence of defendant's insanity was available, or by the exercise of due diligence could have been developed by counsel and presented in defendant's behalf, we cannot conclude that defendant suffered from ineffective assistance of counsel because no such evidence was offered.[7]

Defendant having failed to show prejudicial error, we find in the verdict and judgment of the trial court

No error.

STATE OF NORTH CAROLINA v. DAVID DANIEL SILVA, JR.

No. 84

(Filed 6 October 1981)

1. Criminal Law § 92.4— consolidation of offenses for trial—correctness of joinder determined at time of decision—defendant's motion for severance

There was no abuse of discretion on the part of the trial court in consolidating the charges of felonious larceny of an automobile, conspiracy to commit armed robbery and robbery with a dangerous weapon where at the time the consolidation order was entered there appeared to be a sufficient transactional connection among the three offenses. Joinder is a decision which is made prior to trial and when subsequent developments at defendant's trial negated the existence of the transactional link, the joinder was not improper as a matter of law. The nature of the decision to join and its timing indicate that the correctness of the joinder must be determined as of the time of the trial court's decision and not with the benefit of hindsight. G.S. 15A-927(a) provides a method by which an accused may protect against prejudice to his defense. Defendant should make a pretrial motion for severance, and if, during the presentation of the State's evidence, severance becomes justified on a ground

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7. Our decision is, as it must be, based on the record before us. It is, of course, without prejudice to defendant's pursuit of this claim in appropriate post-conviction proceedings, if indeed he has more evidentiary support for his ineffective assistance claim than appears in this record.

not previously known to the defendant, the challenge is preserved by a motion for severance made before or at the close of the State's evidence.

2. **Searches and Seizures § 45— objection to testimony concerning search—necessity of court to conduct a voir dire**

In a prosecution for armed robbery and automobile larceny where the defense attorneys made a series of objections to testimony concerning the fruits of a search of defendant's bedroom, the objections were overruled and later the trial judge conducted a voir dire hearing on the legality of the search, found the search unlawful and instructed the jury to disregard testimony concerning items found which linked defendant to the robbery, it was error for the trial court to refuse to excuse the jury and to refuse to conduct a voir dire on the legality of the search of defendant's bedroom immediately upon defendant's general objection to testimony concerning the fruits of that search. The evidence erroneously admitted, though withdrawn, was of a highly incriminating nature and the trial court's subsequent curative instruction was insufficient to avert any prejudice.

3. **Criminal Law §§ 76.4, 169.6— refusal to permit excluded testimony to be placed in record—error**

The trial court's refusal to allow defense counsel to preserve in the record the defendant's answers on voir dire concerning evidence seized during the illegal search of defendant's bedroom constituted error which rendered the Court unable to determine the voluntariness of defendant's confession and, therefore, constituted prejudicial error.

ON appeal of right pursuant to G.S. 7A-27(a) from judgment entered by *Bruce, Judge,* at the 1 October 1979 Criminal Session of Superior Court, NEW HANOVER County.

Defendant was charged in indictments, proper in form, with felonious larceny of an automobile, conspiracy to commit armed robbery and robbery with a dangerous weapon. The charges were consolidated for trial on the State's motion and over defendant's objection. The conspiracy charge was dismissed at the close of all evidence on defendant's motion. At trial, the jury found defendant guilty of armed robbery and felonious larceny. Defendant was sentenced to life imprisonment for both crimes. He appeals to this Court as a matter of right.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Herbert P. Scott and John P. Swart for the defendant.

CARLTON, Justice.

I.

Evidence for the State tended to show that shortly after 9:15 a.m. on 29 May 1979 two armed men wearing ski masks entered the Long Leaf Branch of First Citizens Bank and Trust Company in Wilmington. Each was armed, one with a small silver gun, the other with a large black handgun which had a brown stock and a black barrel. The masked men shouted obscenities, laughed and told everyone to "[p]ut your hands up" and to "[h]it the floor." The robber with the small silver gun then shot a bank customer in the back, seriously wounding him. Another shot was fired, and the robbers took money from all the cashiers' drawers. Included in the money stolen was approximately $1,000 in bait money, specially packaged twenty dollar bills of whose series and serial numbers the bank had made a list. The robbers wore long shirts and gloves, and the witnesses were unable to determine even their race. After emptying the cash drawers, the robbers fled in a green Ford pickup truck with either yellow or white stripes on the sides.

A truck fitting the general description of the one used in the bank robbery was stolen from Jerry Lee Little on the night of 4 April 1979. Little's truck was recovered two and one-half months later on 26 June 1979. A set of jumper cables, a jack, a chain and some tools were missing. Defendant was not charged with this theft.

On 24 June 1979 Raeford Newman discovered that his white Ford pickup truck had been stolen from his home. He had last seen his truck on the previous day around noon. The police spotted the truck on 25 June 1979 parked in some woods in Wilmington and, with Newman's permission, placed the truck under surveillance. The next morning, 26 June 1979, at approximately 8:45, three males were seen walking into the woods and shortly thereafter the truck was driven out of the woods. Three people were inside. Two had ski masks on; the third's face was concealed by a yellow garment. The police chased the vehicle to another wooded area, and the truck stopped. The occupants fled on foot into the woods and were not captured. The two ski masks were found inside the truck. A search of the wooded area yielded a

wallet containing an operator's and a chauffeur's license issued to defendant and a yellow head covering.

On the afternoon of the same day the police had under surveillance a Chevrolet Corvette and a motorcycle parked in the doctor's parking area at New Hanover Memorial Hospital. Defendant's sister, Diana Silva Shiver, and half-brother, William Evans, were seen circling the lot and were stopped and questioned by the police. As a result of the discovery of driver's licenses issued to defendant and information given them by defendant's sister, the police arrested defendant on the evening of 26 June 1979 at William Evans's home.

On the afternoon or evening of 26 June 1979 the police went to Winnabow to search the home where defendant lived with his mother and sister. Although the police had obtained a warrant to search the home, it was never served or returned. Defendant's sister, Ms. Shiver, accompanied the police to the home and gave her consent to the search.

A search of defendant's bedroom revealed a yellow shirt, a blue bank bag and a snubnose .38 revolver which matched the description of one of the guns used in the robbery. Ms. Shiver and FBI Agent Zimmerman were allowed to testify over defendant's objection as to the items seized from his bedroom, but Judge Bruce subsequently ruled that the search of defendant's bedroom was illegal and instructed the jury to disregard that evidence. Search of a truck parked outside the home yielded a set of jumper cables similar to those missing from Mr. Little's truck.

On 2 July 1979 defendant was questioned by police officers. The officers advised him of his constitutional rights, and he signed a written waiver of them. Although defendant did not expressly admit his participation in the robbery, he agreed to lead the police to the wooded area where checks stolen in the robbery had been discarded. The checks were found in the spot where defendant led them. He told the police that the checks had been left in the woods when he and his accomplices divided the robbery proceeds and that he had planned the robbery. The wooded area where the checks had been discarded was the same area where Mr. Little's green Ford pickup truck had been found on 26 June 1979.

Defendant offered no evidence. His motion to dismiss the conspiracy charge was allowed at the close of all evidence, and the charges of robbery with a dangerous weapon and felonious larceny of an automobile were submitted to the jury. The jury returned verdicts of guilty as charged and Judge Bruce sentenced defendant to life imprisonment.

Other facts pertinent to this decision will be noted below.

II.

[1] Defendant first assigns as error the consolidation for trial of the robbery, larceny and conspiracy charges.

G.S. 15A-926(a) (1978) governs the joinder for trial of several charges against the same defendant. It provides that "[t]wo or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Thus, offenses may be joined for trial if they are based on the same act or transaction or arise out of a series of acts or transactions which are connected together or are part of a single scheme or plan. *Id.; State v. Bracey,* 303 N.C. 112, 277 S.E. 2d 390 (1981). In short, for offenses to be joined, there must be a "transactional connection" common to all. *State v. Powell,* 297 N.C. 419, 428, 255 S.E. 2d 154, 159 (1979).

A mere finding of the transactional connection required by the statute is not enough, however. In ruling on a motion to consolidate, the trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial; if consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated. *State v. Greene,* 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Davis,* 289 N.C. 500, 508, 223 S.E. 2d 296, 301, *death sentence vacated,* 429 U.S. 809, 97 S.Ct. 47, 50 L.Ed. 2d 69 (1976). A motion to consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. *E.g., State v. Bracey,* 303 N.C. 112, 277 S.E. 2d 390 (1981); *State v. Davis,* 289 N.C. 500, 223 S.E. 2d 296. If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law. *See* G.S. § 15A-926(a).

We are faced here with a complex set of facts. Defendant was indicted for armed robbery of a bank, larceny of a truck and conspiracy to commit another bank robbery. At the time the motion for consolidation was made and the charges were ordered consolidated, there appeared to be a transactional connection among the three charges. The State's theory of this case was that defendant, with others, conceived a scheme to rob banks whereby he and his accomplices would steal a vehicle and use that vehicle to transport them to and from the targeted bank. Such a theory, in our opinion, provides an adequate basis to support a finding of a "transactional connection." Although the conspiracy charge, the actual link connecting the armed robbery and larceny charges, was dismissed at the close of the evidence, that fact does not and cannot enter into our consideration of whether Judge Bruce abused his discretion in allowing joinder. Whether an abuse of discretion occurred must be determined as of the time of the order of consolidation; subsequent events are irrelevant on this issue. *See State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971). Because at the time the consolidation order was entered there appeared to be a sufficient transactional connection among the three offenses, we hold that the trial judge committed no abuse of discretion. Given the State's theory of a single scheme to commit bank robberies, we think that there was no abuse of discretion "in permitting the State to paint its entire picture on a single canvas," *id.* at 13, 184 S.E. 2d at 853.

This, however, does not end our inquiry. As noted above, the statutorily required transactional link, the conspiracy charge, was never shown at trial. The conspiracy charge was dismissed at the close of all the evidence, leaving no transactional connection between the armed robbery and the larceny charges. The disappearance of the transactional link raises the question of whether, when subsequent developments at trial negate the existence of the transactional link, the joinder is improper as a matter of law, *i.e.*, whether subsequent developments can render the joinder improper. We think not. Joinder is a decision which is made prior to trial; the nature of the decision and its timing indicate that the correctness of the joinder must be determined as of the time of the trial court's decision and not with the benefit of hindsight. *See State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851. While this rule may seem severe and, perhaps, highly prejudicial to an accused,

our statutes provide a method by which an accused may protect against prejudice to his defense. Under G.S. 15A-927(a), a defendant may protect his right to a fair determination of the charges against him by making a pre-trial motion for severance. If this motion is overruled, the defendant may preserve his challenge to the joinder by renewing his motion before or at the close of all evidence. G.S. § 15A-927(a)(2) (1978). If, during the presentation of the State's evidence, severance becomes justified on a ground not previously known to the defendant, the challenge is preserved by a motion for severance made before or at the close of the State's evidence. G.S. § 15A-927(a)(1) (1978). If a severance motion is not made or is not renewed at the appropriate time, the right to severance is waived. G.S. § 15A-927(a)(2). On motion, the trial court must order severance during trial if it finds it "necessary to achieve a fair determination of the defendant's guilt or innocence of each offense," G.S. § 15A-927(b)(2) (1978). If a motion for severance is granted during trial, a motion by defendant for a mistrial must also be granted. G.S. § 15A-927(a)(4) (1978).

Defendant here moved to sever prior to trial but did not renew that motion at the close of all evidence; therefore, he has waived any right to severance, G.S. § 15A-927(a)(2). Thus, we need not consider whether, under the facts of this case, defendant became entitled to severance when the conspiracy charge was dismissed, and we hold that the consolidation of charges for trial was not in error.[1]

III.

[2] Defendant next assigns as prejudicial error the failure of the trial court to excuse the jury and to conduct a voir dire on the legality of the search of defendant's bedroom immediately upon defendant's general objection to testimony concerning the fruits of that search.

During the State's presentation of its case, defendant's sister, Diana Silva Shiver, testified that she accompanied the law enforcement officers on their search of the home where she and

1. Because defendant is entitled to a new trial on grounds later discussed, we note that the charges of armed robbery and automobile larceny may not be consolidated on retrial as there is no longer any possible transactional connection between them which would permit their consolidation.

defendant lived with their mother. Ms. Shiver told the jury that she saw the officers find a .38 revolver under the mattress of defendant's bed, a yellow shirt in the trash can and a blue bank bag behind a false panel in the fireplace. Defendant objected to her testimony concerning the revolver, but his objections were overruled.

The State's next witness, FBI Agent Joseph Zimmerman, in response to questions asked by the District Attorney, testified in detail about items seized from defendant's bedroom:

> We searched David's room first. I searched David's room. As you went in the room, on the immediate left inside the door of David's room, there was a small dresser. I searched it first.
>
> Q. Did you find anything there?
>
> MR. SCOTT: OBJECTION.
>
> COURT: Did you object?
>
> MR. SCOTT: Yes sir.
>
> COURT: OVERRULED.
>
> A. Nothing that I confiscated.
>
> Q. Okay. Where did you go after that?
>
> A. I then searched a closet.
>
> Q. Did you find anything in there?
>
> A. I did not.
>
> Q. What did you do after that?
>
> A. I next came upon a fireplace that had a false front or wind front—some type of plywood edifice there and I pulled it out and found the bank bag.
>
> MR. SCOTT: OBJECTION. MOTION TO STRIKE.
>
> COURT: OBJECTION OVERRULED. MOTION TO STRIKE DENIED.
>
> Q. After you found that, what did you do?

A. There was another bureau located to the right of the fireplace and we searched that and found nothing. Next was the bed and a night stand, and we confiscated the—

MR. SCOTT: OBJECTION.

COURT: OVERRULED.

A. I confiscated a thirty eight snub nose detective special, Colt in brand, from underneath the mattress near the head of the bed.

Q. Can you describe that revolver?

A. It was what they call a snub nosed revolver, two and a half inch barrel. It had heavy brown stocks and it was blue steel.

Q. Okay.

A. It was a new weapon.

Q. What did you do after that?

A. There was a night stand immediately to the right of the bed that produced nothing. Then there was a foot locker, I believe—seems that there was something between the night stand, I think another dresser. And then there was a dresser just on the other side—no, excuse me, just before the dresser was a trash can located next to the dresser in which we found the—

MR. SCOTT: OBJECTION.

A. —in which I found—

COURT: Approach the Bench.

At this point, the trial judge excused the jury and conducted a voir dire hearing on the legality of the search of defendant's bedroom. After hearing the evidence, he found as fact that the officers had in their possession a search warrant for the Winnabow home but that it was never properly served or returned and that Diana Silva Shiver had consented to the search of the home. Based on these findings, he concluded that Ms. Shiver had no authority to consent to the search of defendant's bedroom and that the search of the bedroom was unlawful. He ordered that the

testimony concerning the items seized during the search be suppressed. When the jury members returned, Judge Bruce instructed them: "Ladies and Gentlemen, reference to the blue bank bag, the thirty eight caliber pistol found underneath the mattress and the State's Exhibit 36, the piece of the yellow shirt, is hereby stricken. You are not to consider those items as evidence in this proceeding." Immediately after this instruction was given the defendant moved for mistrial under G.S. 15A-1061.[2] Judge Bruce denied the motion, finding that defendant had suffered no substantial prejudice. No additional curative instruction was given.

Defendant contends that his general objections to the testimony of Ms. Shiver and Agent Zimmerman were sufficient to raise the issue of the legality of the search and to require the trial judge immediately to conduct a voir dire and that the trial judge's failure to do so constitutes reversible error. Under the facts of this case, we agree that the admission of the evidence of the fruits of the search prior to holding a voir dire was error and that the delayed voir dire hearing and ruling and subsequent curative instruction were insufficient to correct it.

It is a well-established principle of constitutional law that fruits of an unlawful search may not be admitted against a defendant in a criminal proceeding in a state court, assuming, of course, that the defendant has standing to challenge the legality of the search. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961). Although the boundaries of this exclusionary rule are by no means certain, *see, e.g.*, Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 Ore. L. Rev. 151 (1979), the principle of enforcing the fourth amendment guarantee of security in person and abode through removal of the incentive to violate that right remains intact and is binding upon the states.

Defendant contends that when a general objection to testimony concerning a search is entered the trial judge must im-

2. G.S. 15A-1061 (1978) provides:

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. If there are two or more defendants, the mistrial may not be declared as to a defendant who does not make or join in the motion.

mediately conduct an inquiry into the legality of the search outside the jury's presence. Although this Court has never addressed this point, the Court of Appeals, in *State v. Fowler*, 3 N.C. App. 17, 164 S.E. 2d 14 (1968), has held that "when the defendant objects to evidence obtained by a search which requires a search warrant, the court should determine the legality of the search by a preliminary inquiry in the absence of the jury, and that . . . the general objection is sufficient." *Id.* at 22, 164 S.E. 2d at 17.

We agree with the reasoning of the Court of Appeals in *Fowler*. This Court, long ago, instituted the rule that the State must establish the legality of the search as a prerequisite to the admission of evidence concerning the search unless the defendant has waived his right or has no standing to challenge the search. *State v. McMilliam*, 243 N.C. 771, 92 S.E. 2d 202 (1956). The legality of a search and the admissibility of evidence obtained by the search are not matters for the jury's determination but are matters of law to be decided by the trial judge outside the jury's presence. *E.g.*, *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972). Although this Court has never been faced with the question of whether a general objection is sufficient to raise the question of the legality of the search and to force the State to its proof, we have considered this question as it applies to the area of confessions.

In *State v. Vickers*, 274 N.C. 311, 163 S.E. 2d 481 (1968), the defendant entered a general objection when the State sought to introduce incriminating statements made by defendant to a law enforcement officer while in custody. The trial judge overruled the objection and the evidence was admitted. On appeal, this Court granted a new trial for failure to make a preliminary inquiry and stated:

> For more than one hundred years this Court has recognized that "it is the duty of the judge to decide the facts upon which depends the admissibility of testimony; he cannot put upon others the decision of a matter, whether of law or of fact, which he himself is bound to make." *State v. Andrew*, 61 N.C. 205. The requirement now recognized in North Carolina that there should be a preliminary investigation in the absence of the jury to determine the voluntariness of confessions is demanded because of the conclusive nature of a confession. A trial jury's deliberations should not be infected by forcing a defendant to fight out his objection as to

> admissibility of an alleged confession in the presence of the jury. Even though the trial court might, after a hearing in the presence of the jury, rule out the confession as being involuntary and instruct the jury not to consider it in determining the innocence or guilt of a defendant, yet it must, in most cases, be prejudicial against the defendant.

Id. at 318, 163 S.E. 2d at 486. While items seized during a search may not possess the same degree of conclusiveness as a confession, there is no way for the trial judge to know the damaging nature of the fruits of the search until the testimony has been heard. If the testimony is first heard before the jury, it will be too late, in many instances, to protect the fourth amendment rights of the defendant. The need to protect the defendant's constitutional rights and the rule that the State lay a foundation for testimony concerning a search either by producing the warrant or otherwise proving the legality of the search require, we think, that the trial judge conduct an inquiry into the legality of the search in the absence of the jury upon a general objection to the proffered testimony by the defendant.

The State contends that even if the trial judge erred in failing immediately to conduct a voir dire, his subsequent curative instruction was sufficient to avert any prejudice. We disagree. While the general rule is that an instruction that evidence is not to be considered accompanied by the withdrawal of that evidence cures any error in its admission, *e.g.*, *State v. Brown*, 266 N.C. 55, 57, 145 S.E. 2d 297, 299 (1965), the rule is inapplicable when the error admitting the evidence is of constitutional dimension. When the error committed deprives a defendant of a constitutional right, prejudice is presumed, and the burden is on the State to prove otherwise. G.S. § 15A-1443(b) (1978). In the case before us, the evidence erroneously admitted, though withdrawn, was of a highly incriminating nature: a blue bank bag similar to ones stolen from First Citizens Bank and a gun similar to one used in the bank robbery. While there was other evidence of defendant's guilt, as noted below, this evidence may have been discovered by confronting defendant with the fruits of the illegal search, rendering his confession and subsequent actions inadmissible. Because the record does not demonstrate beyond a reasonable doubt that defendant was not prejudiced by the admission of evidence resulting from the illegal search, the State has failed to carry its burden, and defendant is entitled to a new trial.

In a related assignment on appeal, defendant contends that the trial court erred in denying his motion for mistrial made immediately after the curative instruction was given to the jury. In light of the foregoing discussion concerning the admission of the evidence and our disposition of that issue, we deem it unnecessary to discuss this assignment as it is unlikely to recur.

IV.

[3] By his next assignment of error defendant contends that the trial court erred in admitting into evidence testimony about incriminating statements made by and actions of the defendant.

On 2 July 1979 defendant, after being advised and signing a written waiver of his constitutional rights, agreed to take the police to the place where he had left a quantity of checks stolen during the bank robbery. He directed them into a wooded area, and, during the trip, told officers about the route he and his accomplices had taken in flight from the bank, that he had planned the robbery, and various other details concerning events following the robbery. He led the officers to the discarded checks and told them how the money had been divided. Testimony concerning the events of 2 July 1979 was admitted and the jury was allowed to consider the evidence in its deliberations.

Prior to the admission of this testimony, a voir dire was conducted to determine its admissibility. At the conclusion of the voir dire Judge Bruce found that the confession was voluntarily given and overruled defendant's objection.

Defendant's assignment of error is based on the trial judge's refusal to allow him to inquire into whether the incriminating evidence seized during the illegal search of defendant's bedroom in any way influenced, induced or coerced his confession. Due to poor preparation of the record on appeal, this Court has been presented with only a single excerpt from the voir dire hearing, a part of defendant's cross-examination of Detective Elledge, an officer with the Wilmington Police Department who was questioning the defendant when Agent Zimmerman and other officers returned from searching defendant's home:

> Q. And did you see Mr. Zimmerman when he came back that night to the police station?

A. When he came back?

Q. Yes.

A. From where?

Q. Winnabow.

A. I'm sure I seen him.

MR. BONEY: OBJECTION.

COURT: SUSTAINED.

Q. Did he have anything with him when he came back?

MR. BONEY: OBJECTION.

COURT: SUSTAINED.

MR. SCOTT: Can I get his answer in the record please?

COURT: No. Go ahead.

Q. Did he have a pistol with him when he came back?

MR. BONEY: OBJECTION.

COURT: SUSTAINED.

MR. SCOTT: Can I get that answer in the record?

COURT: No.

Q. Did he have a yellow shirt with him when he came back?

MR. BONEY: OBJECTION.

COURT: SUSTAINED. No, you may not get the answer in the record.

MR. SCOTT: I have no further questions.

COURT: (To the witness.)—Come down. No further evidence. All right, Sheriff, take a recess until 9:30 A.M. Monday morning.

EVENING RECESS

EXCEPTION NO. 15.

The trial court's refusal to allow defense counsel to preserve the witness's answer in the record constitutes error which renders this Court unable to determine the voluntariness of the confession

and, therefore, constitutes error. *See* 1 Stansbury's North Carolina Evidence § 26 (Brandis Rev. 1973). As we stated in *State v. Chapman*, 294 N.C. 407, 415, 241 S.E. 2d 667, 672 (1978):

> [W]e regard the trial judge's refusal to allow counsel to complete the record as a regrettable judicial mistake. A judge should be loath to deny an attorney his right to have the record show the answer a witness would have made when an objection to the question is sustained. In refusing such a request the judge incurs the risk (1) that the Appellate Division may not concur in his judgment that the answer would have been immaterial or was already sufficiently disclosed by the record, and (2) that he may leave with the bench and bar the impression that he acted arbitrarily.

In *Chapman*, we held that defendant had suffered no prejudice from the erroneous refusal to allow the answers to be preserved because, no matter what the answer would have been, it would have been immaterial and/or cumulative. *See also State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977). Here, the facts disclosed by the record are such that we cannot hold that defendant suffered no prejudice. Defendant is correct in arguing that if his confession and subsequent actions were induced by knowledge that his bedroom had been searched and incriminating evidence seized, then his confession would be rendered inadmissible as involuntary. *State v. Hall*, 264 N.C. 559, 142 S.E. 2d 177 (1965). We stress that the record does not establish that the confession was induced by the illegal search; the error lies in the refusal of the trial judge to allow inquiry or preservation of evidence for the record on that issue.

While the record does not establish that the admission of the confession was error, defendant must be given an opportunity to establish, if he can, that his actions were indeed involuntary because induced by the fruits of the illegal search and, therefore, he must be granted a new trial.

V.

Defendant's remaining assignment of error challenges the propriety of the trial court's inclusion of restitution as a condition of work release or parole. Because defendant is entitled to a new

trial on other grounds, this assignment is now moot, and we shall not address it.

VI.

We must caution counsel that the Rules of Appellate Procedure are mandatory; it is essential that the record on appeal be prepared thoroughly and in accord with those rules. Such was not the case here. For example, the record submitted on appeal does not include the indictment on the conspiracy charge, nor does it give any indication as to the disposition of that charge. In order to dispose of the joinder issue it was necessary for this Court to obtain a transcript from the Superior Court, New Hanover County. It is not the function of this Court to serve as counsel for the defendant.

By virtue of errors committed by the trial court, the State is now forced to retry a defendant who has confessed to the crimes with which he is charged. Other evidence against him is substantial. This is the unfortunate result when a trial judge stubbornly refuses to allow counsel to have answers preserved for the record and when other constitutional rights of the defendant, long established in this jurisdiction, are violated.

Because of the delay in holding a voir dire on the legality of the search of defendant's bedroom and the refusal of the trial court to allow defendant to inquire into whether items seized in the illegal search induced his confession, we conclude that defendant is entitled to new trials on the charges of armed robbery and larceny of an automobile.

New trial.

VERNON M. HOLT v. VERDIE R. HOLT AND WILLIAM S. HOLT

No. 113

(Filed 6 October 1981)

1. Executors and Administrators § 33.1— family settlement agreement—sufficiency of consideration

In order for a promise not to contest a will to constitute consideration to support a family settlement agreement modifying a will, there must be a *bona*

fide dispute as to the validity of the will in question. Therefore, plaintiff's relinquishment of his right to caveat a codicil to his mother's will, in which codicil he was left nothing, was insufficient consideration, in the absence of a *bona fide* dispute as to the codicil's validity. The mere quieting of a family dispute over the provisions of a will is insufficient consideration for an agreement modifying the will.

2. **Executors and Administrators § 33.1— summary judgment motion—failure to rebut showing of no bona fide dispute**

Where all the evidence forecast at a summary judgment hearing was that a codicil excluding plaintiff from sharing in his mother's estate was duly executed and the deceased had testamentary capacity when she executed it, and the only evidence to the contrary was plaintiff's bare allegations that if the codicil were probated he would contest it, plaintiff failed to rebut defendants' showing that there was no *bona fide* dispute as to the codicil's validity, and summary judgment was properly entered for defendants.

ON discretionary review[1] of a decision of the Court of Appeals[2] reversing *Judge William Wood's* order at the 26 October 1979 Civil Session of STANLY Superior Court granting defendants' and denying plaintiff's motion for summary judgment.

Lefler and Bahner, by John M. Bahner, Jr., and James E. Griffin, Attorneys for plaintiff appellee.

Brown, Brown and Brown, by Richard Lane Brown, III, and Steven F. Blalock, Attorneys for defendant appellants.

EXUM, Justice.

Plaintiff's complaint alleges that defendants, his brothers, breached a family settlement agreement. Defendants moved for and were granted summary judgment. The Court of Appeals reversed and remanded. We consider first whether plaintiff's relinquishment of his right to caveat a codicil to his mother's will in which codicil he was left nothing may, in the absence of a *bona fide* dispute as to the codicil's validity, constitute consideration for defendants' promise to distribute a portion of their property given under the codicil to plaintiff. We hold that it may not. Accordingly, since plaintiff here has presented no forecast of evidence indicating that at trial he would be able to show that a *bona fide* dispute existed as to the validity of the codicil in ques-

1. Allowed 7 October 1980.

2. Reported at 47 N.C. App. 618, 267 S.E. 2d 711 (1980).

tion defendants' motion for summary judgment was properly granted.

Affidavits submitted in support of both plaintiff's and defendants' motions for summary judgment reveal the following facts: By will dated 29 October 1964 Annie Holt provided that "all of my property of every sort, kind and description . . . [shall go] to my three sons, namely, Verdie R. Holt, Vernon M. Holt and William S. Holt, share and share alike, absolutely and in fee simple." On 11 September 1969, however, she executed a codicil wherein she provided that all of her property was to go "to two of my sons, Verdie R. Holt and William S. Holt, share and share alike, absolutely and in fee simple. I am not willing my son Vernon M. Holt anything . . . because he has not treated me as a child should treat his mother." Annie Holt died on 25 March 1977.

Shortly thereafter Verdie and William Holt, accompanied by their wives, and Vernon Holt, accompanied by his daughter, met in the office of S. Craig Hopkins, an attorney in Albemarle, North Carolina. Hopkins read the will and codicil. He also read a note, found with the codicil and purportedly in the deceased's handwriting, which further explained why Vernon was not to share in her estate. A bitter dispute between the brothers followed. Hopkins' affidavit reveals that "[a]fter the codicil to the Will and the note . . . were read by me, Mr. Vernon Holt and his daughter became quite upset and contended that his mother did not write this note and that it was not in her handwriting, and that Mrs. Holt wanted the three sons to share and share alike in her property. There ensued quite a heated discussion between Mr. Vernon M. Holt and his daughter and Verdie and William Holt in connection with the wishes of their mother. Mr. Vernon Holt's daughter began to use very vile language and calling [sic] Verdie and William and members of their family profane names. The language was so vile and intemperate that it became very embarrassing to me." Similarly, affidavits of both Verdie and William Holt indicate that "Vernon M. Holt and his daughter . . . became enraged upon the reading of the . . . Codicil and thereupon incited a violent argument; that [Vernon Holt's daughter] began using extremely vile language . . . . [A]t one point in the argument, Vernon M. Holt . . . threatened to commence a lawsuit . . . in order to inundate us with attorney's fees unless we conveyed a share of the

estate assets to him. . . . [W]e refused to do so and made known our intention not to succumb to such threats."

Mr. Hopkins attempted to resolve the conflict by explaining that if they so desired the three brothers could divide the property equally by probating the will and not probating the codicil. After Vernon Holt "agreed to be a brother to all of them and that they would be a family together again" an agreement was reached to probate the will and not probate the codicil. The codicil was then torn into several pieces and on 28 March 1977 the will was probated.

Beyond this, however, the nature of the agreement reached is disputed. Verdie and William Holt contend that while they agreed to probate the will alone, it was further understood that William would receive the largest share of the property and that this would be accomplished by executing reciprocal deeds drawn accordingly. Vernon Holt contends the agreement contemplated only that he "would share equally in my mother's estate and that the will . . . would constitute the Last Will and Testament of Annie H. Holt."

Consequently Vernon Holt refused to execute a deed drawn at his brothers' direction which in his opinion did not equally divide the property. Upon his failure to execute the deed Verdie and William Holt reconstituted the codicil and offered it for probate. The codicil was probated on 4 August 1977.

Vernon Holt filed complaint on 26 March 1978 requesting the trial court to "specifically enforce the family settlement agreement . . . and award to the plaintiff a one-third interest in all land Annie H. Holt died seized of and the sum of $3,232.95 which represents one-third of the personal property of Annie H. Holt." Subsequently both plaintiff and defendants moved for summary judgment. Judge William Wood, presiding at the 26 October 1979 Civil Session of Stanly Superior Court, granted defendants' and denied plaintiff's motion.

The Court of Appeals, in an opinion by Judge Webb with Judges Parker and Clark concurring, reversed and remanded the matter to the trial court. That court concluded that the agreement not to probate the codicil was not against public policy. Further, "the family settlement agreement . . . was supported by

sufficient consideration . . . ." Consequently the court held that as to the personal property in the estate plaintiff was entitled to summary judgment. As to the real property, the court held that if plaintiff's version of the oral agreement is correct it was fully executed and thus not subject to the Statute of Frauds; conversely, if defendants' version of the oral agreement is correct it was partially executed and thus subject to and barred by the statute. Accordingly, the Court of Appeals remanded for a jury trial on this issue.

Defendants contend the Court of Appeals erred in reversing summary judgment in their favor. Among other things, they argue that the agreement was not supported by consideration since "there . . . never [was] any question raised as to the authenticity of the codicil or as to the mental competency of the testatrix or as to undue influence on the part of the [defendants]." We agree with this contention. The Court of Appeals erred in concluding to the contrary. Since this decision disposes of the case, we neither reach nor determine the correctness of the Court of Appeals' conclusions on the other issues it addressed.

We note at the outset that the essence of the agreement between plaintiff and defendants was to distribute to plaintiff a portion of deceased's property devised to defendants. The parties could, of course, have agreed to do this even if they probated the codicil. Thus their agreement to tear up and not probate the codicil was legally immaterial. Tearing up, or not probating, the codicil was merely the mechanism by which the parties sought to effect their only legally material promises, which were defendants' promise to give to plaintiff certain property devised to them in exchange for plaintiff's promise not to engage the estate in litigation over the codicil's validity. The complaint alleges:

> "That the plaintiff and the defendants, in order to avoid costly litigation, to preserve the estate and to promote and encourage family accord, agreed each with the other that, *in return for Vernon Holt's agreement not to file Caveat to said Codicil,* that said Codicil would not be probated and that the property of Annie H. Holt would descend as provided in said Will." (Emphasis supplied.)

Whether plaintiff's promise to relinquish his right to litigate the codicil's validity constitutes consideration sufficient to render en-

forceable defendants' promise to give plaintiff a portion of the property devised to them is the question before us. To resolve it we must examine both the law applicable to family settlement agreements and to summary judgments. We begin with a discussion of the law of family settlement agreements.

I

[1] Family settlement agreements, when fairly made and not prejudicial to creditor's rights, are favorites of the law. *In re Will of Pendergrass*, 251 N.C. 737, 112 S.E. 2d 562 (1960); *Bohannon v. Trotman*, 214 N.C. 706, 200 S.E. 852 (1939); *Tise v. Hicks*, 191 N.C. 609, 132 S.E. 560 (1926). Being a species of contract, they must be supported by consideration. *Sternberger Foundation, Inc. v. Tannenbaum*, 273 N.C. 658, 161 S.E. 2d 116 (1968); *O'Neil v. O'Neil*, 271 N.C. 106, 155 S.E. 2d 495 (1967). The mere relinquishment of a right to contest a will is not sufficient consideration to support a reciprocal promise to modify the will unless there is a *bona fide* dispute as to the will's validity. In *O'Neil v. O'Neil, supra*, pending trial of issues raised by caveat, a family settlement agreement was entered into providing for modification of the will. In consideration for these modifications the caveators agreed that they would "interpose no objection to the probate of the 'Will' in solemn form." 271 N.C. at 108, 155 S.E. 2d at 497. The trial court approved the family settlement agreement upon finding, among other things, that there was a "bona fide controversy regarding the validity of the paper writing purporting to be the will." 271 N.C. at 110, 155 S.E. 2d at 499. This Court, however, concluding that there was insufficient evidence in the record to support this finding of a *bona fide* controversy, remanded the matter for further proceedings saying, 271 N.C. at 112, 155 S.E. 2d at 500:

> "The mere fact that a caveat has been filed, standing alone, is not sufficient ground for modification of the dispositive provisions of the will. The outcome of the litigation must be in doubt to such extent that it is advisable for persons affected to accept the proposed modifications rather than run the risk of the more serious consequences that would result from an adverse verdict.

> "Nothing in the record indicates evidence was offered when the case was submitted to Judge McConnell. The judgment seems to be based solely upon admissions and stipulations. Hence, its binding effect, if any, upon defendants, is predicated upon the agreements and consent of their guardian *ad litem.*"

Later, after evidence was offered to support the existence of a *bona fide* dispute over the will's validity, this Court affirmed the judgment of the trial court approving the family settlement agreement. *O'Neil v. O'Neil*, 271 N.C. 741, 157 S.E. 2d 544 (1967). This requirement that the outcome of litigation over the will be in doubt, most often expressed in terms of the need for a *bona fide* dispute, permeates our case law on family settlements.[3]

Indeed this point was noted in *Bailey v. Wilson*, 21 N.C. (1 Dev. & Bat. Eq.) 182 (1835), this Court's first family settlement case. *Bailey* involved a father's will in which he made substantial provisions for each of his four sons. Two sons, because their devise of *land* was somewhat less than that devised to their other two brothers, threatened to contest the will. In order to avoid this litigation the four sons entered into a relatively elaborate written agreement by which they effected a more equal distribution of their father's land *and personal property* than he had by will provided. The agreement provided that the two brothers who got more land would give some of it to the other brothers in return for the other brothers giving to them some of their personalty. There was nothing in the case to cast any doubt on the validity of the will. When an action was brought to enforce this agreement, one of the defenses was lack of consideration. Speaking to this defense, the Court said, 21 N.C. at 188-89:

> "It is objected that the agreement of compromise was wholly voluntary, and that a court of Equity will not enforce

3. In the following cases, for example, a specific finding that the dispute was *bona fide* was made either by the trial court or there was a conclusion to that effect by the appellate court: *Sigmund Sternberger Foundation, Inc. v. Tannenbaum, supra; O'Neil v. O'Neil, supra*, 271 N.C. 741; *Bohannon v. Trotman, supra.* In the relatively few cases affirming a family settlement agreement in the absence of a finding by the trial court as to the existence of a *bona fide* controversy it is usually clear that such a controversy did in fact exist, *see, e.g., In re Will of Pendergrass, supra*, or there was other sufficient consideration to support the agreement, *Bailey v. Wilson*, 21 N.C. (1 Dev. & Bat. Eq.) 182 (1835), discussed, *infra*, in text.

its specific execution. Where there is a fair doubt as to the rights of parties, an agreement entered into without fraud, for the compromise of those rights, is not a voluntary agreement, and is a fit subject for the jurisdiction of a court of Equity. We should, however, have great difficulty in enforcing this agreement merely as a compromise of doubtful rights, for the bill sets forth no rights as claimed by the plaintiffs in opposition to those derived under the will. There is no averment of any matter which should render the validity of the will doubtful, but only of an intention on the part of the dissatisfied brothers to contest its probate. It seems to us that in order to make out a case of a compromise of doubtful rights it was necessary to state what were the alleged rights in regard to which the doubts existed. But it is not exclusively on this ground that the claim of the plaintiffs rests. The agreement was confessedly entered into for the purpose of quieting disputes between the children of the same father, in relation to the disposition of his property; it is apparently equal; it is not denied to be fair; and was deliberately assented to as a proper and just family arrangement. Such arrangements are upheld by considerations, affecting the interests of all the parties, often far more weighty than any considerations simply pecuniary. *Stapilton v. Stapilton*, 1 Atk., 10; *Cary v. Cary*, 1 Ves., 19; *Pullen v. Ready*, 2 Atk., 292." (Emphasis original.)

The language in *Bailey* which seems to say that the mere quieting of the family dispute over the provisions of the will provides sufficient consideration for an agreement modifying the will was quoted in *Tise v. Hicks*, *supra*, 191 N.C. 609, 613-14, 132 S.E. 560, 562. Similar language was used in *In re Will of Pendergrass*, *supra*, 251 N.C. 737, 745, 112 S.E. 2d 562, 568. It is clear, however, that in *Tise* there was sufficient other consideration to support the agreement and in *Pendergrass* there was, in fact, a *bona fide* dispute over the will. This language, consequently, must be read in the context of the facts to which it applied. So read, it is clear that the language refers not simply to the quieting of a family dispute over a will but to the provisions of the particular agreement by which two brothers gave personalty bequeathed to them to the two other brothers in return for a greater share in the land. This was the consideration which supported the agreement in *Bailey*.

Whether there is a *bona fide* dispute depends, furthermore, not on what any particular party to the alleged compromise may subjectively believe about it, but whether the *bona fides* of the disagreement may, under all the facts and circumstances of the case, be reasonably found to exist by the trier of fact. This principle inheres in our decisions; and cases from other jurisdictions with near uniformity hold that absent any basis in fact and law upon which to challenge the validity of a will, a compromise promise to distribute the property differently from the manner contemplated by the will is unenforceable due to lack of consideration if the reciprocal promise is merely not to contest the will. As stated by the Supreme Court of Errors of Connecticut (now Supreme Court of Connecticut) in *Warner v. Warner*, 124 Conn. 625, 631-32, 1 A. 2d 911, 914 (1938):

> "*[I]n order to furnish a consideration for a compromise agreement the contest must be instituted or intended in good faith and based upon reasonable grounds for inducing a belief that it is sustainable. 'With no basis in fact for a contest, and no reasonable ground for believing that a contest might rightfully be instituted and maintained, the agreement to refrain from doing so furnishes . . . no sufficient consideration for the promise . . . .' Montgomery v. Grenier*, 117 Minn. 416, 420, 136 N.W. 9, 11; *Hardin's Adm'rs v. Hardin*, 201 Ky. 310, 312, 256 S.W. 417, 38 A.L.R. 756; 12 Am. Jur., Contracts, §§ 85, 86, 87. . . . 'It is well settled that . . . the termination of family controversies affords a consideration which is sufficient to support a contract made for such purposes. . . . In order to render valid the compromise agreement, it is not essential that the matter should be really in doubt; but it is sufficient if the parties consider it so far doubtful as to make it the subject of compromise. . . . But it is necessary, *in order to furnish consideration for such compromise agreement that the contention be made in good faith and be honestly believed in.' Preston v. Ham*, 156 Ga. 223, 234, 119 S.E. 658, 662. The fact that family settlements are favorites of the law does not dispense with the necessity for some consideration to render them valid. *Hardin's Adm'rs v. Hardin*, supra, page 311, 256 S.W. 417." (Emphasis supplied.)

Similarly, as noted by the Supreme Court of Iowa in *Lockie v. Baker*, 206 Iowa 21, 24, 218 N.W. 483, 484 (1928):

> *"The quite universal rule is that to sustain a compromise and settlement it must appear that the claim or controversy settled,* though perhaps not in fact valid in law, *was presented and demanded in good faith and upon reasonable grounds* for inducing the belief that it was enforceable." (Emphasis supplied.)

Again, as expressed by the Supreme Court of Illinois in *Anderson v. Anderson*, 380 Ill. 488, 496, 44 N.E. 2d 43, 47 (1942):

> "[T]he established rule [is] that . . . contracts [compromising family disputes], as well as all other contracts require as an essential element of their validity a sufficient consideration. The disputes between rival claimants to an estate are fair subjects of compromise and settlement, and the mutual concessions of the parties for the prevention of litigation afford a valid consideration for the agreement. . . . It goes without saying, however, that *there must be some reasonable or substantial basis for the claims advanced by the parties which are surrendered by the agreement.*" (Emphasis supplied.)

Other cases holding that for a promise not to contest a will to furnish consideration for a family settlement agreement there must appear from all the facts and circumstances a reasonable basis upon which to challenge the validity of a testamentary instrument include: *Crawford v. Engram*, 157 Ala. 314, 47 So. 712 (1908); *Murphy v. Henry*, 311 Ky. 799, 225 S.W. 2d 662 (1949); *Schultz v. Brennan*, 195 Minn. 301, 262 N.W. 877 (1935); *Stanley v. Sumrall*, 167 Miss. 714, 147 So. 786 (1933); *Bryant v. Bryant*, 295 Pa. 146, 144 A. 904 (1929); *see generally* Annot., 29 A.L.R. 3d 8, "Family Settlement of Testator's Estate," § 27; 80 Am. Jur. 2d Wills §§ 1105-06 (1975); Restatement (Second) of Contracts § 76B (1973).[4]

In summary, in order for a promise not to contest a will to constitute consideration to support a family settlement agreement

4. We recognize that certain decisions contain language suggesting that consideration sufficient to support a family settlement agreement is present where the party who threatens to or in fact challenges a testamentary instrument subjectively believes he has a good claim even though he is unable to demonstrate in the facts and circumstances a reasonable basis for this belief. *See, e.g., Mackin v. Dwyer*, 205 Mass. 472, 91 N.E. 893 (1910); *Rutledge v. Hoffman*, 81 Ohio App. 85, 75 N.E. 2d 608 (1947). We expressly reject such an approach.

modifying the will, there must be a *bona fide* dispute as to the validity of the will in question. Further, the *bona fides* of the dispute must be reasonably apparent from all the facts and circumstances surrounding the dispute itself.

II

[2] We next consider the law applicable to summary judgment and the parties' factual showing on their motions.

Summary judgment is a device by which a defending party may present a forecast of evidence tending to show that claimant will be unable at trial to make out a *prima facie* case because he will not be able to offer sufficient evidence of an essential element of his claim. If such a forecast of evidence is presented, the burden is then upon the claimant to come forward with a forecast of evidence demonstrating that he will at trial be able to make out at least a *prima facie* case. *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419, 421 (1979). The claimant "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." *Dickens v. Puryear, supra*, 302 N.C. at 453, 276 S.E. 2d at 335.

The record here consists both of the estate docket and the civil docket. The estate docket reveals the following: The deceased executed a codicil excluding plaintiff from sharing in her estate because "he has not treated me as a child should treat his mother." Execution of the codicil was witnessed by Elton Hudson and Sherri McClure. Elton Hudson submitted an affidavit stating that deceased, in his presence, "signed the paper writing . . . and at such time declared the paper writing to be [her] Last Will and Testament; and that then, at the request and in the presence of the deceased, affiant signed the paper writing as an attesting witness. Affiant further says that at the time aforesaid the deceased was of sound mind and disposing memory, of full age to execute a will, and was not under any restraint to the knowledge, information or belief of the affiant." Because Sherri McClure had moved to another county Karen Hudson submitted an affidavit stating that she is acquainted with the handwriting of Sherri McClure and that the signature subscribed to the codicil is that of Ms. McClure. A note, found with the codicil, further explained

why testatrix excluded plaintiff from her estate. The codicil was on 4 August 1977 admitted to probate.

The civil docket contains both plaintiff's and defendants' affidavits. Defendants' affidavits allege, among other things, that when decedent executed the codicil she "possessed the requisite capacity, mental and legal"; that she "knew the nature and extent of her worldly possessions" and the natural objects of her affection; that she had on numerous occasions stated her desire to exclude plaintiff from sharing in her estate; that in deceased's opinion plaintiff had treated her "cruelly and in a manner wholly unlike that in which a mother ought to be treated by her son"; that the note which was found with the codicil was in the decedent's handwriting; that upon the reading of the codicil and note plaintiff and his daughter became enraged; that plaintiff "threatened to commence a lawsuit against [defendants] in order to inundate [them] with attorneys' fees unless [they] conveyed a share of the estate assets to him"; that plaintiff promised "to become a member of the family once again"; that defendants agreed to allow plaintiff to share in decedent's estate, although it was agreed William Holt would receive a larger share; and that "at no point did [plaintiff] . . . assail the authenticity or validity of . . . the . . . Codicil, and that he never sought to file a caveat against the . . . Codicil."

In plaintiff's affidavit, which is his sole evidentiary forecast in the record,[5] he in pertinent part alleges that after the reading of the codicil and note plaintiff "expressed the opinion that the codicil was not the will of [decedent], and that if the purported codicil were probated, I [plaintiff] would contest the same." Further, "that in order to avoid costly litigation, to settle the controversy regarding said codicil and to preserve the estate and family pride and to promote and encourage family accord, I [plaintiff] and . . . Defendants, would share equally in my mother's estate . . . ."

On this state of the record, then, we conclude that defendants have presented a forecast of evidence tending to show that plaintiff at trial will be unable to show any facts or circumstances

5. Although plaintiff's daughter submitted an affidavit on his behalf, it is, except for the substitution of names, exactly like that of plaintiff.

from which it could be reasonably determined that a *bona fide* dispute as to the validity of the codicil existed between the parties. Plaintiff has failed to come forward with a forecast of evidence tending to show that he has or will be able to produce evidence of such facts or circumstances at trial. There is, for example, no forecast of evidence that the deceased lacked testamentary capacity or that the codicil was the result of undue influence, fraud or mistake, or that it was not duly executed. All the evidence forecast at the summary judgment hearing is that the codicil was duly executed and the deceased had testamentary capacity when she executed it. There is only plaintiff's bare allegation that if the codicil were probated he would contest it. Plaintiff has, therefore, failed to rebut defendants' showing that there is no *bona fide* dispute as to the codicil's validity. Consequently, plaintiff's threat to and ultimate promise not to engage the estate in litigation over the codicil's validity provides no consideration for defendants' promise to distribute deceased's property differently from the manner provided by the codicil. Defendants' promise is, therefore, unenforceable. Summary judgment for defendants was properly entered by the trial court.

For reasons stated the decision of the Court of Appeals reversing summary judgment in favor of defendants is

Reversed.

STATE OF NORTH CAROLINA v. LEWIS SEARLES, JR.

No. 21

(Filed 6 October 1981)

1. Criminal Law § 91.7— continuance of two days to locate witness—no denial of effective assistance of counsel

Defendant was not denied the effective assistance of counsel by the trial court's order granting him a continuance of only two days in which to locate a witness where the motion for continuance was made the day defendant's case was called for trial; defense counsel had more than ample time to confer with defendant and any possible witnesses he might have wished to present in his behalf during the fifty-six day interim between the date of his appointment and the date the case was originally calendared for trial; although defense counsel indicated to the court that he had discovered the full name of the

potential witness, defense counsel only identified the witness to the court by a nickname and made no meaningful attempt to inform the court about the nature of his testimony; and the trial court told defense counsel that the matter would be considered further, if necessary, when the case was called for trial again in two days, but defense counsel made no request for more time when trial commenced two days later.

2. **Rape § 4— direct examination of victim—questions identifying acts**

In a prosecution for rape and first degree sexual offense in which the victim testified in detail that defendant had engaged in three separate sexual acts with her, the trial court did not err in permitting the prosecutor to identify these acts separately as he elicited evidence from the victim as to whether she had consented to each sexual act.

3. **Criminal Law § 33.1; Rape § 4— identity of assailant—name mentioned by defendant**

A rape victim's testimony that she thought her assailant had asked her whether she knew "Leon Sales," a name which had some similarity to defendant's name, was relevant to prove the identity of the victim's assailant. Furthermore, defendant waived any objection to this testimony by permitting substantially the same evidence to be thereafter admitted without renewed objections.

4. **Criminal Law § 34.7— evidence of prior crimes—competency to show motive and intent**

Testimony by a rape and burglary victim that defendant told her "that that wasn't the first time anything like [this] had happened, that he got off on white women . . . that he enjoyed degrading white women" was competent to show defendant's motive for sexually assaulting the victim and his possession of a criminal intent when he unlawfully entered her home on the night in question. In any event, defendant waived his right to complain about such testimony when he thereafter permitted similar evidence to be admitted without objection.

ON appeal as a matter of right from judgments of *Kirby, J.*, entered at the 10 November 1980 Criminal Session, BUNCOMBE Superior Court. Defendant received concurrent life sentences for first degree rape and first degree sexual offense. He was also sentenced to a consecutive term of ten to twenty years for first degree burglary. A motion to bypass the Court of Appeals on the burglary conviction was allowed on 4 May 1981.

Defendant was charged in indictments, proper in form, with first degree rape of Alice Ann Robinson and the commission of a first degree sexual offense and burglary connected therewith on 25 June 1980. Defendant entered pleas of not guilty to each charge.

The State's evidence tended to show that Alice Ann Robinson, a white female, lived with her sister and her sister's two children at the Mountain Side Apartments in Asheville, North Carolina. On 25 June 1980, Ms. Robinson was asleep on a couch in her living room when, shortly after midnight, she awoke and discovered that someone was in the room with her. She later identified this person as the defendant, Lewis Searles, Jr., a young black male of medium height with a muscular build. Ms. Robinson testified that defendant grabbed her and began to beat her about the head and face, while admonishing her to be quiet or he would kill her. She fell onto the floor. Defendant then removed her clothes and forced her, as he pressed a metal object against her throat, to perform oral sex on him. After that, he threatened her with anal sex but apparently changed his mind and inserted his penis into her vagina instead. Defendant then picked her up, put her on the couch and raped her again. During the rapes, defendant continued to hold the metal object in his hand and press it against Ms. Robinson's body. In the course of these events, defendant had also removed all of his clothes.

After these acts were completed, defendant produced a towel for them to use to clean themselves. He then sat down on the couch and began talking to her. During this conversation, Ms. Robinson asked defendant whether he had ever done something like this before. According to her testimony, he replied that it "wasn't the first time that anything like that had happened, that he got off on white women, especially white women like [her] that thought they were so much better than other people; that he enjoyed degrading white women." Ms. Robinson futher testified that defendant asked her whether she knew "someone." She stated:

> "[A]t the time I thought he asked me did I know Leon Sales, and I told him no. And he said, 'I swear to God, if you're lying . . . I'll kill you.' And I said I did not know him. And I asked him why, and he said that he was in prison and everyone thought that he was the one that was going around raping all of the women that had been raped."

Subsequently, she persuaded defendant to allow her to go to the bathroom. From there, she escaped to her sister's bedroom. She woke her up and told her about the ordeal. They barricaded the bedroom door and began screaming for help. A neighbor was

aroused and called the police. In the meantime, defendant left the premises.

Officer B. L. Wardlaw arrived on the scene and interviewed Ms. Robinson about the incident. He testified that she told him about the rape and mentioned that her assailant had made some remark that "Leon Searles was doing this." Upon learning this, Officer Wardlaw inquired whether the reference could have been to *Lewis* Searles, whom he knew. Ms. Robinson responded that her attacker "could have said Lewis but she thought he said Leon." The officer further testified that she gave a description of her assailant which matched that of the defendant, Lewis Searles.

Officer Lee Warren was assigned as an investigator. He also related at trial Ms. Robinson's statements to him that her attacker had said that he had done this before, that he enjoyed "humiliating white women" and that everybody thought it was "Lewis Searles doing this, but Lewis is in prison."

With respect to the charge of first degree burglary, the State's evidence was, in brief, as follows. Phyllis Hix, Ms. Robinson's sister, testified that she locked all the doors and windows before going to sleep on 24 June 1980 and that she had not given defendant permission to enter the house, or take anything out of it, on 25 June. Officer Warren, during his investigation, discovered that a window was open. Ms. Robinson testified that her pocketbook had been in the apartment before the entry of the intruder and that it was subsequently missing after his departure.

Defendant did not testify at trial but did present evidence in his behalf through the testimony of his mother and sister. Both of these witnesses testified that defendant was at home on the night in question and that he remained there throughout the early morning hours.

Further facts, pertinent to defendant's assignments of error, shall be incorporated into the opinion below.

Attorney General Rufus L. Edmisten by Assistant Attorney General Christopher P. Brewer for the State.

Assistant Public Defender Robert L. Harrell for the defendant.

COPELAND, Justice.

Defendant brings forward four assignments of error which he contends require a new trial of this matter. For the reasons stated below, we disagree and find that defendant received a fair trial, free from prejudicial error.

[1] First, defendant argues that the court erred in denying his motion for a continuance. Defendant made this motion on 10 November 1980, the day the case was called for trial. After hearing from both defendant and the State, Judge Kirby granted a continuance of two days, until 12 November 1980. Although defendant excepted to the short duration of this continuance, he did not thereafter raise further objections about it when trial commenced two days later. Nonetheless, defendant now says that the court's allowance of such a short continuance, in which to locate a witness and evaluate the relevance and materiality of his possible testimony, constituted a denial of his right to effective assistance of counsel, as guaranteed by the federal and state constitutions, because his counsel was thereby prevented from conferring with witnesses and preparing an adequate defense.

It is, of course, axiomatic that a motion for a continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent a gross abuse. *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980); *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974). It is equally well established, however, that, when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case. *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977). Denial of a motion for a continuance, regardless of its nature, is, nevertheless, grounds for a new trial only upon a showing by defendant that the denial was erroneous and that this case was prejudiced thereby. *State v. Lee*, 293 N.C. 570, 238 S.E. 2d 299 (1977); *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973). We hold that, on this record, defendant has not performed this threshold task of demonstrating prejudicial error in Judge Kirby's order granting him a continuance of two days.

It is true that the constitutional guarantees of assistance of counsel and confrontation of witnesses include the right of a defendant to have a reasonable time to investigate and prepare

his case, but no precise limits are fixed in this context, and what constitutes a reasonable length of time for defense preparation must be determined upon the facts of each case. *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981); *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335, *cert. denied*, 423 U.S. 918, 96 S.Ct. 228, 46 L.Ed. 2d 367 (1975). Here, the record discloses that counsel was assigned to the case on 15 September 1980 and that he had at least one interview with defendant before his arraignment on 29 September 1980. We do not know how many, or how few, times counsel met with defendant to discuss and prepare his defense after arraignment. We do know that appointed counsel had a conference about the case with Mr. Devere Lentz, whom defendant had initially retained to represent him. As a general matter then, it is clear that defense counsel had more than ample time to confer with his client and any possible witnesses he might have wished to present in his behalf during the fifty-six day interim between the date of his appointment and the date the case was originally calendared for trial, 10 November 1980.

In addition, and more particularly, we cannot say, as a matter of law, upon this record, that the trial judge erred in not granting defendant, on the day the case was called for trial, a *longer* continuance for the purpose of locating a *potential* alibi witness, previously known only by the nickname "Puddin." Defense counsel told Judge Kirby that he had been trying to locate this "supposedly material witness" for some time but had actually talked to him, by telephone, for the first time that very morning and then only briefly. Although he indicated that he now knew who "Puddin" was and would, therefore, be able to locate him, defense counsel never identified the witness, by disclosing his full name, and he made no meaningful attempt to inform the court about the nature of his testimony. The trial judge thus had no basis for determining whether this witness's testimony would, in fact, be material.

An analogous situation existed in the case of *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, *cert. denied*, 409 U.S. 1047, 93 S.Ct. 537, 34 L.Ed. 2d 499 (1972). In *Cradle*, defendant had also contended that her constitutional rights of confrontation and assistance of counsel had been denied by the trial court's failure to grant her motion for a continuance. Apparently, defendant asked for the ex-

tension on the day of trial in order to go home and elicit evidence from various witnesses there. Justice Huskins, speaking for the Court, overruled defendant's contention and said:

> "[N]either defendant nor her counsel revealed to the court the name of a single witness defendant allegedly had at her home which she desired to subpoena. What she expected to prove by these witnesses must be surmised. If she went home to get the list of witnesses, the record fails to show it. The oral motion for continuance is not supported by affidavit or other proof. In fact, the record suggests only a natural reluctance to go to trial and affords little basis to conclude that absent witnesses, if they existed, would ever be available. We are left with the thought that defense counsel suffered more from lack of a defense than from lack of time. 'Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds. *State v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520 (1948).' *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972)." 281 N.C. at 208, 188 S.E. 2d at 303.

For similar reasons, we believe that, in the instant case, the trial court did not err in refusing to grant a longer continuance when defendant's oral motion therefor, made on the date set for trial, was not supported by some form of detailed proof indicating sufficient grounds for further delay.

Defendant was arrested on 26 June 1980. His counsel was appointed on 15 September 1980. If "Puddin" possessed information vital to his defense, surely defendant had some idea what "Puddin" might testify about long before the case was called for trial on 10 November 1980. Thus, if the proof were indeed in this "Puddin," defendant should have particularized, to a greater degree, by means of an affidavit or otherwise, the probable content, and importance, of his testimony in support of the motion for a continuance. No additional information has been included in the record or brief for our review which would support a conclusion by us that a longer continuance was constitutionally required to afford defendant a reasonable opportunity to locate a *material* witness. We also note that there is no evidence that defendant even tried, during his two-day extension, to utilize what information he did

possess about "Puddin" to have a subpoena issued to secure his trial attendance.

Finally, we would emphasize that the judge told defense counsel that the matter could be considered further, if necessary, when the case was called for trial again in two days. Judge Kirby plainly said: "[I]f some new problem develops in the interim, you can bring it to my attention." Defendant did not mention the "problem" again or make another request for more time. Obviously, if defendant had nothing to complain of when trial actually began, he certainly has no greater cause to complain now on appeal.

Viewing all of these circumstances as a whole, we are compelled to conclude that the court did not abuse its discretion in granting defendant only two extra days to prepare for trial and that defendant has failed to establish a violation of his constitutional rights in this regard. The assignment of error must be overruled.

[2] By his second assignment of error, defendant argues that the trial court committed prejudicial error in permitting the prosecutor to restate and repeat the answers of the prosecutrix as a preface to further questions. The line of questioning, to which defendant excepted, was in pertinent part, as follows:

> "The first sexual act that was performed, was that done of your own free will and choice?
>
> No, it was not.
>
> . . . .
>
> When that person placed his penis in your vaginal area, was that done of your own free will and choice?
>
> No, it was not.
>
> . . . .
>
> Now, this third time, was that done of your own free will and choice?
>
> No."

When viewed in its proper context, we fail to see how this questioning could be deemed objectionable.

The prosecutrix had previously testified in detail that defendant had engaged in three separate sexual acts with her. In his subsequent examination of her, *supra*, the prosecutor was merely attempting to clarify whether the acts were performed with her consent. We believe it was entirely proper for the prosecutor to identify these acts separately as he elicited evidence from the witness about the presence or absence of her consent to *each* sexual deed. Moreover, we have long held that the scope and manner of examination of witnesses are matters which are ordinarily governed by the trial judge who may take appropriate measures to restrict improper questioning by counsel. *See generally* 1 Stansbury's North Carolina Evidence § 25 (Brandis rev. 1973). In sum, we hold that the trial court did not err in allowing the prosecutor to pursue the line of questioning challenged by defendant. Defendant's contentions to the contrary are without merit, and this assignment is overruled.

[3] Next, defendant maintains that the court erred in admitting speculative testimony about "Leon Sales" over his objection. Specifically, defendant objected to the victim's testimony that she thought defendant had asked her whether she knew Leon Sales. First, we find that this evidence was sufficiently relevant to be properly admitted in this case since it had a logical tendency to prove a fact in issue, to wit, the identity of the victim's assailant. 1 Stansbury's North Carolina Evidence § 77 (Brandis rev. 1973). Second, we hold that this evidence did not constitute an impermissible opinion merely because the victim said "she *thought*" defendant mentioned the name "Leon Sales." *See State v. Joyner*, 301 N.C. 18, 23-24, 269 S.E. 2d 125, 129-30 (1980); *State v. Henderson*, 285 N.C. 1, 15, 203 S.E. 2d 10, 20 (1974), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976). There is some similarity between the name "Leon Sales" and the name of the defendant, Lewis Searles. Understandably, the victim might have misinterpreted the name mentioned to her, especially since she must have been in an excited and frightened state after being forcibly subjected to unseemly acts by an intruder in the middle of the night. Clearly then, it was within the jury's prerogative to weigh this evidence and determine its worth. Third, and perhaps most importantly, defendant plainly waived any objection to this testimony by permitting substantially the same evidence to be thereafter admitted, through the testimony

of the two officers, without renewed objections. *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977); 1 Stansbury, *supra*, § 30. The assignment of error lacks merit and cannot be sustained.

[4] By his fourth assignment of error, defendant finally contends that the court committed reversible error by admitting evidence concerning his prior criminal activities. It is well-settled that evidence of a defendant's past criminal activities is generally inadmissible where such evidence is not related to the offense for which defendant is being tried, and its only bearing upon the case is that it discloses the defendant's bad character and suggests his propensity for committing a particular type of offense. *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981); *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978). There are, however, well-delineated exceptions to this rule, and we find that at least two of those exceptions apply in the instant case. *See State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); 1 Stansbury's North Carolina Evidence § 92 (Brandis rev. 1973).

In pertinent part, defendant excepted to the following portion of the victim's testimony wherein she stated that: "He told me that that wasn't the first time anything like [this] had happened, that he got off on white women . . . that he enjoyed degrading white women." According to Ms. Robinson's testimony, defendant made these statements after he had broken into her home and committed several sexual assaults. On its face, this evidence was relevant to show both defendant's motive for sexually assaulting the prosecutrix, *i.e.*, his desire to humilitate white women,[1] and his possession of a criminal intent when he unlawfully entered her home that night. *See State v. Jones*, 299 N.C. 298, 306-07, 261 S.E. 2d 860, 866 (1980); 1 Stansbury's North Carolina Evidence § 92, at 294-97. Thus it was not error to admit the challenged testimony. In any event, defendant again waived his right to complain about the introduction of the victim's testimony in this regard because he thereafter permitted similar evidence without objection to be admitted through the testimony of Officer Warren. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). This assignment is also overruled.

1. Defendant's statements concerning this passion may also have been relevant to show the existence of a plan or design, on his part, to rape white women indiscriminately. *See State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980).

Defendant has abandoned his remaining assignment of error concerning the propriety of the State's intent to question him about his juvenile record if he elected to testify.

A full and careful review of this entire record and defendant's assignments of error discloses no error or prejudice requiring a new trial.

No error.

JOHNNIE H. HILL AND WIFE, CLARA MAE F. HILL v. PINELAWN MEMORIAL PARK, INC., WILLIAM C. SHACKELFORD AND WIFE, JENNIE L. SHACKELFORD

No. 10

(Filed 6 October 1981)

Lis Pendens § 1; Registration § 5— purchasers for value— prior recordation—effect of lis pendens notice

G.S. 47-18, our recordation statute, does not protect a purchaser from claims to property arising out of litigation. Therefore, defendants, purchasers of a crypt in a memorial park, were not innocent purchasers for value where they had notice of pending litigation affecting title to the crypt prior to the time they acquired title and recorded their deed.

ON the plaintiffs' petition for discretionary review of a decision by the Court of Appeals reported at 50 N.C. App. 231, 275 S.E. 2d 838 (1981), reversing and remanding in part the judgment of *Lane, Judge*, entered at the 8 October 1979 Session of Superior Court, LENOIR County, wherein defendants were ordered to convey to plaintiffs Crypt "D" of the Garden of Eternal Light in Pinelawn Memorial Park, Inc., more particularly described in Deed Book 710 at Page 176 of the Lenoir County Registry. The plaintiffs' petition for discretionary review pursuant to G.S. 7A-31 was allowed on 7 April 1981.

Marcus and Whitley, by Harvey W. Marcus and Robert E. Whitley for plaintiff-appellants.

Jeffress, Morris, Rochelle & Duke, P.A., by A. H. Jeffress for defendant-appellee Pinelawn Memorial Park.

Fred W. Harrison, for defendant-appellees Shackelford.

MEYER, Justice.

The major issue presented in this case is whether a purchaser of real property who obtains and records the deed thereto after being served with summons in an action by a prior purchaser demanding conveyance of that property is protected as a purchaser for value under our recordation statute, G.S. 47-18. We hold that he is not.

In summary, the evidence at trial showed that on 13 October 1972, the plaintiffs entered into an installment sales contract with defendant Pinelawn Memorial Park for the purchase of a mausoleum crypt. The plaintiffs made it clear to Pinelawn that they wanted to purchase the crypt that faces east toward Kinston, Crypt "D". Pursuant to the sales contract, plaintiffs made a down payment of $1,035.60 and continued to make regular monthly payments in the amount of $33.02 until March 1977, when they tendered the balance in full and demanded a deed from Pinelawn for Crypt "D". This demand was refused. On 13 February 1974, some fourteen months after the execution of plaintiffs' contract, the defendants Shackelford also entered into an installment sales contract with Pinelawn for the purchase of the same Crypt "D". The contract provided for a down payment of $1,406.04 and two annual installments of $912.00, the first one due on 3 February 1975 and the final one due on 3 February 1976.

The plaintiffs were first put on notice of the second contract of sale in February 1977, when they visited Pinelawn Memorial Park and saw the Shackelford name on Crypt "D". Through their attorney they informed Pinelawn, by letter dated 4 March 1977, that they were prepared to pay in full the balance of the amount due on the contract to purchase Crypt "D". Pinelawn informed them that while their records showed the balance due upon early payment would be $152.97, they also showed the agreement was for the purchase of Crypt "C", not Crypt "D". The plaintiffs mailed a check for the amount due and requested either a deed conveying to them mausoleum Crypt "D" or the return of the check along with information regarding the disposition of Crypt "D". The check was returned by the park administrator, Jean Hinson, with a letter saying that she had forwarded the request to the home office for an answer.

On 25 April 1977, plaintiff brought this suit against defendant Pinelawn Memorial Park, Inc., demanding specific performance of the contract to convey Crypt "D" and damages for breach of contract and fraud, and against William C. Shackelford and wife, Jennie L. Shackelford, demanding conveyance of Crypt "D" and damages for wrongful interference with their contract with Pinelawn and for conspiracy with Pinelawn to defraud the plaintiffs.

Upon being served with summons, the Shackelfords discovered that they had no deed to the crypt and demanded one from Pinelawn. Pinelawn delivered to them a deed dated 18 August 1977 which the Shackelfords recorded in Book 710, page 126 of the Lenoir County Registry on 9 September 1977.

After directing a verdict in favor of the plaintiffs on the issue of whether the defendants Shackelford were innocent purchasers for value, the court submitted the following issues to the jury which were answered as indicated:

1. Did Defendant Pinelawn Memorial Park, Inc., agree with Plaintiffs to convey to Plaintiff Crypt "D"?

Yes.

2. If so, did Defendant Pinelawn Memorial Park, Inc., fail to perform the agreement to convey Crypt "D" to Plaintiffs?

Yes.

3. What amount, if any, are Plaintiffs entitled to recover of Defendant Pinelawn Memorial Park, Inc., for breach of contract?

$100.00.

4. Did the Defendant Pinelawn Memorial Park, Inc., defraud the Plaintiffs?

Yes.

5. If so, what amount of punitive damages are Plaintiffs entitled to recover of Defendant Pinelawn Memorial Park, Inc.?

$10,800.00.

6. Were the Defendants Shackelfords innocent purchasers for value?

No.

7. Did Defendant William C. Shackelford wrongfully interfere with the contractual relationship between Plaintiffs and Defendants?

No.

8. If so, what amount of damages, if any, are Plaintiffs entitled to recover from Defendant William C. Shackelford?

0.

9. What amount of punitive damages, if any, are Plaintiffs entitled to recover from Defendant William C. Shackelford?

0.

Pursuant to these answers, the trial judge ordered Pinelawn to execute and deliver to the plaintiffs a warranty deed conveying Crypt "D", to pay the plaintiffs the sum of $100.00 as damages for breach of the contract to convey and the sum of $10,800.00 as punitive damages, and to return all sums of money paid by the Shackelfords for the purchase of Crypt "D". The court also ordered defendants Shackelford to execute and deliver to plaintiffs a quitclaim deed conveying Crypt "D" and ordered the plaintiffs to pay to defendant Pinelawn the sum of $152.97 representing the balance of the purchase price due as provided in the contract.

Both Pinelawn and the Shackelfords appealed to the Court of Appeals which held that the Shackelfords, and not the plaintiffs, were entitled to a directed verdict on issue number six because of our recordation statute, G.S. 47-18. The court reversed the judgment as to the Shackelfords, affirmed the award of punitive damages against Pinelawn and otherwise as to the plaintiffs vacated the judgment and remanded the cause to the trial court for entry of judgment of compensatory damages to the plaintiff for the money paid by them to Pinelawn pursuant to the contract of purchase plus the $100.00 awarded by the jury.

The Court of Appeals based its decision on its characterization of the Shackelfords as purchasers for value. As such, they would be protected under our recording statute, G.S. 47-18 which provides:

> No conveyance of land, or contract to convey, or option to convey, or lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

N.C. Gen. Stat. § 47-18 (1976).

The purpose of this statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. *See Chandler v. Cameron*, 229 N.C. 62, 47 S.E. 2d 528 (1948); *Grimes v. Guion*, 220 N.C. 676, 18 S.E. 2d 170 (1942). It serves to provide constructive notice of claims to real property. *See Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E. 2d 129 (1945). It has been characterized as a "pure race" statute. *J. Webster, Real Estate Law in North Carolina* § 331 (1971). Where a grantor conveys the same property to two different purchasers, the first purchaser to record his deed wins the "race to the Register of Deeds' office" and thereby defeats the other's claim to the property, even if he has actual notice of the conveyance to the other purchaser. *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E. 2d 769 (1965); *Patterson v. Bryant*, 216 N.C. 550, 5 S.E. 2d 849 (1939). Thus, in order to protect himself against the possibility that his grantor has conveyed the same property to another, a purchaser must examine the public registry. If he finds no record of such, even if he knows there has been a prior conveyance, he may record his deed with the assurance that his title will prevail.

However, G.S. 47-18 does not protect a purchaser from claims to property arising out of litigation. Therefore, in order to protect himself against the possibility that there is pending litigation which would affect title to the property, a purchaser must check the *lis pendens* docket. The firmly-established doctrine of *lis pendens* is that:

> When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been.

Rollins v. Henry, 78 N.C. 342, 351 (1878).

Were the rule otherwise, a defendant could defeat the judgment in such an action by conveying the property in anticipation of it to some stranger and the plaintiff would be compelled to bring a new action against him, and so on indefinitely. *Id.*

Our statute on the effect of *lis pendens* notice on subsequent purchasers provides as follows:

> From the cross-indexing of the notice of lis pendens only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice.

N.C. Gen. Stat. § 1-118 (1969). The purpose of this statute is to supplement our registration statute by providing a simple and readily available means of ascertaining the existence of adverse claims to property not otherwise disclosed by the public registry. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E. 2d 129 (1945). Both the *lis pendens* provisions and the registration provisions serve to provide record notice upon the absence of which a prospective innocent purchaser may rely. *Id.* However, *lis pendens* notice under our statute is not exclusive. *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E. 2d 162 (1974); *Morris v. Basnight*, 179 N.C. 298, 102 S.E. 389 (1920). It serves only to provide *constructive* notice of pending litigation. *Whitehurst v. Abbott*, 225 N.C. at 6, 33 S.E. 2d at 132. As we stated in *Lawing*, "The *lis pendens* statutes enable a purchaser for a valuable consideration *who has no actual notice* of the pendency of litigation affecting the title to the land to proceed with assurance when the *lis pendens* docket does not

disclose a cross-indexed notice disclosing the pendency of such an action." 285 N.C. at 432, 206 S.E. 2d at 171.

Our registration statute does not protect all purchasers, but only innocent purchasers for value. *See Lawing v. Jaynes*, 285 N.C. 418, 206 S.E. 2d 162; *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E. 2d 129. While actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status. *Compare Lawing v. Jaynes*, 285 N.C. 418, 206 S.E. 2d 162 *with Dulin v. Williams*, 239 N.C. 33, 79 S.E. 2d 213 (1953). Where a purchaser claims protection under our registration laws, he has the burden of proving by a preponderance of the evidence that he is an innocent purchaser for value, *i.e.*, that he paid valuable consideration and that he had no actual notice, or constructive notice by reason of *lis pendens*, of pending litigation affecting title to the property. *Lawing v. Jaynes*, 285 N.C. at 432-33, 206 S.E. 2d at 171-72; *See Waters v. Pittman*, 254 N.C. 191, 118 S.E. 2d 395 (1961); *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E. 2d 129 (1945); *King v. McRackan*, 168 N.C. 621, 84 S.E. 1027 (1915), *aff'd on rehearing*, 171 N.C. 752, 88 S.E. 226 (1916). The Shackelfords failed to meet this burden.

Defendants Shackelford do not challenge the law set forth in *Lawing*. Instead, they argue that *Lawing* does not apply. They contend that they purchased and acquired their interest in Crypt "D" on either 3 February 1974 when they entered into the contract of purchase, or on 3 February 1976 when they completed payment under the contract. Since at both of these times they had no notice of the plaintiffs' claim to Crypt "D", the Shackelfords argue that the doctrine of actual notice of pending litigation does not apply. We disagree. The interest which the Shackelfords wished to acquire was title to Crypt "D", so the crucial point in time is the time they acquired title. As between a grantor and grantee, title passes upon delivery of the deed. *See Barnes v. Aycock*, 219 N.C. 360, 13 S.E. 2d 611 (1941); *Patterson v. Bryant*, 216 N.C. 550, 5 S.E. 2d 849 (1939); *Warren v. Williford*, 148 N.C. 474, 62 S.E. 697 (1908). The Shackelfords therefore had no title until Pinelawn delivered the deed to them. Furthermore, their title was not effective as against purchasers for value and lien creditors until registration of the deed. N.C. Gen. Stat.

§ 47-18 (1976). *Patterson v. Bryant*, 216 N.C. 550, 5 S.E. 2d 849; *Warren v. Williford*, 148 N.C. 474, 62 S.E. 697.

At the time the Shackelfords acquired their deed and at the time they recorded it, they clearly had actual notice of the plaintiffs' suit as shown by Mr. Shackelford's own testimony:

> The first time that I heard about the controversy, was when the sheriff greeted us. At that time, I did not have a deed to my cemetery lot. The sheriff came down to my house and served papers on me for the first time in my life and my wife was a school teacher and when she got home, I told her to find the deed and to find it then. I never recorded my deed. My wife couldn't find one so I told her to produce me the deed, she had handled the negotiations and she could not and I called an attorney in Kinston which was Leland Heath and I said, 'I've got some papers here I want to bring to you for you to look into.' I later got a deed from Pinelawn.
>
> . . . .
>
> My wife and I received a copy of the Summons and Complaint in this suit and examined it and then we took it to Leland Heath. I carried it to Mr. Heath and told him to take care of it, to do whatever was necessary that I didn't understand what it was about, just to straighten it out.
>
> I carried the Complaint to Mr. Heath and he recorded the deed for me and recorded it in the Courthouse. My wife and I had the Summons and Complaint. We carried them to him, I looked them over briefly, I wasn't that concerned. I didn't understand what it was for, and at that time, I was really busy and when I got to Mr. Heath's office, then is when I was informed about what it was about. Mr. Heath informed me and my wife about what the nature and purpose of the suit was.

Record at 117-18.

Not only did the Shackelfords obtain their deed from a party to the action, they were parties to the action themselves.

The trial court was correct in instructing the jury to find that the Shackelfords were not innocent purchasers for value. The Court of Appeals erred in reversing the judgment of the trial court.

Since counsel for petitioners conceded in oral argument that the Hills would not be entitled to both the $100.00 awarded as compensatory damages for breach of contract and specific performance, the $100.00 award must be vacated. We have considered the issues brought forward by the appellees and find that the Court of Appeals ruled correctly on them.

For the reasons stated, the judgment of the trial court must be reinstated as modified herein.

The Court of Appeals opinion reversing the judgment of the superior court is reversed. The cause is remanded to the Court of Appeals for further remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CLINTON MARSHALL

No. 12

(Filed 6 October 1981)

1. **Criminal Law § 146.6— moot questions**

Questions raised by defendant relating to the sentencing phase of a first degree murder trial are moot and will not be decided where the jury at that phase returned a verdict favorable to defendant.

2. **Criminal Law §§ 15.1, 98.2; Jury § 2.1— denial of change of venue, special venire and sequestration of witnesses**

The trial court did not abuse its discretion in denying defendant's motions for change of venue, for a special venire, and for sequestration of the State's witnesses.

3. **Jury § 6— motion for individual voir dire**

Defendant failed to show that the trial court erred in the denial of his motion "for individual voir dire" where the record does not disclose the text of the motion or any explanation about it.

4. **Homicide § 21.1— photographs of body and crime scene**

The trial court in a first degree murder prosecution did not err in admitting photographs of the victim's body and of the service station where the alleged homicide took place where the photographs were used to illustrate the testimony of the witnesses, and the court instructed the jury that the photographs could be considered for that purpose only and not as substantive evidence.

5. Homicide § 21.5— first degree murder—sufficient evidence of deliberation

The evidence was sufficient to permit the jury to find that defendant killed the victim with premediation and deliberation and thus was guilty of first degree murder where there was evidence tending to show that defendant and the victim engaged in an argument and scuffle concerning two bullet holes in a front window of the victim's service station; after the victim slapped defendant a few times, defendant ran across the road to his home where he obtained a rifle; defendant then returned to the victim's service station, proceeded to exchange insults with the victim, and then shot him.

6. Criminal Law § 5— exclusion of evidence of defendant's mental deficiency

The trial court in a first degree murder prosecution did not err in excluding testimony by a psychologist that he had concluded from testing of defendant that defendant had an I.Q. of 54, that defendant was mildly retarded, and that defendant's mental deficiency would cause him to use poor judgment and be "impulsive in his responses," since evidence of low mentality in itself was not sufficient to raise a defense to a criminal charge, defendant did not plead insanity, and there was no evidence tending to show that he was insane or lacked requisite mental capacity to commit the murder.

APPEAL by defendant from *Albright, Judge*, 3 November 1980, Special Criminal Session of Superior Court for MONTGOMERY County.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the first-degree murder of William Junior (Billy) Simmons on 12 August 1980. A bifurcated trial was held as mandated by G.S. 15A-2000, *et seq.*

Following the guilt determination phase of the trial, the jury returned a verdict finding defendant guilty of first-degree murder. The court then conducted a sentencing hearing, using the same jury. After hearing additional evidence, arguments of counsel and instructions by the court, the jury recommended that defendant be given a life sentence.

From judgment imposing a life sentence, defendant appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Ann Reed, for the state.

Russell J. Hollers for defendant-appellant.

BRITT, Justice.

[1] Defendant's assignments of error numbers 1, 2, 3, 5 and 14 all relate to the sentencing phase of the trial. Since the jury at that

phase returned a verdict favorable to defendant, the questions which he attempts to raise are moot and will not be decided. *Jamison v. Kyles*, 271 N.C. 722, 157 S.E. 2d 550 (1967). We will consider and pass upon only those assignments relating to the guilt determination phase of the trial.

[2] Defendant has consolidated his assignments of error 5, 6, and 7 into one argument. He contends that the trial court abused its discretion in denying his motions for change of venue, for a special venire, and for sequestration of the state's witnesses. There is no merit in these assignments.

It is well-settled, and defendant concedes, that the court's ruling on each of the questions raised by these assignments is addressed to the sound discretion of the trial court and that its ruling will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Hamilton*, 298 N.C. 238, 258 S.E. 2d 350 (1979) (change of venue); *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976) (special venire panel); and G.S. 15A-1225 (exclusion of witnesses from courtroom). Defendant has failed to show any abuse of discretion.

[3] By his assignment of error number 8, defendant contends that the trial court erred in denying his motion "for individual voir dire." The record reveals that this motion was made and denied at a pretrial hearing on 13 October 1980 and again when the case was called for trial on 3 November 1980. However, the record does not disclose the text of the motion or any explanation about it—only the words above quoted. That being true, we can only speculate as to the nature of the motion. This we will not do. It is encumbent on the defendant to show error and also to show that the error was prejudicial to him. *State v. Sanders*, 280 N.C. 67, 185 S.E. 2d 137 (1971). The assignment is overruled.

[4] By his eleventh and twelfth assignments of error, defendant contends the trial court erred in admitting into evidence certain photographs of the victim's body and of the service station where the alleged homicide took place. These assignments have no merit.

It is axiomatic that a witness may use photographs to illustrate his testimony and make it more intelligible to the court and jury. 1 Stansbury's N.C. Evidence (Brandis Rev.) § 34. "If a

photograph is relevant and material, the fact that it is gory or gruesome . . . will not alone render it inadmissible." *Ibid. See also State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979).

The record reveals that the photographs complained of were used to illustrate the testimony of witnesses. The court instructed the jury that the photographs would be considered for that purpose only and not as substantive evidence. The photographs were not sent to this court as part of the record on appeal, therefore, we are not in position to determine how gory or gruesome they are. We conclude that defendant has failed to show error.

[5] By his assignments of error 9 and 12, defendant contends the trial court erred in denying his motions to dismiss, particularly as to first-degree murder, made at the conclusion of the state's evidence and at the close of all of the evidence. These assignments have no merit.

The evidence presented by the state, and reasonable inferences arising therefrom, is summarized in pertinent part as follows:

On 12 August 1980 Billy Simmons was operating a service station and grill on U.S. Highway 220 several miles south of Candor, North Carolina. Defendant lived in a house which was located immediately across the highway from Simmons' place of business. On the morning of said date, Simmons discovered two bullet holes in a front window of his building. Early that evening defendant went to Simmons' place and an argument arose between them regarding the bullet holes. Defendant denied knowing anything about them.

The argument was followed by a scuffle in front of the station between defendant and Simmons after which defendant went to his home. Simmons entered his station, told his wife to call the sheriff's department, and put a small pistol in his hip pocket. Shortly thereafter defendant returned to the Simmons' premises carrying a rifle. Simmons went to his front door and stood there while defendant proceeded to use profane and indecent language. Simmons asked defendant several times to "go back across the road". Simmons continued to stand in his doorway with his arms crossed. He told defendant that the "law" had been called and would soon come and "settle all of this".

Several rifle shots were fired and Simmons fell to the floor. Defendant left the scene. An ambulance was called but before it arrived, a highway patrolman arrived on the scene. The patrolman found Simmons lying on his right side in the doorway of his service station. Simmons was unconscious but the officer determined that he was still alive. An ambulance arrived some five minutes later, carried Simmons to the hospital in Troy, but he was pronounced dead on arrival at the hospital. Immediately thereafter a small pistol was found "buried" in a rear pocket of Simmons' pants.

An autopsy revealed gunshot wounds to Simmons' leg, body and head. One bullet entered his forehead on the right side, passed through his head and lodged in the bone on the left side. Death resulted from the shot to his head.

At around 9:00 p.m. on said date, defendant went to the home of his sister, Judy Marshall. He gave her a .22 caliber automatic rifle which she later delivered to the police. Defendant told his sister that Simmons had slapped him and "he shot him".

Defendant's evidence, including his own testimony, is summarized in pertinent part as follows:

On the date in question defendant was 22 years old. He left school when he was 16. The entire time he was enrolled he attended special education classes. Defendant could not read. He had moved into the house across the highway from Simmons' place of business some two years prior to the shooting incident. His girlfriend lived with him and they had a 10-month-old baby. He had worked for Simmons at intervals over a period of several years.

Some two weeks prior to the day of the shooting, defendant was working for Simmons in a peach orchard. On that occasion, he and Simmons got into an argument when Simmons complained about some of his tools being missing. Simmons accused defendant of knowing about people taking his tools and breaking into his station but not telling Simmons about it. When defendant denied knowing anything about these matters, Simmons called him a liar. After further conversation Simmons drew his pistol and pointed it at defendant. Defendant grabbed a hatchet and Simmons "backed off".

On the evening in question, defendant went to Simmons' station to purchase some items. Simmons proceeded to talk to him regarding the two bullet holes in the window. When defendant insisted that he knew nothing with respect to who shot the holes, Simmons called him a liar. Defendant then called Simmons a liar. After that Simmons grabbed him and slapped him to the ground. "He slapped me three times in the face." Defendant called Simmons a s.o.b. and ran across the road to his home where he obtained his rifle.

Defendant returned to the station, crying and mad. Simmons told him he slapped him because he called Simmons a damn liar. After they exchanged words with each other, defendant saw the handle of a pistol in Simmons' pocket. Simmons reached for his pistol after which defendant began shooting. He did not intend to shoot Simmons. "I wasn't thinking nothing because I was mad . . . I was going to let him know he wasn't going to slap me around. . . ."

The trial court submitted the case to the jury on first and second-degree murder as well as voluntary manslaughter. We hold that the evidence was sufficient to survive the motions for dismissal of all those offenses.

Murder in the first-degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). Murder in the second-degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Fleming, supra.* Manslaughter is the unlawful killing of a human being without malice and without premeditation or deliberation. *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967).

Defendant does not seriously argue that the charges of murder in the second-degree and manslaughter should have been dismissed. The thrust of his argument is that all of the evidence showed that he was not in a "cool state of blood" at any time during the events that led up to and at the time of the shooting.

Murder in the first-degree differs from murder in the second-degree in that the former requires premeditation and deliberation. Premeditation means thought beforehand for some length of time, however short. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d

80 (1975). Deliberation means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation. *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied*, 30 L.Ed. 2d 74. "Cool state of blood" as used in connection with premeditation and deliberation in a homicide case does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, 96 A.L.R. 2d 1422, *cert. denied*, 7 L.Ed. 2d 49 (1961). Deliberation is seldom capable of actual proof, but must be determined by the jury from the circumstances. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980).

The undisputed evidence in the case at hand shows that after defendant and Simmons had their scuffle, and after defendant says Simmons slapped him, defendant crossed the highway to his home, obtained his rifle, returned to Simmons' premises, proceeded to exchange insults with Simmons, and then shot him. We hold that it was for the jury to determine if defendant killed Simmons with premeditation and deliberation.

[6] By his assignment of error number 17, defendant contends the trial court erred in not permitting a psychologist to testify with regard to defendant's mental capacity. This assignment has no merit.

After defendant testified, he called Dr. Ferre, a psychologist, as a witness. State objected to the testimony proposed to be offered by this witness and the court conducted a voir dire in the absence of the jury. At that time the witness stated that he had conferred with defendant; that he had conducted an oral testing of defendant; that he had concluded that defendant had an I.Q. of 54; that defendant was mildly retarded; and that defendant's mental deficiency would cause him to use poor judgment and be "impulsive in his responses." The court refused to admit this testimony.

Defendant did not plead insanity and there was no evidence tending to show that he was insane or lacked requisite mental

capacity to commit the crime with which he was charged. "Evidence of low mentality in itself is not sufficient to raise a defense to a criminal charge." Huskins, J., in *State v. Vinson*, 287 N.C. 326, 343, 215 S.E. 2d 60 (1975), citing *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345 (1969), *cert. denied*, 24 L.Ed. 2d 518 (1970).

We have considered the other assignments of error brought forward in defendant's brief and conclude that they too are without merit.

In defendant's trial and the judgment entered we find

No error.

RENTAL TOWEL AND UNIFORM SERVICE v. BYNUM INTERNATIONAL, INC.

No. 20

(Filed 6 October 1981)

Contracts § 28— breach of contract action—instructions proper

In an action to recover damages for breach of a contract under which plaintiff supplied uniforms for defendant's employees, evidence was insufficient to raise a question for the jury as to whether the parties intended to enter into a thirty month contract or whether they intended to enter a contract for a renewal term; therefore, the trial court did not err in failing to so instruct the jury.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from decision of the Court of Appeals (51 N.C. App. 203, --- S.E. 2d --- (1981)) granting a partial new trial in this cause which was heard at the 11 March 1980 Session of the District Court for CUMBERLAND County presided over by *Cherry, Judge.*

In this civil action plaintiff seeks to recover sums allegedly due it under a written contract which it contends defendant breached. In its complaint plaintiff alleges that the parties entered into the contract on 8 November 1978; that under the terms of the contract plaintiff agreed to supply defendant with uniforms for defendant's employees in return for monetary compensation to be paid by defendant to plaintiff; that on or about 29

May 1979 defendant breached the contract by informing plaintiff that it should retrieve its uniforms from defendant's place of business and discontinue any and all further service to defendant; that plaintiff fully performed its duties under the contract from 8 November 1978 until it received notice from defendant to terminate service thereunder; that the contract provides that upon a breach of its terms, plaintiff would be entitled to liquidated damages in the amount of one-half of the weekly fee set forth in the contract multiplied by the remaining number of weeks stated therein; and that plaintiff is entitled to recover $3,276.44 plus interest and costs.

Defendant filed an answer and counterclaim in which it (1) moved to dismiss the complaint pursuant to Rule 12(b) for that it fails to state a claim against defendant for which relief can be granted; (2) admitted that the parties are corporations with offices in Cumberland and Harnett Counties but denied all other allegations of the complaint; and (3) pleaded a "THIRD DEFENSE AND COUNTERCLAIM" in which it did the following: (a) alleged a counterclaim for $1,000 based on plaintiff's tender of nonconforming goods and defendant's rejection of same as provided by G.S. 25-2-612 and other sections of the Uniform Commercial Code; and (b) alleged the further defense that the contract in question was a renewal contract, that defendant had made material alterations to the paper writing signed by defendant, and that plaintiff was not entitled to any recovery thereunder.

Both parties presented evidence. At the conclusion of plaintiff's evidence and at the close of all the evidence, defendant's motions for directed verdict were denied. At the conclusion of the evidence, plaintiff's motion for a directed verdict as to defendant's counterclaim was allowed.

Issues were submitted to and answered by the jury as follows:

> (1) Did the parties intend to enter into a contract to become effective on the installment date of December 11, 1978, with the terms of the contract to be as set forth in Paragraph Two (2) of the contract?
>
> Yes: X No ___

(2) Did the defendant, Bynum International, Inc. breach the contract?

Yes: X No ___

The court calculated the amount of damages as provided by the contract and entered judgment in favor of plaintiff for $3,276.44 plus interest and costs. Defendant appealed but did not assign error to the granting of plaintiff's motion for a directed verdict as to the counterclaim.

A majority of the hearing panel of the Court of Appeals held that the evidence was sufficient to raise an inference that the parties intended to enter into a 30-month contract as contended by plaintiff; that the evidence was also sufficient to raise an inference that the parties intended to enter into a contract for a renewal term as contended by defendant; and that the first issue submitted to the jury did not resolve the controversy. Thereupon, the Court of Appeals affirmed the judgment as it related to defendant's counterclaim but ordered a new trial with respect to plaintiff's claim.

Judge Clark dissented on the ground that the issues submitted were properly raised by the pleadings and the evidence and were sufficient to resolve all material controversies between the parties.

H. Gerald Beaver for plaintiff-appellant.

R. Allen Lytch, P.A., by Benjamin N. Thompson, for defendant-appellee.

BRITT, Justice.

Plaintiff contends that the Court of Appeals erred in concluding that the trial judge did not submit appropriate issues to the jury. We agree with this contention.

It is an elementary principle of law that the trial judge must submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings and supported by the evidence. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); *Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131 (1968); *Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966); *Brown v. Daniel*, 219 N.C. 349, 13 S.E. 2d 623 (1941). "Issues shall be framed

in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues." G.S. 1A-1, Rule 49(b). "The number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E. 2d 505 (1967).

Paragraph two of the agreement admittedly signed by the parties provides in pertinent part as follows:

> 2. TERMS OF AGREEMENT: In consideration of the substantial investment by RENTAL [plaintiff] in merchandise and equipment to provide service to CUSTOMER [defendant], this Agreement shall continue for thirty (30) months from the installation date, and shall continue from year to year thereafter, provided it is not terminated by either party by written notice to the other at least sixty (60) days prior to the expiration of the initial term or any renewal term. . . .
>
> * * *
>
> If the CUSTOMER fails to comply with this Agreement or if the CUSTOMER elects to terminate it for any reason prior to the expiration of the term above stated, the CUSTOMER will pay RENTAL as liquidated charges, an amount equal to one-half of the total regular weekly rental multiplied by the number of weeks remaining in the term, plus the current replacement value of any garments not returned to RENTAL.

The Court of Appeals concluded that the trial court should have submitted an issue as to whether the parties intended to enter into a contract for a renewal term as contended by defendant. We disagree with this conclusion for the reason that defendant's contention on this point is not supported by the pleadings and the evidence.

Plaintiff alleged the execution by both parties of the written agreement introduced into evidence, that it complied with the terms thereof, and that defendant breached the agreement. While defendant alleged in the further defense pleaded in its answer that the agreement in question was a renewal of an existing

agreement between the parties, it failed to plead and prove the terms of the existing agreement.

At trial plaintiff introduced a paper writing entitled "Rental Service Agreement" which contained the signature of John W. Miller, the general manager of plaintiff, dated 8 November 1978, and the signature of Richard F. Bynum, the president of defendant.

Miller testified in pertinent part that the parties had been doing business under a contract which began in 1976; that the contract had expired and the parties were in the process of negotiating a new contract; that on or about 8 November 1978 he received from his route salesman the document in question which had been signed by Mr. Bynum; that when he received the document, there was nothing written in the blank provided for installation date; that the date 10/16/78 was written in the blank "that said renewal"; that he understood this was the date on which Mr. Bynum signed the contract; that after receiving the document, he struck out the date 10/16/78 in the renewal blank and inserted therein plaintiff's identification number; that he inserted the installation date in that blank; that upon receiving the contract, plaintiff ordered all new pants and long-sleeved shirts for defendant's employees; that on 11 December 1978 the new uniforms were delivered to and accepted by defendant; that defendant paid the rental fees for several months; that when plaintiff received them back, they had been worn; and that the identification number he placed on the document refers to the previous contract.

Larry A. Vetter testified that he was plaintiff's route salesman that called on defendant from March, 1979, to July, 1979; that around 15 May 1979 he began delivering short-sleeved shirts from the previous season to defendant; that Mr. Bynum indicated that he was dissatisfied with the short-sleeved shirts and wanted the route supervisor to call him; and that he made his final pickup of uniforms from defendant on 23 July 1979.

Stanley Willis testified that he was a route supervisor for plaintiff for 13 years including the times in question in 1979; that some time in May of 1979 Mr. Vetter told him that Mr. Bynum was dissatisfied with the shirts defendant was getting and felt that they should get new ones; that he ordered new shirts for

defendant and received them in about two weeks; that he then called Mr. Bynum and told him the new shirts had arrived; that Mr. Bynum advised him that he had ordered shirts from another company; and that he informed Mr. Bynum that he was ordering new shirts before he did so.

Richard F. Bynum was the sole witness for defendant. He testified that he was defendant's president and general manager; that in 1976 "we entered into business with the plaintiff for the rental of towels and uniforms"; that in October of 1978 he had a conversation with one of plaintiff's representatives concerning new uniforms; that the representative informed him it was necessary for him to sign a renewal agreement before defendant could receive new uniforms; that he signed the document in question but it has been changed since then; that the renewal date has been struck out and "our former contract" number has been inserted in the renewal blank; and that an installation date has been written in. On cross-examination he stated that he was aware of the difference between the ordering date of the uniforms and the installation date; that he was not surprised by the installation date being written on the contract some weeks after he signed it; that he read the contract but he signed it as a renewal "from the people I had been doing business with for several years"; that he was not aware that paragraph two of the contract provided that the agreement was to continue 30 months from the installation date; that he did not want a 30-month contract; that although he signed the document in question and paragraph two does state that the agreement shall continue for 30 months following the installation date, he signed the document as a renewal; that his interpretation of the contract in question was that it would be for 12 months and not 30 months as plaintiff contends.

Although defendant alleged in its further defense that it intended to enter into a "renewal" contract, and its evidence in several instances alluded to a "renewal" contract, there was never any showing by any evidence what the terms of the previous contract were. Defendant appears to argue that the previous contract contained provisions similar to paragraph two of the new contract quoted above, but there was no evidence tending to show that.

We conclude that the trial judge submitted issues that were necessary to settle the material controversy raised in the

pleadings and supported by the evidence. While it is true that in his charge to the jury the trial judge reviewed certain evidence relating to a "renewal" contract, and that he stated defendant's contention thereon, since this part of the charge was favorable to defendant, it is not in position to complain. *See* 1 Strong's N.C. Index 3d, Appeal and Error, § 47.

The decision of the Court of Appeals is reversed and the judgment of the trial court will be reinstated.

Reversed.

STATE OF NORTH CAROLINA v. JAMES EDWARD COOPER

No. 25

(Filed 6 October 1981)

1. **Criminal Law § 142.3— possession of stolen credit cards—condition of probation—driving restrictions**

Where defendant pled guilty to fourteen counts of felonious possession of stolen credit cards and was placed on probation, a condition of defendant's probation that he not operate a motor vehicle on the streets or highways of North Carolina from 12:01 a.m. until 5:30 a.m. during the three-month period of probation was reasonably related to the offenses to which defendant pled guilty, was reasonably related to his rehabilitation, was not unnecessarily lengthy, and was valid, since the use of a motor vehicle at other than normal business hours, particularly late at night, is reasonably related to the reception, possession and disposition of stolen property, and limiting defendant's use of a motor vehicle after midnight imposes a legitimate restriction on his travels and tends to minimize his opportunity for contact with persons engaged in criminal activities.

2. **Criminal Law § 142.3— objection to condition of probation—timeliness**

As used in the statute providing that failure to object to a condition of probation at the time it is imposed does not waive the right to object at "a later time," G.S. 15A-1342(g), the words "at a later time" refer to the revocation hearing; therefore, a defendant cannot relitigate the legality of a condition of probation unless he raises the issue no later than the hearing at which his probation is revoked.

APPEAL by the State of North Carolina from decision of the Court of Appeals, 51 N.C. App. 233, 275 S.E. 2d 538 (1981), reversing judgment of *Stevens, J.*, entered at 21 April 1980 Session, ONSLOW Superior Court.

On 18 December 1979, defendant pled guilty to fourteen counts of felonious possession of stolen credit cards. The fourteen separate charges were consolidated for judgment and Judge Llewellyn sentenced defendant to prison for a term of not less than two nor more than three years. The sentence was suspended for three years and defendant was placed on probation on certain conditions therein named, including the following: That defendant "[n]ot operate a motor vehicle on the streets or highways of North Carolina from 12:01 a.m. until 5:30 a.m. during the period of probation."

At a revocation hearing before Judge Stevens on 21 April 1980, Patrolman Stahl, a Jacksonville police officer, and Melville Lewis Hope, a student at Coastal Carolina Community College, both testified they saw defendant operating a dark blue Cadillac, license number PWT-338, on Court Street in Jacksonville between the hours of 12:01 a.m. and 5:30 a.m. on the 22nd and 29th of December 1979 in violation of the terms of his probation.

Defendant denied the allegations and offered evidence tending to show that on 22 December 1979 the car he was allegedly driving was actually being driven in South Carolina by a friend named Brenda Duncan. Defendant further testified that he was in the Cadillac on 29 December 1979 during the prohibited hours but the car was being driven by someone else. The testimony of Brenda Duncan and Elizabeth Cooper, defendant's mother, tends to corroborate defendant's testimony.

Judge Stevens found as a fact that defendant willfully and without lawful excuse violated the special condition of his probation that he not operate a motor vehicle on the streets or highways of North Carolina between 12:01 a.m. and 5:30 a.m. during the period of probation by operating a motor vehicle on the streets of Jacksonville on 22 December 1979 at 1:25 a.m. and on 29 December 1979 at 1:04 a.m. Judge Stevens thereupon ordered that defendant's probation be revoked and the sentence of not less than two nor more than three years be reduced to a period of eighteen months under the supervision of the Department of Corrections, commitment to issue accordingly.

Defendant appealed to the Court of Appeals and that court, with Vaughn, J., dissenting, reversed on the grounds that the condition of probation prohibiting defendant from operating a motor

vehicle on the public streets and highways between 12:01 a.m. and 5:30 a.m. during the period of probation was not reasonably related to the offenses defendant had committed, was not reasonably related to his rehabilitation and was not imposed for a reasonable period of time. The State appealed to this Court as of right under the provisions of G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by David Roy Blackwell, Assistant Attorney General, for plaintiff appellant.

Bailey, Raynor & Erwin by Edward G. Bailey, for defendant appellee.

HUSKINS, Justice.

[1] Was the condition in the probation judgment that defendant not operate a motor vehicle on the streets or highways of North Carolina from 12:01 a.m. until 5:30 a.m. during the period of probation a valid condition? Answer to this question disposes of this appeal.

G.S. 15A-1343 provides in pertinent part:

> (b) Appropriate conditions.—When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:
>
> . . .
>
> (17) Satisfy any other conditions reasonably related to his rehabilitation.

G.S. 15A-1342(g) reads as follows:

> Invalid conditions; timing of objection.—A court may not revoke probation for violation of an invalid condition. The failure of a defendant to object to a condition of probation at the time it is imposed does not constitute a waiver of the right to object at a later time to the condition.

Defendant challenges the validity of the condition that he not operate a motor vehicle on the streets or highways of North Carolina from 12:01 a.m. until 5:30 a.m. during the period of probation on the grounds that (1) it bears no reasonable relationship to the offenses he had committed, (2) it was not reasonably

related to his rehabilitation, and (3) the three-year period of probation is unreasonably lengthy. He contends, therefore, that the challenged condition is invalid and Judge Stevens had no authority to revoke his probation for violation of an invalid condition. The Court of Appeals so held.

We find no merit in defendant's position and therefore reverse the Court of Appeals. The record shows that defendant pled guilty to fourteen crimes involving the possession of stolen credit cards. The use of a motor vehicle at other than normal business hours, particularly late at night, is reasonably related to the reception, possession and disposition of stolen property. Limiting defendant's use of a motor vehicle after midnight imposes a legitimate restriction on his travels and tends to minimize his opportunity for contact with persons engaged in criminal activities. Thus the challenged condition bears a reasonable relationship to the offenses committed by defendant, tends to reduce his exposure to crime and to assist in his rehabilitation. Moreover, three years on probation is very reasonable indeed for fourteen felonies.

[2] It is appropriate to note at this point that defendant did not raise this issue at the revocation hearing, offered no evidence challenging the validity of any condition of probation, interposed no objection and took no exception to the action of the court. The record contains no showing that defendant did not use a motor vehicle in the commission of the crimes to which he pled guilty. The record contains no evidence that the crimes were not committed in the nighttime and that a motor vehicle was not used in the commission of them. In fact, the record contains nothing to indicate that the challenged condition of probation is invalid. At the revocation hearing, defendant contended only that he was not the driver of the vehicle. The first time he challenged the validity of the no-driving condition was on appeal to the Court of Appeals. We hold that defendant cannot relitigate the legality of a condition of probation unless he raises the issue no later than the hearing at which his probation is revoked. We interpret G.S. 15A-1342(g) to mean that a probationer is not required to object to a condition of probation at the time probation is imposed but that he has the right to object "at a later time" to the condition. The words "at a later time" refer to the revocation hearing. It does not mean that a probationer has a perpetual right to challenge a

condition of probation and may exercise such right for the first time at the appellate level. Our construction of this statute is supported by the following language from the Official Commentary to G.S. 15A-1342:

> Subsection (g) seeks to make clear the resolution of the dilemma a defendant is placed in when he is placed on probation with invalid conditions. The defendant wishes to contest the conditions but is afraid that if he does so he will be given an active sentence. Subsection (g) makes it clear that he may accept the probation and still contest the validity of the condition if his probation is later sought to be revoked for its violation.

We conclude that the challenged condition of probation imposed by the trial judge was reasonably related to the offenses to which defendant pled guilty, was reasonably related to his rehabilitation, and was not unnecessarily lengthy. The condition was therefore valid. Since the evidence at the revocation hearing amply supported the findings of fact that defendant had violated a condition of his probation upon which the prison sentence had been suspended, the order of Judge Stevens revoking probation and activating the prison sentence was properly entered. This conclusion is supported not only by the statutes but by case law as well. *See State v. Smith*, 233 N.C. 68, 62 S.E. 2d 495 (1950); *State v. Miller*, 225 N.C. 213, 34 S.E. 2d 143 (1945); *State v. Shepherd*, 187 N.C. 609, 122 S.E. 467 (1924); *State v. Johnson*, 169 N.C. 311, 84 S.E. 767 (1915).

For the reasons stated, the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to Onslow Superior Court for reinstatement of the judgment of Stevens, J., revoking defendant's probation and activating a prison sentence of eighteen months.

Reversed and remanded.

STATE OF NORTH CAROLINA v. BOBBY McRAE POPLIN

No. 3

(Filed 6 October 1981)

Criminal Law § 161— Rules of Appellate Procedure—no question for review

Where, in a criminal case in which defendant received a sentence of life imprisonment, counsel for defendant withdrew all assignments of error as being without merit but requested the Court to review the record on appeal to determine whether there exists any prejudicial or reversible error, the Court under Rule 2 of the Rules of Appellate Procedure had authority to review the entire record even though Rule 28 limits their review to questions presented.

APPEAL by defendant as a matter of right, pursuant to G.S. 7A-27(a), from judgment of *Hairston, J.*, entered at the 17 November 1980 Criminal Session of Superior Court, ROWAN County.

Defendant was charged in three separate bills of indictment with murder in the second degree, felonious assault with a deadly weapon with intent to kill inflicting serious injury, and first degree burglary. The charges were consolidated for the purpose of trial and defendant entered a plea of not guilty to each.

The State's evidence tended to show that during the early morning hours of 20 July 1980, the defendant entered the Kannapolis residence of his estranged wife, Margaret Frances Poplin, by cutting a screen outside her son's bedroom window. Although still legally married, the defendant and his wife had not lived together for approximately one month, since 21 June 1980. The defendant proceeded to his estranged wife's bedroom, thereby waking her and her bedmate, Hayden Kenneth Brown, from their sleep. From the foot of the bed, defendant fired three bullets from a pistol. The first bullet passed through Mrs. Poplin's left arm and into her stomach. The other two entered Brown's abdomen and chest causing his death. The defendant exited through the son's bedroom window and left in a brown and white Camaro.

The defendant's version of the incidents was substantially different. He testified to the effect that he had hidden behind a living room couch when no one else was in Mrs. Poplin's house. He heard the voice of a man talking to his wife. He remained behind the couch until he heard her send her son to bed and

heard what he thought to be kissing coming from his wife's bedroom. He went outside the house and looked through a window into his wife's bedroom where he saw two figures lying in bed. When he felt sure the two people were asleep, he took pictures through a running electric fan in the window. He wanted to get better pictures, so he came back inside the house and waited for a short while near the living room couch. There he found a lady's purse with a gun in it. He put the gun in his belt and went into his wife's bedroom where he took pictures of her and Brown asleep in bed together. The camera flash awakened them and Brown shouted to the wife, "Get the gun, kill the son-of-a-bitch, get the gun, get the gun." A struggle ensued between defendant and his wife. The defendant saw Brown reach under his pillow, so he pointed his gun in Brown's direction and told him that all he wanted to do was leave and no one would get hurt. Mrs. Poplin grabbed the defendant by the arm, and the gun went off. He pushed his wife away, and the gun went off again.

The jury returned verdicts of guilty on all three charges. The counts were consolidated for judgment and the defendant was sentenced to life imprisonment.

Rufus L. Edmisten, Attorney General by Assistant Attorney Generals John C. Daniel, Jr., and Thomas B. Wood, for the State.

J. H. Rennick, Attorney for Defendant-Appellant.

MEYER, Justice.

Counsel for defendant excepted to certain trial proceedings and brought forward five assignments of error. In his brief, he withdraws all five assignments of error as being without merit, but requests that we review the record on appeal to determine whether there exists any prejudicial and reversible error in the proceedings below.

Rule 28 of the Rules of Appellate Procedure limits our review to questions presented in the briefs which are supported by arguments and authorities upon which the parties rely. *State v. Cohen*, 301 N.C. 220, 270 S.E. 2d 416 (1980); *State v. Adams*, 298 N.C. 802, 260 S.E. 2d 431 (1979). Here, defendant made no arguments in his brief and cited no authority. Therefore, nothing is presented to us for review. However, Rule 2 of the Rules of Ap-

pellate Procedure allows the appellate court to suspend or vary the requirements or provisions of the Rules in order to prevent manifest injustice to a party or to expedite decision in the public interest. Because of the severity of the sentence of life imprisonment imposed upon the defendant, we elected, pursuant to our inherent authority and Rule 2, to review the entire record. After careful review, we conclude that the charges were properly presented to the jury for decision since there was substantial evidence of every essential element of the offenses charged in the bills of indictment and that the defendant was the perpetrator of those offenses. *See State v. Adams*, 298 N.C. 802, 260 S.E. 2d 431 (1979); *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). We find that the defendant had a fair trial, free of prejudicial error.

No error.

BURKE COUNTY PUBLIC SCHOOLS BOARD OF EDUCATION v. JUNO CONSTRUCTION CORPORATION AND STATESVILLE ROOFING AND HEATING COMPANY

No. 8

(Filed 6 October 1981)

BEFORE *Snepp, Judge*, presiding at the 26 November 1979 Regular Civil Session of BURKE Superior Court, judgment based on a jury verdict was entered in favor of defendants. The Court of Appeals, in an opinion by *Judge Harry C. Martin*, concurred in by *Chief Judge Morris* and *Judge Webb*, (50 N.C. App. 238, 273 S.E. 2d 504 (1981)) affirmed the judgment as to defendant Juno Construction Corporation; the court vacated the judgment as to defendant Statesville Roofing and Heating Company and remanded the cause to the superior court for determination of the issue of damages as to that defendant. On 7 April 1981 we allowed plaintiff's and defendant Statesville's petitions for discretionary review.

Simpson, Aycock, Beyer & Simpson, P.A., by Samuel E. Aycock and Dan R. Simpson, for plaintiff-appellant Burke County Public Schools Board of Education.

Raymer, Lewis, Eisele & Patterson, by Douglas G. Eisele, for defendant-appellant Statesville Roofing and Heating Company.

Miller, Johnston, Taylor & Allison, by John B. Taylor, for defendant-appellee Juno Construction Company.

PER CURIAM.

Plaintiff brought this action for damages alleging that defendants failed to properly install the roof on the Freedom High School building in Burke County. Plaintiff had contracted with the architectural firm of The Shaver Partnership for the design of the building. Defendant Juno was the general contractor and it subcontracted the roofing work to defendant Statesville. Statesville entered into an "Agreement to Maintain Roofing" as required by the contract between plaintiff and Juno.

In their answers defendants alleged, *inter alia*, that any defect in the roof was caused by deficiency in the design and specifications provided by the architect. Upon issues submitted, the jury found that while both defendants breached their contracts with plaintiff, the defective roof was caused solely by the architect.

With respect to defendant Juno, the Court of Appeals held that where a contractor is required to and does comply with the plans and specifications prepared by the owner or the owner's architect, the contractor will not be liable for the consequences of defects in the plans and specifications.

With respect to defendant Statesville, the Court of Appeals held that under the agreement to maintain the roof which defendant Statesville entered into with plaintiff, deficiencies in the design and specifications for the roof provided by plaintiff's architect would not bar plaintiff from recovering from defendant Statesville.

After reviewing the record, the briefs, and hearing oral arguments on the questions presented, we conclude that the petitions for further review were improvidently granted. Our orders

granting further review are, therefore, vacated. The decision of the Court of Appeals affirming the judgment of the superior court as to defendant Juno, vacating the judgment as to defendant Statesville and remanding the cause for a determination of the issue of damages as to defendant Statesville, remains undisturbed and in full force and effect.

Discretionary review improvidently granted.

ZARN, INC. v. SOUTHERN RAILWAY COMPANY

No. 9

(Filed 6 October 1981)

ON plaintiff's petition for discretionary review pursuant to G.S. 7A-31 of the decision of the Court of Appeals, reported at 50 N.C. App. 372, 274 S.E. 2d 251 (1981), affirming jury verdict in the amount of $10,000 in favor of plaintiff entered by *Wood, Judge*, at the 17 December 1979 Civil Session of Superior Court, ROCKINGHAM County.

Plaintiff instituted this action on 20 March 1978 to recover from defendant, a common carrier for hire, for damage to plaintiff's silos due to defendant's negligence while in transit from Savannah, Georgia, to Reidsville, North Carolina. In its complaint plaintiff sought compensation for the loss of the silos themselves, the additional costs incurred in locating and installing a replacement, and loss of use for the period during which plaintiff was searching for a replacement and requested that it recover $54,764.00 from defendant. Defendant's answer, in pertinent part, denied any negligence or mishandling of the silos on its part and alleged as an affirmative defense to plaintiff's request for special damages that it had not been given notice by plaintiff that the freight was "unique" and that plaintiff would incur special damages if the freight was delayed or damaged. On 23 May 1979 defendant filed a motion for partial summary judgment on plaintiff's request to be compensated for additional costs incurred in locating and installing a replacement and for damages for loss of use and requested that plaintiff's recovery be limited to the dif-

ference between the fair market values of the silos before and after the damage. The motion and arguments were heard by Judge Walker, who allowed defendant's motion as to special or consequential damages incurred by reason of the extra cost of locating and installing replacement equipment, loss of storage capacity and overhead expense resulting from loss of use.

At the final pre-trial conference the parties stipulated that the contested issue to be tried by the jury was "What amount is the plaintiff entitled to recover from the defendant, Southern Railway Company?"

Trial was held on 17 December 1979, at which the judge excluded evidence concerning plaintiff's consequential and special damages. The trial judge instructed the jury that the measure of damages was the difference between the market values of the silos before and after they were damaged. The above-quoted issue was the sole issue submitted to the jury and it returned a verdict for plaintiff in the amount of $10,000.

Plaintiff appealed to the Court of Appeals, bringing forward challenges to the entry of partial summary judgment, to the exclusion of evidence on special damages and to the jury instructions. A unanimous Court of Appeals affirmed, holding that regardless of whether a claim against a common carrier for hire is brought in tort or on a contract the plaintiff is limited to compensation for damage to the freight itself unless the defendant was given notice at the time the contract was made of the circumstances giving rise to the special damages claimed or the contract itself imposes such liability.

We allowed plaintiff's petition for discretionary review pursuant to G.S. 7A-31 on 7 April 1981.

Gwyn, Gwyn & Morgan, by Julius J. Gwyn, for plaintiff-appellant.

Griffin, Deaton & Horsley, by Hugh P. Griffin, Jr., and William F. Horsley, for defendant-appellee.

PER CURIAM.

Upon review of the record, the briefs and oral arguments of counsel and the authorities there cited, we conclude that the petition was improvidently granted.

The order granting discretionary review is vacated; the decision of the Court of Appeals affirming the actions of the trial court remains undisturbed.

WESTERN AUTO SUPPLY COMPANY v. JAMES OLIVER VICK, TRADING AND DOING BUSINESS AS A WESTERN AUTO ASSOCIATE STORE

No. 77

(Filed 6 October 1981)

ON rehearing.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Carl N. Patterson, Jr., Attorneys for plaintiff appellant.

Biggs, Meadows, Etheridge & Johnson, by Samuel W. Johnson and M. Alexander Biggs, Attorneys for defendant appellee.

Berry, Hogewood, Edwards & Freeman, P.A., by Harry A. Berry, Jr., Dean Gibson and Gary D. Chamblee, Attorneys for North Carolina Consumer Finance Association, Inc., amicus curiae.

A. Thomas Small, Vice-President and Counsel, First Union National Bank of North Carolina, amicus curiae.

PER CURIAM.

The first opinions in this case, both for the majority and the dissenters, were filed 5 May 1981 and are reported at 303 N.C. 30, 277 S.E. 2d 360. In apt time plaintiff filed a petition to rehear which was allowed on 8 July 1981, 303 N.C. 320, 281 S.E. 2d 659.

After reargument and full reconsideration of the case, the opinions of the Justices of the Court as originally expressed remain unchanged. The original decision and opinion of a majority of the Court is, therefore, reaffirmed by that majority and remains the decision and opinion of the Court. Consequently, for the reasons given in the original opinion for the majority, the decision of the Court of Appeals is again affirmed and the case is remanded to the Court of Appeals that it may then be remanded to the trial court for further proceedings consistent with the majority's original opinion. The original dissenters continue to adhere to the positions stated in their dissenting opinions.

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

ADCOCK v. PERRY

No. 325 PC.

No. 133 (Fall Term).

Case below: 52 N.C. App. 724.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 6 October 1981.

ANDERSON v. GREENE

No. 276 PC.

Case below: 52 N.C. App. 585.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

BEATTY v. OWSLEY & SONS, INC.

No. 335 PC.

Case below: 53 N.C. App. 178.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

BROWN v. J. P. STEVENS & CO.

No. 147 PC.

Case below: 49 N.C. App. 118.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 October 1981.

BOYCE v. BOYCE

No. 312 PC.

Case below: 52 N.C. App. 734.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 October 1981.

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

BUTLER v. NATIONWIDE MUTUAL

No. 328 PC.

Case below: 52 N.C. App. 734.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

CARTER v. INSURANCE CO.

No. 279 PC.

Case below: 52 N.C. App. 520.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

CHURCH v. PARSONS TRUCKING

No. 321 PC.

Case below: 52 N.C. App. 164.

Petition by defendant for certiorari is allowed and cause is remanded to the North Carolina Court of Appeals for appropriate proceedings and hearing on the merits 6 October 1981.

COSTIN v. SHELL

No. 329 PC.

Case below: 53 N.C. App. 117.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

CROWELL v. CHAPMAN

No. 218 PC.

No. 129 (Fall Term).

Case below: 52 N.C. App. 164.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 6 October 1981.

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

DELP v. DELP

No. 293 PC.

Case below: 53 N.C. App. 72.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

FIKE v. BD. OF TRUSTEES

No. 306 PC.

Case below: 53 N.C. App. 78.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

GAYMON v. BARBEE

No. 261 PC.

Case below: 52 N.C. App. 627.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

HEATER v. HEATER

No. 304 PC.

Case below: 53 N.C. App. 101.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

HUFF v. TRENT ACADEMY

No. 327 PC.

Case below: 53 N.C. App. 113.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

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

IN RE FARMER

No. 255 PC.

Case below: 52 N.C. App. 97.

Petition by Osie Farmer for writ of certiorari to North Carolina Court of Appeals denied 6 October 1981.

IN RE WAKE FOREST UNIVERSITY

No. 213 PC.

Case below: 51 N.C. App. 516.

Petition by Forsyth County for reconsideration of the denial of discretionary review under G.S. 7A-31 denied 6 October 1981.

JONES v. STONE

No. 272 PC.

Case below: 52 N.C. App. 502.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 October 1981.

LOWERY v. NEWTON

No. 263 PC.

Case below: 52 N.C. App. 234.

Petition by defendants for reconsideration of the denial of discretionary review under G.S. 7A-31 denied 6 October 1981.

MANN v. MANN

No. 343 PC.

Case below: 53 N.C. App. --- (8010DC1088).

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

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

MANGUM v. NATIONWIDE MUTUAL

No. 330 PC.

Case below: 52 N.C. App. 734.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 October 1981.

MILLS v. J. P. STEVENS & CO.

No. 12 PC.

Case below: 53 N.C. App. 341.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 October 1981.

MORRISON v. KIWANIS CLUB

No. 278 PC.

Case below: 52 N.C. App. 454.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 October 1981.

PEEDE v. GENERAL MOTORS CORP.

No. 324 PC.

Case below: 53 N.C. App. 10.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

SHOPPING CENTER v. LIFE INSURANCE CORP.

No. 311 PC.

Case below: 52 N.C. App. 633.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 October 1981.

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

SMITH v. AMERICAN & EFIRD MILLS

No. 191 PC.

Case below: 51 N.C. App. 480.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 October 1981. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 6 October 1981.

STANBACK v. STANBACK

No. 340 PC.

Case below: 53 N.C. App. 243.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 October 1981.

STATE v. BROWN

No. 305 PC.

Case below: 53 N.C. App. 82.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 October 1981.

STATE v. CALDWELL and STATE V. MADDOX

No. 331 PC.

Case below: 53 N.C. App. 1.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 October 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 October 1981.

STATE v. CHAMBERS

No. 354 PC.

Case below: 53 N.C. App. 358.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 October 1981.

STATE v. CHRISTMAS

No. 264 PC.

Case below: 52 N.C. App. 186.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 October 1981.

STATE v. COOPER

No. 337 PC.

No. 134 (Fall Term).

Case below: 52 N.C. App. 349.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals allowed 6 October 1981.

STATE v. FURR

No. 24 PC.

Case below: 52 N.C. App. 735.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 October 1981.

STATE v. GOLLETT

No. 253 PC.

Case below: 52 N.C. App. 585.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 October 1981.

STATE v. HALL

No. 269 PC.

Case below: 52 N.C. App. 492.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 6 October 1981. Motion of defendant to dismiss appeal for lack of significant public interest allowed 6 October 1981.

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

STATE v. HARRIS

No. 302 PC.

Case below: 52 N.C. App. 735.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

STATE v. HOOPER

No. 310 PC.

Case below: 51 N.C. App. 711.

Application by defendant for further review denied 6 October 1981.

STATE v. KNOTTS

No. 4 PC.

Case below: 41 N.C. App. 767.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 October 1981.

STATE v. LOMBARDO

No. 259 PC.

No. 130 (Fall Term).

Case below: 52 N.C. App. 316.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 October 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 6 October 1981.

STATE v. McBRIDE

No. 262 PC.

Case below: 52 N.C. App. 378.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

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

STATE v. MOORE

No. 309 PC.

Case below: 53 N.C. App. 371.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

STATE v. OWEN

No. 322 PC.

Case below: 53 N.C. App. 121.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

STATE v. SELLARS

No. 280 PC.

Case below: 52 N.C. App. 380.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 October 1981.

STATE v. THOMPSON

No. 122.

Case below: 53 N.C. App. 371.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 October 1981.

TROTTER v. TROTTER

No. 289 PC.

Case below: 52 N.C. App. 586.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 October 1981.

STATE OF NORTH CAROLINA v. JOHN WILLIAM ROOK

No. 2

(Filed 3 November 1981)

1. Criminal Law § 76.7— confession—voir dire hearing—sufficiency of evidence to support findings

The evidence in a voir dire hearing to determine the admissibility of defendant's confession supported findings by the trial court that an officer called defendant a liar and then read a warrant to defendant charging him with murder, and the court did not err in failing to find that the officer also told defendant he had "good evidence" against him where the evidence on that point was conflicting. Furthermore, the evidence also supported findings by the court that an officer spoke to defendant in a loud but not an angry or threatening tone of voice, that an officer advised defendant that neither he nor another officer could help him and that the only thing that could help him was to tell the truth, and that no officer made any offer to help defendant with the district attorney or with his alcoholic or drug problems if he would confess.

2. Criminal Law § 76.10— confessions—conduct of officers—voluntariness—question of law

Whether the conduct and language of investigating officers amounted to such threats or promises or influenced the defendant by hope and fear as to render a subsequent confession involuntary is a question of law reviewable on appeal.

3. Criminal Law § 75.5— confessions—Miranda warnings—test of voluntariness

Even where the procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, are recited by officers and defendant signs a waiver stating that he understands his constitutional rights, including his right to counsel, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly given.

4. Criminal Law § 75.2— confession not induced by offer of help—sufficiency of evidence and findings

The evidence on voir dire supported the trial court's determination that defendant's confession to a murder was not induced by an offer of help to keep defendant from receiving the death penalty so that he would be sent to prison where he would receive help for his drinking and drug problems and that the confession was voluntarily and understandingly made.

5. Criminal Law § 75.2— confessions—promises of collateral advantage

Any statements by officers concerning help for defendant with regard to defendant's drinking and family problems related to matters entirely collateral to the criminal charges against him and would not render defendant's confession involuntary.

6. Searches and Seizures § 20— requisites of affidavit for search warrant

A search warrant cannot be issued upon affidavits which are purely conclusory and which do not state underlying circumstances upon which the affiant's belief of probable cause is founded; there must be facts or circumstances in the affidavit which implicate the premises to be searched.

7. Searches and Seizures § 23— sufficiency of affidavit for search warrant

An officer's affidavit was sufficient to support issuance of a warrant to search the trailer in which defendant lived for "a wooden club or instruments that could be used as a club, bloody clothing, and other instrumentalities" of a "rape, kidnapping, murder" where the affidavit alleged sufficient facts and circumstances to establish probable cause to believe that a "wooden club or instruments that could be used as a club" and "bloody clothing" constituted evidence of the crimes being investigated, that a club, or an object appearing to be a club, was in the possession of defendant and was used as an instrumentality in committing the crimes being investigated, and that "bloody clothing" would constitute evidence of the offenses committed or would reveal the identity of a person participating in those offenses, and where the affidavit alleged sufficient facts and circumstances to establish reasonable cause to believe that the club-like object and the bloody clothing would be found on the premises to be searched.

8. Constitutional Law § 80; Criminal Law § 135.4; Homicide § 31.3— death penalty—list of aggravating circumstances—constitutionality

The aggravating circumstances listed in the death penalty statute, G.S. 15A-2000(e), are not so vague as to violate due process or to allow a jury arbitrarily and capriciously to impose the death penalty.

9. Criminal Law § 135.4— death penalty—especially heinous, atrocious or cruel murder—constitutionality of statute—sufficiency of evidence

The "especially heinous, atrocious or cruel" aggravating circumstance listed in G.S. 15A-2000(e)(9) is not unconstitutionally vague where it has been judicially construed to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Furthermore, such aggravating circumstance was properly submitted to the jury in this first degree murder case where the evidence showed an aggravated battery of the victim amounting to torture which necessarily caused her great physical pain and emotional distress.

10. Homicide § 21.5— first degree murder—theory of premeditation and deliberation—sufficiency of evidence

Submission of a charge of first degree murder to the jury under the theory of premeditation and deliberation was not improper because the State introduced a confession containing defendant's statements that he did not mean to strike the victim with a knife or to run over her with a car where (1) submission of the first degree murder charge under the theory of premeditation and deliberation was supported by evidence that defendant obtained a tire tool from the trunk of a vehicle because the victim was resisting defendant's sexual advances, defendant deliberately struck the victim with the tire tool in the head area prior to sexually assaulting her and continued to beat her

thereafter, and the injuries to the head area significantly contributed to the victim's blood loss and ultimate death; (2) defendant's statement that he did not mean to strike the victim with the knife was contradicted by competent circumstantial evidence; and (3) physical evidence at the crime scene contradicted defendant's assertion that he did not mean to run over the victim with the car.

11. Criminal Law §§ 135.4, 138.4— first degree murder—premeditation and deliberation and felony murder theories— underlying felony as aggravating circumstance—punishment for underlying felony

Where defendant was found guilty of first degree murder on both premeditation and deliberation and felony murder theories, the trial court properly submitted the underlying felony of rape as an aggravating circumstance, and the court could impose additional punishment for the rape.

12. Criminal Law § 135.4; Homicide § 31— death penalty—written findings as to *mitigating circumstances* not required

The trial court did not err in permitting the jury to return its recommendation for a sentence of death in a first degree murder case without requiring the jury to indicate in writing its finding as to each mitigating circumstance submitted to it, since there is no statutory or constitutional requirement of specific findings on mitigating circumstances. Furthermore, defendant was not prejudiced by failure of the trial court to require the jury to specify the mitigating factors it found to exist where the Supreme Court could not conclude that the death sentence was arbitrary, excessive or disproportionate even if the jury accepted as true all sixteen mitigating circumstances submitted to it.

13. Criminal Law § 135.4— death penalty not disproportionate or excessive

Imposition of the death penalty for first degree murder was not disproportionate or excessive, considering the crime and the defendant, where the evidence showed that defendant beat the victim viciously with a tire tool, repeatedly cut her with a knife, raped her, ran over her battered body with an automobile and left her to bleed to death in a lonely field.

Justice EXUM concurring in part and dissenting in part.

APPEAL from judgments entered by *Clark, Judge*, at the 6 October 1980 Criminal Session of Superior Court, WAKE County. Defendant was convicted by a jury of first degree rape, kidnapping, and first degree murder. For his conviction of first degree murder, defendant was sentenced to death. Defendant received consecutive life sentences for the crimes of kidnapping and first degree rape. From all these judgments, defendant appeals to this Court as a matter of right.

Attorney General Rufus L. Edmisten, by Assistant Attorney General J. Michael Carpenter, for the State.

C. D. Heidgerd and J. Franklin Jackson for the defendant.

CARLTON, Justice.

Defendant brings forth assignments of error relating to several pre-trial matters, an alleged error in the guilt determination phase of his trial and several alleged errors relating to the sentencing phase of his trial. After a careful consideration of these assignments, as well as the record before us, we find no error in any of these proceedings and affirm.

I.

At trial, evidence for the State tended to show that at approximately 7:20 p.m. on 12 May 1980, Ann Marie Roche, a registered nurse, was walking home on Avent Ferry Road. She was clad in a T-shirt and blue jeans, was wearing glasses and was carrying a brown gym bag. As she was nearing the Lake Raleigh Road intersection defendant, who was driving a Mercury automobile borrowed from his neighbor, turned left onto Lake Raleigh Road and blocked her path. Defendant beckoned Ms. Roche and she approached his car. The two talked for several minutes and then began arguing and, within seconds, defendant began to beat her.

All of this was observed by Howard B. Harris, Jr., who lived on Avent Ferry Road, and George Edward Schlager, who was jogging by. Mr. Schlager approached the car just as defendant was beating Ms. Roche. Ms. Roche was on the ground with her back against the driver's door. Her face and arms were cut and bleeding, and defendant was crouching over her, armed with a stick or some other object about one or two inches in diameter. Mr. Schlager asked if he could help and defendant stood and replied, "just go on, man, this doesn't concern you." Mr. Schlager then saw Mr. Harris and went to confer with him. Both saw the car leave with Ms. Roche in the passenger seat, with her head down, crying. Mr. Schlager jogged toward the car and observed the license number, RAP-980. He wrote the number on a matchbook and gave a copy of it to Mr. Harris.

Two other persons, Donna Atkins and Pamela Dodd, observed the struggle between Ms. Roche and her assailant. Ms. Atkins positively identified defendant as the assailant. Ms. Dodd observed a man beating a young woman. She testified:

> I saw a guy over the front seat beating a girl brutally. The steering wheel appeared to jar at times he was beating her so hard. Then they were out of the car. He was swinging her around by the hair on the ground once that I can remember. At that time I ran in the house and called the police.

Although Ms. Dodd did not positively identify the assailant as the defendant, her description of the assailant matched that of the defendant.

Officer Ronnie Holloway arrived in the area at approximately 7:30 p.m. in response to the calls. Although he patrolled the area, he could not find the car.

On 13 May 1980 at approximately 7:30 p.m., Norman Cash, a patrol officer with Dorothea Dix Hospital, was on routine patrol in the area just south of Lake Raleigh. In a large, open field he discovered a pile of clothing and a billfold. A short distance away, he observed a body and notified the Wake County Sheriff's Department. Deputy Pickett of the Wake County Sheriff's Department was called and he, too, observed the body. At 8:45 p.m., Officer William E. Hensley, a crime scene specialist, was called to the scene. He observed a white female body, badly bruised and battered, with cuts and abrasions. The ground around the body was covered with blood. The body was nude and was approximately thirty-five feet from the pile of clothing. A T-shirt, blue jeans and glasses were recovered as well as other articles including a brown bag. The body was identified as Ann Marie Roche.

From the license number recorded by Mr. Schlager the police were able to trace the car and locate the owner. On 15 May 1980, Officer Holloway went to Stovall Drive and found the car in question. Surveillance was set up and the car was subsequently stopped by officers. It was operated by Ms. Edwards, the owner, who told the police that defendant had borrowed her car on the evening of 12 May 1980. She told police that when he borrowed the car, defendant was dressed only in blue jeans, was barefooted,

and had pulled his hair back in a pony tail. This description matched that given by all the witnesses to the assault. Surveillance of the area continued and the defendant was observed entering a trailer near where the car was parked. Raleigh police officers approached the trailer, knocked on the door, and were told to enter. Inside were two white males, two white females and a small child. Sergeant G. W. Black requested permission to search for defendant and this was denied. Shortly thereafter, however, the defendant came from the hallway of the trailer and stated, "I guess I'm the one you're looking for." Defendant was then taken into custody and placed in a patrol car.

On 15 May 1980, Deputy Sheriff P. J. Bissette obtained a search warrant to search the trailer where defendant had been arrested and conducted a search. During the search, Officer Bissette found and seized a pair of blood-stained blue jeans. Officer Hensley, who assisted in the search, found a Rapala Finland knife and a leather carrying case on the dash of a vehicle parked in front of the trailer. He then inspected the Mercury vehicle which had been taken to the Wake County Courthouse and found fresh stains on the driver's side as well as grass caught between certain sections of the vehicle. He observed red stains on the hubcaps and underneath the vehicle. During the autopsy of Ms. Roche, Officer Hensley observed an unusual circular impression, approximately five centimeters in size, on the right hip. He noted a corresponding five centimeter area in the chassis of the Mercury automobile.

S.B.I. agent Mark Nelson came to the crime scene on the evening of 13 May at approximately 11:30 p.m. He made numerous tests and observations and stated his opinion that one particular bloody smear was consistent with the large bloody object, like a body, being rolled or dragged down the slope of the field. He also examined the Mercury automobile and found blood in numerous places. He also performed tests on the vaginal and anal smears taken from Ms. Roche's body and found the presence of sperm.

Dr. Dana D. Copeland, a pathologist, conducted the autopsy on Ms. Roche on 14 May 1980. He observed cuts on the front part of her body, all parallel. The cuts were straight across and were of a uniform, shallow depth. The placement and uniform depth, in

Dr. Copeland's opinion, indicated that the cuts had been made deliberately shallow and "with some care and effort." His conclusion was that Ms. Roche's cuts were caused by a sharp instrument like a knife. Dr. Copeland found numerous lacerations on her head and hands which were, in his opinion, produced by beating with a long, blunt instrument with a round striking surface. In addition to the numerous cuts and abrasions throughout Ms. Roche's body, her left leg was completely fractured and broken at the top. The pelvis was fractured and separated. Compression injuries in the pelvic region were consistent with her having been struck by an automobile. Severe internal bleeding had taken place and he found injuries in the vaginal area which, in his opinion, could have been produced by forcible sexual intercourse. Her right rib was also broken. In Dr. Copeland's opinion, Ms. Roche died as a result of loss of blood from the injuries she sustained. Moreover, his opinion was that she could have remained alive from a period of two hours up to a maximum of twenty-four hours after receiving the injuries observed.

At approximately 8:12 p.m. on 15 May 1980, Deputies Freddie Benson and Ted Lanier and Detective J. C. Holder of the Raleigh Police Department began interviewing the defendant. Deputy Benson advised defendant of his *Miranda* rights and defendant signed a waiver of rights form. Defendant stated that he understood his rights. Deputy Benson left the room and Detective Holder began to question defendant. He again advised defendant of his rights and defendant was calm and in control. Detective Holder testified that "Johnny looked at me, and he said that he did it. He asked me if I was happy. I told him that I was not happy. I said, 'What did you do.' He said that he killed that girl." Defendant then proceeded to give Officers Holder and Lanier a complete statement.

Defendant's statement to the officers can be summarized as follows: On 12 May 1980 he was at a cookout on Stovall Drive and needed more beer. He borrowed the Mercury from Ms. Edwards and drove to the A & P Store on Western Boulevard where he purchased a bag of charcoal. Upon leaving the store he got into a fight with a black person and ran and hid until they left. He then went to an apartment complex on Avent Ferry Road and removed some money from the coin-operated laundry machines. As he drove down Avent Ferry Road he saw Ms. Roche walking and

blew his horn. She waved, and he turned into the first dirt road, backed and turned, and sat headed toward Avent Ferry Road to await the girl. When Ms. Roche walked up to the car, he pinched her. She slapped him, and they began scuffling. He then apologized, and she said he had already hurt her arm. He asked her to go riding with him and she got into the car. A jogger came up during the scuffle and defendant told the jogger to keep his eyes on what he was doing. He and Ms. Roche then drove down Avent Ferry Road headed south and, after making a few turns, they eventually reached a wheat field. Defendant told her to get out of the car and "tried to get into her pants." She resisted, and he told her he was going to have to get his "damn gun" from the vehicle, although, in fact, he did not have one. Defendant got a tire tool out of the trunk of the car, and Ms. Roche removed her pants. As she did so, he struck her on the side of the head and she fell to the ground. He then had forcible sexual intercourse with her. She tried to pull his hair, and he began to hit her some four or five times on the head and got blood on his face, shoulder, wrist and pants. According to defendant, he swung his knife at her and cut her on the face and neck, but he didn't mean to cut her. He then attempted anal intercourse, and when she resisted, he hit her again, and, instead of fighting, she just laid there bleeding. Defendant then got into his car and drove down to turn around. He could barely see over the steering wheel, but knew he had run over her with the car because he heard a thump and the car got stuck. He spun the tires to free the car and then drove home. When he arrived, the police were at the trailer. He returned to the cookout and explained the blood on his clothing and body as the result of the fight at the A & P.

At approximately 10:26 p.m. on 15 May 1980, defendant consented to a taped interview. Prior to this taking place, Officer Holder again advised defendant of his rights and defendant again repeated essentially the confession summarized above. Later that evening, defendant accompanied Detective Holder and other officers to the crime scene and showed them various items involved in the crime.

Defendant offered no evidence during the guilt determination phase of the trial.

Upon receiving the jury verdict finding defendant guilty of first degree murder, first degree rape, and kidnapping, the court

convened the sentence determination phase of the trial before the same jury. The State offered no evidence during this phase, choosing to rely instead upon the evidence introduced at the guilt determination phase. The defendant presented evidence through his brother and sister, who described in detail their life with their parents. Their parents were violent and constantly drunk and beat their children frequently. Their father spent time in prison, and the children were placed in foster homes. Defendant was forced to begin drinking by his father before he was ten years of age and would get "stone-drunk." Defendant became a heavy drinker and drug user.

Dr. Bob Rollins, a specialist in forensic psychiatry, examined defendant and diagnosed defendant as having a mental disorder of emotionally unstable personality as a result of experiences during his formative years. Dr. Rollins also testified that defendant was able to proceed to trial in that he understood his legal situation and was able to cooperate with his lawyer. Dr. Rollins felt that defendant understood what he was charged with, the different pleas he might make and the possible consequences of the situation. He further testified:

> Mr. Rook just has never been able to make a satisfactory adjustment out in society, not been able to get along with people. He's been involved in violence, the longest he had ever been employed is three weeks; he can't get along with his own family, with his wife, or with anybody. He just doesn't have the capacity to do that.

It was also Dr. Rollins's opinion that defendant associates sexual gratification with violence and aggressive acts and is sexually excited by violence and aggression. His opinion was that defendant, to some extent, "enjoys inflicting pain on other people." Dr. Rollins was of the opinion that defendant would not benefit from psychiatric treatment and believed that defendant's conduct would continue in the future in a manner similar to that of the past if he were to go free. In Dr. Rollins's opinion, defendant, at the time of the crime, was aware that what he was doing was wrong and that he would be held responsible for his actions. Chief District Court Judge George F. Bason of the Tenth Judicial District testified that during the years Mr. Rook was involved in the juvenile courts, no beneficial program was available to help him.

Dr. Seymour Halleck, a psychiatrist, testified that defendant's brutality probably resulted from his exposure to brutality himself as a child. He also testified that defendant suffered a mental illness although he was not insane. He stated:

> I base my opinion on the fact that anybody that uses as much alcohol and as many drugs as he has and who has this kind of history of so much deprivation, so little moral or social learning, but I'm primarily based it on the drug issue, anybody who uses these drugs cannot exercise rational judgment, anybody with a degree of alcoholism found in this family as the disease, this kind of alcoholism is definitely a disease.

Dr. Halleck agreed with Dr. Rollins that defendant would not benefit from psychiatric treatment for any brief period of time.

At the conclusion of the testimony, the trial court instructed the jury on the sentencing phase. Three aggravating circumstances were submitted to the jury: (1) whether the murder was committed while defendant was engaged in the commission of the rape of the victim; (2) whether the murder was committed while the defendant was engaged in the commission of the kidnapping of the victim; and (3) whether the murder was especially heinous, atrocious or cruel. Sixteen mitigating circumstances were submitted to the jury.[1] The jury found beyond a reasonable

1. The mitigating circumstances submitted to the jury were:

(1) That this murder was committed while John William Rook was under the influence of mental or emotional disturbance.

(2) The capacity of John William Rook to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

(3) The age of John William Rook at the time of this murder is a mitigating circumstance.

(4) John William Rook, in his formative years, was subjected to cruelty and physical abuse by his parents.

(5) John William Rook, in his formative years, was subjected to mental abuse by his parents.

(6) John William Rook, in his formative years, was subjected to emotional abuse by his parents.

(7) John William Rook has been a loving and affectionate husband to his wife.

doubt each of the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. The jury also found one or more mitigating circumstances, although it did not designate which of the sixteen were found, and then found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. The jury then returned a recommendation that the death penalty be imposed, and the court entered judgment imposing the death penalty for the crime of first degree murder. Defendant also received consecutive life sentences for the crimes of kidnapping and first degree rape. From these judgments, defendant appealed of right to this Court.

II.

PRE-TRIAL PHASE

Prior to trial, defendant entered several motions which were denied by the trial court. The denial of these motions provides the basis for four of defendant's primary contentions on this appeal. He first contends that the trial court erred in denying his motion to suppress custodial statements because the findings of fact of the trial court in the order were not supported by suffi-

(8) John William Rook has been loving and affectionate to his brothers and sisters and their children.

(9) John William Rook is an alcoholic.

(10) John William Rook is an abuser of drugs and is addicted to drugs.

(11) John William Rook was sexually abused by an older man whom he lived with when he was 10 years old in order to have a more stable home environment.

(12) John William Rook had a deprived and chaotic childhood in which he was schooled in violence and criminality by his parents.

(13) John William Rook now has an IQ of 71 and received very little education in his formative years.

(14) John William Rook, in his formative years, received very little religious and moral training.

(15) John William Rook confessed in detail as to what he did and cooperated with the detectives and investigators of the Raleigh Police Department and Wake County Sheriff's Department as to his involvement.

(16) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value.

cient and competent evidence. He also contends that the trial court erred in ruling that his confession was voluntary in that it was obtained by the influence of hope or fear implanted in his mind by the acts and statements of police officers during his custodial interrogation. Defendant also contends that his motion to suppress all evidence obtained as a result of the search warrant issued for the trailer on Stovall Street and the Mercury automobile should have been allowed because the record reveals insufficient facts or circumstances to support the finding of probable cause by the magistrate who issued the search warrant. Finally, defendant contends that his motion to dismiss the proceedings pursuant to G.S. 15A-2000 should have been allowed on the grounds that that section of our General Statutes is unconstitutional on its face and as applied to him. We discuss these contentions *seriatim*.

A.

[1] As a result of defendant's motion to suppress his custodial statements, the trial court conducted an extensive voir dire hearing on the admissibility of the statements. Evidence was presented both by the State and defendant. Thereafter, the court entered extensive findings of fact and conclusions of law and denied the motion. With respect to the trial court's order, defendant first contends that certain findings of fact contained therein were not supported by substantial and competent evidence. We find no merit to this contention.

Defendant acknowledges the general rule in this jurisdiction that findings of fact made by the trial court following a voir dire hearing on the voluntariness of a confession are conclusive on appellate courts if supported by competent evidence in the record. *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). No reviewing court may properly set aside or modify those findings if so supported. *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971). Indeed, a trial judge's findings will not be disturbed on appeal when the finding is supported by competent evidence even when there is conflicting evidence. *State v. McRae*, 276 N.C. 308, 172 S.E. 2d 37 (1970).

Here, the trial court found as a fact that "Lieutenant Benson advised the defendant that he was a G.D. liar, and then read a

warrant to the defendant charging him with murder and advised him that he was being charged with murder."

Defendant admits the truth of this finding but contends, however, that it is incomplete. Defendant argues that this finding should include a statement to the effect that Benson stated that "He had good evidence against him [the defendant] and that he didn't go down to the magistrate and get warrants for first degree murder without good evidence against him." Defendant contends that the finding made by the trial court is not a fair and clear statement of the events transpiring on the evening of 15 May 1980 absent the language he would add. We disagree. While there is some evidence from the defendant on voir dire which supports his contention as to events transpiring during the interrogation, other evidence before the trial court on voir dire supports the finding as stated. Indeed, Detective Holder flatly denied that Detective Benson told the defendant that he had "good evidence" implicating the defendant. Detective Holder testified, "At the time Freddie [Benson] left the room he did *not* say anything to him *other* than calling him a liar." [Emphasis added.] Hence, the trial court's finding was supported by competent evidence, and there was no error in the failure of the trial court to make the extended finding formulated by the defendant.

Defendant next contends that the following finding of fact was also not supported by competent evidence: "That Officer Benson spoke to the defendant in a loud but not an angry or threatening tone of voice." Defendant contends that the finding that the tone of voice used by Officer Benson during interrogation was not angry or threatening is not supported by evidence. Defendant primarily relies, in support of this argument, on the response of Detective Holder on cross-examination that, "Freddie Benson became very angry and upset at that time." We do not think the quoted testimony contradicts the trial court's finding that Benson's *voice* was not "angry or threatening." Immediately following the quoted testimony, Holder further testified that "Freddie Benson raised his voice. He didn't yell at him. He just raised his voice." Moreover, Benson himself testified that, "I used a loud tone of voice to tell him he was lying . . . I did not at any time threaten, make any promises or strike Mr. Rook when I was in the room." Immediately following this incident, Detective Benson left the room and took no further part in interrogation of the

defendant. Thus, the trial court's finding that Detective Benson's tone of voice was loud but not angry is supported by evidence and is binding on this Court.

Defendant next objects to the following finding of fact: "Holder advised the defendant that neither he nor Officer Lanier could help him and that the only thing that could help him was to tell the truth." Defendant contends that while there is conflicting evidence as to what Detective Holder did in fact tell the defendant concerning helping him, it is clear that the tenor of Holder's conversation with defendant prior to his confession was concern with giving him help for his drinking and drug problems. Defendant contends that Detective Holder "implicitly" promised to help the defendant. Again, we disagree. Even the defendant concedes that the evidence on this finding is "conflicting," and we find that the record reveals compelling evidence which supports the trial court's finding. Detective Holder testified:

> I told Johnny at that point, I said, Johnny, I can't help you. We cannot help you. The only thing that can help you is the truth. . . .
>
> I reemphasized the point that the only thing for him to do at that point was to tell the truth, that I could not help him, Mr. Lanier could not help him.
>
> . . . .
>
> . . . I told Johnny, I can't help you, Mr. Lanier cannot help you. The only thing that can help you is the truth. And that was it.
>
> . . . And, I told Johnny several times, I said Johnny, I can't help you.

Clearly, there is abundant evidence to support the trial court's finding.

Defendant next contends that the trial court erred in entering the following finding of fact:

> At no time did either officer advise or promise the defendant that he could or would be helped in court or with the District Attorney on the charges against him and offered no help to him with his alcoholic problems.

Defendant also contends that certain other findings similar to that quoted above regarding the offer of help to him with respect to his alcoholic problems are unsupported by evidence at the voir dire hearing. Defendant contends, as we address more fully in the next section of this opinion, that the evidence clearly shows that the defendant's confession was induced by an offer of help to keep him from receiving the death penalty and that, in return for confessing, he was told that he would be sent to prison where he would receive help for his drinking and drug problems. All findings to the contrary, defendant contends, are unsupported by the evidence.

There is simply no merit to defendant's contentions in this regard. The record is replete with testimony to support all of the trial court's findings that no offer of help was made to defendant in order to induce him to make his confession. For example, Detective Holder testified:

> I never offered or advised Mr. Rook that he could be helped in court. I never advised that he could be helped with the District Attorney's Office with respect to these charges.
>
> . . . Neither me nor Mr. Lanier offered to help Mr. Rook with his alcohol problem specifically. He seemed to understand that if he went back to prison he could get this help. We did not promise him any help at all. I did not make any promises with respect to the charges pending against him.
>
> . . . .
>
> . . . I said, Johnny, is there anyone in this room, Mr. Lanier, myself and Miss Mobley, have they promised, have I promised or threatened you or put you under any pressure or coerced you in any way to make this statement. He said, no. . . .
>
> . . . .
>
> No one during the course of the interview touched Mr. Rook's person in any threatened manner, strike him, or do anything of that nature to him.

We hold, therefore, that each of the challenged findings of fact is supported by competent evidence in the record and is binding on this Court. Moreover, we have examined the remaining findings

of fact in the order denying suppression of defendant's confession and find that each of them is supported by competent evidence adduced at the voir dire hearing. These assignments of error are overruled.

B.

With respect to the trial court's order denying defendant's motion to suppress his custodial statements, defendant next contends that the trial court's findings of fact do not support its conclusion of law that his confession was voluntarily and understandingly made. Defendant contends that the circumstances of his confession were such that the confession was obtained by the influence of hope and fear implanted in his mind by the acts and statements of police officers during his custodial interrogation.

[2, 3] As noted in the preceding section of this opinion, facts found by the trial court are conclusive on appellate courts when supported by competent evidence. Nevertheless, the conclusions of law drawn from the facts found are not binding on the appellate court. *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968). Hence, whether the conduct and language of the investigating officers amounted to such threats or promises or influenced the defendant by hope and fear as to render the subsequent confession involuntary is a question of law, as defendant contends, reviewable on appeal. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968); *State v. Biggs*, 224 N.C. 23, 29 S.E. 2d 121 (1944). Even where the procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1968), are recited by the officers and defendant signs a waiver stating that he understands his constitutional rights, including his right to counsel, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly given. The fact that the technical procedural requirements of *Miranda* are demonstrated by the prosecution is not, standing alone, controlling on the question of whether a confession was voluntarily and understandingly made. The answer to this question can be found only from a consideration of all circumstances surrounding the statement. *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511; *accord, Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895 (1966); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92.

[4] Our inquiry, therefore, is whether the facts revealed by the record before us indicate that the challenged confession was obtained by the influence of hope or fear implanted in defendant's mind by the acts and statements of the police officers during defendant's custodial interrogation. The long-standing rule in this jurisdiction was stated by Chief Justice Taylor in *State v. Roberts*, 12 N.C. (1 Dev.) 259, 260 (1827):

> The true rule is, that a confession cannot be received in evidence, where the Defendant has been influenced by any threat or promise; for, as it has been justly remarked, the mind, under the pressure of calamity, is prone to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail; and therefore a confession obtained by the slightest emotions of hope or fear, ought to be rejected.

Justice Henderson, concurring, set forth the rule which we have followed since:

> Confessions are either voluntary or involuntary. They are called voluntary, when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with *him*, and which, it is said, in the perfectly good man, cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope, or exhorted by fear, are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected. . . .

Id. at 261-62. In *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92, Justice Branch, now Chief Justice, noted the rules quoted above and summarized the numerous cases decided by this Court involving various factual backgrounds on this question. Here, defendant relies on *Pruitt* to support his contention that his confession was obtained by the influence of hope and fear. We think, however, that his reliance on *Pruitt* is misplaced. In *Pruitt*, the interrogation of defendant by three police officers took place in a "police-dominated atmosphere." The evidence was uncontradicted that the officers repeatedly told defendant that they knew he had committed the crime and that his story had too many holes in it; that

he was "lying" and that they did not want to "fool around." Such circumstances, this Court held, gave rise to the inference that the language used by the officers tended to provoke fright. Such language was then tempered by statements that the officers considered defendant the type of person "that such a thing would prey heavily upon" and that he would be "relieved to get it off his chest." These "flattering" statements were capped by the statement that "it would simply be harder on him if he didn't go ahead and cooperate." Justice Branch concluded, "Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess." *Id.* at 458, 212 S.E. 2d at 102.

Here, there is no evidence of any oppressive environment in the room where defendant was interviewed. It was a normal interview room at the Wake County Courthouse, approximately eight feet by fifteen feet, with a table and chairs and lighted by normal ceiling lights. Initially, there were three officers in the room when defendant was read his rights, but the evidence indicates that no more than one officer talked with him at a time. Detective Benson left the room shortly after the rights were read and Detective Holder became the sole questioner. Officer Lanier asked questions only after defendant had confessed. We have held on numerous occasions that a confession is not made inadmissible merely because it is made to officers of the law, or because defendant was in jail, or under arrest, or because it was given in response to questioning. *E.g.*, *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92; *State v. Smoak*, 213 N.C. 79, 195 S.E. 72 (1938).

Moreover, there is no evidence that defendant was subjected to any threats or suggested violence or show of violence to persuade or induce him to make a statement. Indeed, the evidence that was presented showed that no threats were made to the defendant, nor was he touched or struck in any manner. As discussed in the preceding section of this opinion, there is ample and competent evidence to support the trial court's findings that "Officer Benson spoke to defendant in a loud but not angry or threatening tone of voice."

Defendant apparently relies primarily, in attacking the voluntariness of his confession, on the argument that he was "induced" to make his statement by an offer of "help" from Detective

Holder. As discussed in the preceding section of this opinion, however, we find competent evidence to support the trial court's finding that no such "help" was offered. Moreover, the record is clear that all talk of "help" emanated from the defendant himself. At each juncture when defendant mentioned that he "needed help" with his alcohol problem, Officer Holder was quick to tell him that he could not help him. The evidence overwhelmingly supports the trial court's finding of fact and conclusion of law that the officers did nothing to induce defendant's confession through hope or fear. The situation here is more similar to that in *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977). In *Small*, the uncontradicted evidence showed that one of the officers had told the defendant that he could not "buy" one of defendant's statements and that defendant should tell the truth. This Court held that such statements "do not constitute a persuasive showing that defendant's will was overborne by these acts of the police officers." *Id.* at 653, 239 S.E. 2d at 435.

[5] Finally, we reiterate the rule stated in *Pruitt* that any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, and not to any mere collateral advantage. Here, all discussions concerning any "help" for defendant were centered around defendant's drinking and family problems. Clearly, these are matters entirely collateral to the criminal charges against him.

This Court has consistently followed the rule enunciated by Justice Henderson in his *Roberts* concurrence. In *Pruitt*, we summarized numerous cases demonstrating this Court's adherence to that rule. We have made it equally clear, however, that custodial admonitions to an accused by police officers to tell the truth, standing by themselves, do not render a confession inadmissible. *State v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300 (1955); *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620 (1946); *State v. Thompson*, 224 N.C. 661, 32 S.E. 2d 24 (1944). Such custodial admonitions to tell the truth are all we find from the record before us. Here, as discussed in the preceding section of this opinion, there was ample evidence to support the trial judge's findings that defendant's confession was not coerced, and the findings in turn support his conclusion that the incriminating statement was made voluntarily and knowingly. We hold that the confession was properly admitted into evidence.

C.

Prior to trial, defendant moved for the exclusion of all evidence obtained as a result of the search of the trailer where the defendant lived and all evidence obtained as a result of the search of the Mercury automobile on the ground that there was not probable cause for the issuance of the search warrant. The searches resulted in the seizure of certain bloody clothing which was introduced into evidence against defendant. Defendant attacks the search warrant in question on the grounds that (1) the application for the search warrant failed to contain sufficient facts and circumstances to indicate that the items sought constituted evidence of any crime, and (2) that the search warrant failed to contain sufficient facts or circumstances to indicate that the items would be in the trailer in question.

[6] These arguments are governed by well-established legal principles. The probable cause required by the fourth amendment and G.S. 15A-243-245 is simply:

> a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. [Citation omitted.] Thus, the affidavit upon which a search warrant is issued is sufficient if it "supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender."

State v. Riddick, 291 N.C. 399, 406, 230 S.E. 2d 506, 511 (1976) (quoting *State v. Vestal*, 278 N.C. 561, 576, 180 S.E. 2d 755, 765 (1971), *cert. denied*, 414 U.S. 874 (1973)). *Accord, State v. Jones*, 299 N.C. 298, 303, 261 S.E. 2d 860 (1980). Whether probable cause exists for the issuance of a search warrant depends upon a practical assessment of the relevant circumstances, and each case must be decided on its own facts. Reviewing courts will pay deference to judicial determinations of probable cause, *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); *State v. Louchheim*, 296 N.C. 314, 250 S.E. 2d 630, *cert. denied*, 444 U.S. 836 (1979); "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accord-

ed to warrants," *United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed. 2d 684, 689 (1965). A search warrant cannot be issued upon affidavits which are purely conclusory and which do not state underlying circumstances upon which the affiant's belief of probable cause is founded; there must be facts or circumstances in the affidavit which implicate the premises to be searched. *State v. Edwards*, 286 N.C. 162, 209 S.E. 2d 758 (1974); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972). With these principles before us, we review the search warrant and the affidavit upon which it was obtained.

[7] An examination of the application, prepared by Officer Bissette, indicates that the items sought included "a wooden club or instruments that could be used as a club, bloody clothing, and other instrumentalities of the crime," which was stated to be "rape, kidnapping, murder." In this connection, the application contained an affidavit from Officer Bissette which averred:

> On May 15, 1980, at 4:30 p.m., the vehicle, a 1972 Mercury, N.C. license #RAP-980, that the murder victim, Ann Marie Roche, was seen being forced into on May 12, 1980, was located at Stovall Drive Raleigh, N.C. The person in control of the vehicle, Ruby Howell, states that it is her mother's car and that she drives it and keeps it all the time. She states that on Monday, May 12, 1980, her neighbor, Johnny Rook, who lives at Lot 15, College View Trailer Park, 1508 Stovall Drive, borrowed the car at 5:45 p.m. and returned the car about two hours later. At the time he returned the car he had fresh cut marks on his face and blood on his arms. Johnny Rook is a white male with long blond hair that he wears in a pony tail. At the time he borrowed the car he was dressed in blue jeans and shoes only. . . . The murder victim was seen being forced into this car at 7:30 p.m. on Avent Ferry Road at Lake Raleigh Road by a white male wearing only blue jeans and shoes and using an object appearing to be a club to beat the victim. Her body was found on May 13, 1980 approximately one-fourth mile from this intersection nude with massive head and body injuries.

The information contained in this affidavit clearly establishes probable cause to believe that a "wooden club or instruments that could be used as a club" and "bloody clothing" constituted

evidence of the crimes being investigated, that a club, or an object appearing to be a club, was in the possession of defendant and was used as an instrumentality in committing the crimes being investigated, and that "bloody clothing" would constitute evidence of the offenses committed or would reveal the identity of a person participating in those offenses. Additionally, the items sought to be discovered were sufficiently described to enable officers to identify them.

Defendant argues, however, that the application for the search warrant failed to allege sufficient facts or circumstances which would indicate that the items sought would be discovered in the trailer to be searched. We disagree. The portion of the application dealing with this issue reads:

> Ruby Howell states . . . that on Monday, May 12, 1980, her neighbor, Johnny Rook, who lives in Lot 15, College View Trailer Park, 1508 Stovall Drive, borrowed her car at 5:45 p.m. and returned the car about two hours later. . . . At the time he borrowed the car he was dressed in blue jeans and shoes only. *She stated that after he returned the car he went to Lot 15, his residence in the park. He lives in this trailer* in the first bedroom on the right. The trailer is rented by Barry E. Staton. Johnny Rook has access to the entire trailer, according to a statement of Barry E. Staton. . . .

These facts or circumstances, in our opinion, supply reasonable cause to believe that the club-like object and the bloody clothing would be found on the premises to be searched.

The affidavit upon which the probable cause determination was based contained specific, and not purely conclusory, allegations and stated underlying circumstances upon which the affiant's belief of probable cause was founded. Clearly, there were facts and circumstances in the affidavit implicating the premises to be searched. A practical assessment of the information before the magistrate would clearly allow a reasonable person to conclude that the information contained in the application was credible and that the proposed search would reveal, upon the premises to be searched, the presence of the objects sought and that those objects would aid in the apprehension or conviction of the offender. Issuance of the search warrant by the magistrate on the

information available to him was, under the law of this State, clearly justified.

D.

By this assignment defendant challenges the constitutionality of G.S. 15A-2000(e), the provision governing the submission of aggravating circumstances in the penalty phase of a first degree murder trial, both on its face and as applied in this case. The exceptions on which this assignment is based challenge the trial court's denial of defendant's pre-trial motion to dismiss the penalty phase proceedings and the trial court's entry of judgment imposing the death penalty upon the jury's recommendation.

[8] Defendant contends that the list of permissible aggravating circumstances violates the eighth and fourteenth amendments to the United States Constitution in that the circumstances listed are vague and overlapping and may cause the jury arbitrarily and capriciously to impose the death penalty. Defendant acknowledges that this Court has considered the issue of the constitutionality of G.S. 15A-2000(e) and has decided the issue adversely to him, *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980), but requests that we reconsider that ruling. We are not so inclined.

In *Barfield*, the defendant challenged the constitutionality of the statutorily defined aggravating circumstances as "vague and without definition." In rejecting this claim this Court, per Justice Britt, noted:

> Sentencing standards are by necessity somewhat general. While they must be particular enough to afford fair warning to a defendant of the probable penalty which would attach upon a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which society has judged to warrant the application of the criminal sanction. *See Gregg v. Georgia*, 428 U.S. at 194-195, 49 L.Ed. 2d at 886-887, 96 S.Ct. at 2935. While the questions which these sentencing standards require juries to answer are difficult, they do not require the jury to do substantially more than is ordinarily required of a fact finder in any lawsuit. *See Proffitt v. Florida*, 428 U.S. at 257-258, 49 L.Ed. 2d at 926, 96 S.Ct. at 2969. The issues which

> are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning. Jurors who are sitting in a criminal trial ought to be capable of understanding them and applying them when they are given appropriate instructions by the trial court judge. *See Jurek v. Texas*, 428 U.S. at 279, 49 L.Ed. 2d at 939, 96 S.Ct. at 2959 (White, J., concurring).

Id. at 353, 259 S.E. 2d at 543. We adhere to this reasoning and reaffirm our holding that the aggravating circumstances listed in G.S. 15A-2000(e) are not so vague as to violate due process or to allow a jury arbitrarily and capriciously to impose the death penalty. This assignment of error is overruled.

[9] Defendant specifically challenges the constitutionality of the statutory aggravating circumstance of the capital felony being "especially heinous, atrocious or cruel," G.S. § 15A-2000(e)(9) (1978), in that it requires a subjective evaluation of the evidence by the jurors. We disagree. This argument was rejected by this Court in *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). In *Goodman*, we recognized that while the United States Supreme Court has found a statute employing similar language to be unconstitutional because it allowed the jury too much latitude, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976), that Court has upheld similarly worded statutes whose meaning has been carefully limited by judicial construction, *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1978). Accordingly, in *Goodman* we interpreted our statutory aggravating circumstance of "heinous, atrocious or cruel" as " 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,' " *id.* at 25, 257 S.E. 2d at 585 (quoting *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974)), the same interpretation approved by the United States Supreme Court in *Proffitt*, 428 U.S. at 255-56, 96 S.Ct. at 2968, 49 L.Ed. 2d at 924-25. Based on our reasoning in *Goodman* and that of the United States Supreme Court in *Proffitt*, we once again affirm the constitutionality of this aggravating circumstance.

Nor do we think that the trial court's instructions on this aggravating circumstance were so vague as to violate due process. With regard to this factor, the trial court told the jury:

> Now, I instruct you, members of the jury, that in this context heinous, as that word is used, means extremely wicked or shockingly evil. Atrocious, as used there, means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.
>
> However, it is not enough that this murder be heinous, atrocious or cruel, as those terms have just been explained to you, this murder must have been especially heinous, atrocious or cruel, and not every murder is especially so.
>
> For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing.
>
> The murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

This instruction accords with the construction of G.S. 15A-2000(e)(9) adopted in *Goodman*, and its submission to the jury was proper on the evidence in this case. The evidence summarized in Section I of this opinion reveals the most gruesome murder imaginable and is sufficient to allow the jury to find that this was a "conscienceless or pitiless crime which was unnecessarily torturous to the victim."

Defendant further contends, however, that the decision of the United States Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980), compels a reversal of our holding in *Goodman*. We disagree. In *Godfrey*, both victims died instantly from a gunshot wound to the head. The aggravating circumstance of the crime being "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," was submitted by the trial court and approved by the Georgia Supreme Court. The United States Supreme Court reversed the death sentence, holding that the Georgia Supreme Court had failed to be consistent in its interpretation of this aggravating circumstance. In earlier decisions, the Georgia Supreme Court had interpreted this aggravating circumstance to require a showing of torture or aggravated battery to the victim. In the case of the *Godfrey*

murders, the victims died instantly and the United States Supreme Court reasoned that "There is no principled way to distinguish this case, in which the death sentence was imposed, from the many cases in which it was not." *Id.* at 433, 100 S.Ct. at 1767, 64 L.Ed. 2d at 409.

This Court has avoided the problem presented by *Godfrey* by holding that this aggravating circumstance does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering on the victim. *State v. Goodman*, 298 N.C. 1, 24-26, 257 S.E. 2d 569, 585; *accord, State v. Oliver and Moore*, 302 N.C. 28, 274 S.E. 2d 183 (1981). The instructions given by the trial judge here accorded with this interpretation and the evidence revealed by the record supports the submission of this aggravating circumstance to the jury. The record shows aggravated battery of the victim amounting to torture which necessarily caused her great physical pain and emotional distress. Thus, we hold that the instruction given complied with constitutional requirements and that the submission of the aggravating circumstance that the murder was especially heinous, atrocious or cruel was proper.

We conclude that the statutory scheme for determining the sentence in a capital case, G.S. § 15A-2000, is neither unconstitutional on its face nor as applied to this defendant.

III.

GUILT PHASE

[10] Defendant next contends that the trial court erred in denying his motion to dismiss the charge of murder in the first degree based on premeditation and deliberation. In presenting this contention, defendant argues that the evidence from the pathologist and the defendant's statement establish (1) that Ms. Roche did not die immediately from any one blow or injury but from blood loss resulting from *all* of her injuries; (2) that the injuries to Ms. Roche's head were caused by defendant's hitting her with a tire tool; (3) that the injuries to her leg were caused by defendant's running over her with his automobile; and (4) that the exculpatory statements in his confession introduced by the State clearly established that he did not mean to strike Ms. Roche with the knife nor did he mean to run over her with the automobile. De-

fendant strongly urges that his own statement was the only evidence introduced by the State as to how Ms. Roche was injured and how she ultimately died and that there was no evidence contradictory to the defendant's statement that he did not mean to strike her with the knife or run over her. Hence, defendant argues that the State, by introducing his confession in which he claimed that the knife and automobile injuries were accidental, is bound entirely by the truth of such statements and that although the submission of the murder charge was proper under the felony murder rule, it was not proper under the theory of premeditation and deliberation. This is significant, defendant notes, because if submission of the murder charge were proper only under the felony murder rule, then rape should not have been submitted to the jury as an aggravating factor in the sentencing phase under *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980). Had that aggravating factor not been submitted to the jury, defendant contends, the jury might possibly have found that the numerous mitigating circumstances outweighed the aggravating factors and would have recommended life imprisonment.

In presenting this argument, defendant is relying primarily on the principle of law enunciated by this Court in *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461 (1961). There, this Court stated:

> When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by the statements. [Citations omitted.]
>
> And when the State's evidence and that of the defendant is to the same effect, and tend only to exculpate the defendant, his motion for judgment as of nonsuit should be allowed.

Id. at 479, 119 S.E. 2d at 464.

The principle has remained viable in this jurisdiction. Defendant has, however, ignored other rules which must be applied by this Court in reviewing the trial court's denial of the motion to dismiss. It is likewise the rule in this jurisdiction that the introduction by the State of a statement of the defendant which in-

cludes exculpatory assertions does not prevent the State from showing facts which contradict the exculpatory statements. Moreover, on motions to dismiss, only evidence favorable to the State is considered. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). Put another way, the State is not bound by the exculpatory portions of a confession which it introduces if there is "other evidence tending to throw a different light on the circumstances of the homicide." *State v. Bright*, 237 N.C. 475, 477, 75 S.E. 2d 407, 408 (1953).

This Court answered a similar argument in *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928 (1977). There, it was said:

> Defendant assigns as error the failure of the trial court to enter judgment as of nonsuit at the close of all the evidence. Specifically, the defendant contends that he comes within the purview of the rules stated in *State v. Carter*, 254 N.C. 475, 479, 119 S.E. 2d 461, 464 (1961), that "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *See also State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972). *However, the introduction by the State of an exculpatory statement made by a defendant does not preclude the State from showing the facts concerning the crime to be different, and does not necessitate a nonsuit if the State contradicts or rebuts the defendant's exculpatory statement. . . .*

Id. at 658, 235 S.E. 2d at 187 (emphasis added).

We find the emphasized portion of the rule cited from *May* applicable here. Crucial to defendant's contention is his insistence that the cause of Ms. Roche's death was injury suffered at his hands which he states in his confession he did not "mean to" inflict. He relies on the pathologist's testimony that all the injuries together caused her death to support his argument. A close reading of Dr. Copeland's testimony, however, indicates that he stated only that "none of the injuries taken together or acting singularly would have produced *immediate* death." (Emphasis added.) He also testified that the two injuries which were significantly severe to produce the blood loss causing death were the injuries

to the thigh due to the broken leg and the injuries to the head. There is nothing in the defendant's confession which implies that he did not intend to strike the victim about the head area with the tire tool, and defendant does not so contend on appeal. Indeed, defendant confessed to striking the victim with the tire tool prior to sexually assaulting her and that he continued to beat her thereafter. Defendant obtained the tire tool from the trunk of the vehicle because the victim was resisting defendant's sexual assaults, presumably to gain her submission. Such forethought and execution constitute premeditation and deliberation. It is clear from the pathologist's testimony that the injuries to the head area significantly contributed to the victim's blood loss and ultimate death and from defendant's own statement that these injuries were deliberately inflicted. This evidence, taken in the light most favorable to the State, sufficiently shows premeditation and deliberation to withstand defendant's motion to dismiss.

Other evidence gleaned from the record tends "to throw a different light on the circumstances of the homicide," *State v. Bright*, 237 N.C. at 477, 75 S.E. 2d at 408. Defendant's statement that he did not "mean to hit her" with the knife is contradicted by competent circumstantial evidence. From the placement, depth and straight lines of the cuts on the upper body, the pathologist concluded "that they were made in an *intentionally* superficial manner. . . . [Such a cut] is made deliberately shallow with some care and effort . . . ."

Moreover, physical evidence obtained by the officers from the murder scene substantially contradicts defendant's assertion that he did not "mean" to run over the victim. It is unnecessary to repeat that evidence here. Suffice it to say that the location of the victim's body in relation to the pile of clothing and the size of the field in which these brutal acts took place seriously challenge defendant's assertion that he accidentally ran over the victim.

In another case in which the defendant attacked the sufficiency of the evidence to support a jury finding of premeditation and deliberation, we recently stated:

> In the instant case, the State presented evidence tending to show that defendant choked the deceased, pushed her out of the car, and ran over her several times. The requisite premeditation and deliberation could be inferred from the

> brutal nature of the assault, the use of grossly excessive force or the "dealing of lethal blows after the deceased had been felled." [Citations omitted.] We hold that there was plenary evidence to support a jury finding that the defendant killed Ms. Grossnickle with premeditation and deliberation.

State v. Ferdinando, 298 N.C. 737, 741-42, 260 S.E. 2d 423, 426 (1979).

We hold, in the instant case, that the State submitted abundant evidence to support the trial court's denial of defendant's motion to dismiss the murder charge on the theory of premeditation and deliberation.

IV.

SENTENCING PHASE

Defendant assigns two errors to the sentencing proceedings. He first argues that the trial court erred in submitting the felony of rape as an aggravating circumstance during the sentencing determination phase and, secondly, that the trial court erred in failing to instruct the jury to indicate which of the mitigating circumstances it found to exist. We discuss these contentions *seriatim*.

A.

[11] Defendant contends that the trial court erred in submitting the underlying felony of rape as an aggravating circumstance in his sentencing hearing and that he should not have been sentenced for the crime of rape even though the jury found him guilty of murder under both the theories of premeditation and deliberation and felony murder. We considered this question in *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), and held that when the defendant has been convicted of first degree murder on both the premeditation and deliberation and the felony murder theories, the inclusion of the underlying felony as an aggravating circumstance is proper. The commission of the "underlying" felony is not an essential element of the crime of premeditated murder and, thus, is not the "automatic" aggravating circumstance which we held in *Cherry* to be impermissible. *See State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979). Because this defendant was found guilty of first degree murder under both

theories, there was no error in submitting the rape as an aggravating circumstance.

Likewise, *Goodman* answers defendant's contention that he should not have been sentenced on the rape offense. There, we said:

> [D]efendant contends that he was improperly sentenced for the offenses of kidnapping and armed robbery as those offenses merged with the murder conviction. As we have already said, no merger of the felony occurs when the homicide conviction is based upon the theory of premeditation and deliberation. [Citation omitted.] Defendant was found guilty by virtue of premeditation and deliberation as well as by application of the felony-murder rule. Thus, the court could disregard the felony-murder basis of the homicide verdict and impose additional punishment upon defendant for the crimes of armed robbery and kidnapping.

State v. Goodman, 298 N.C. at 20, 257 S.E. 2d at 582. Here, therefore, the trial court properly sentenced defendant for the crime of rape. These assignments of error are without merit.

B.

[12] Defendant next contends that the trial court erred in failing to provide a space on the "Issues and Recommendation As to Punishment" form for the jury to list which of the specific mitigating circumstances it found or did not so find. Defendant believes that, since the aggravating factors must be specifically answered, the mitigating factors should be specified also. Defendant contends that failure to list which mitigating factors were found or not found impairs this Court's ability to give appropriate review to the sentencing phase of the case. While defendant makes a good argument that it is the better practice, and we agree, to require the jury to specify mitigating factors found and not found for the benefit of this Court in reviewing the appropriateness of the death penalty, we find no such requirement in our statutes.

G.S. 15A-2000, which sets out the procedures for the sentencing phase in a capital case, requires that the jury indicate in writing which of the statutory aggravating circumstances it finds beyond a reasonable doubt. G.S. § 15A-2000(c)(1) (1978). There exists no corresponding requirement regarding the mitigating cir-

cumstances considered by the jury. Instead, in recommending the death penalty the jury is required to state in writing only whether the mitigating circumstances found are insufficient to outweigh any aggravating circumstances found. G.S. § 15A-2000(c)(3) (1978). Thus, when this Court reviews the death sentence on appeal, we will have before us, by virtue of the requirements of the statute, a list of the aggravating circumstances submitted and those found, a list of the mitigating circumstances submitted, and a statement that any mitigating circumstances found are insufficient to outweigh the aggravating circumstances. Although some records presented to this Court have indicated which mitigating circumstances were found by the jury,[2] such information is not required to be presented by G.S. 15A-2000(d). Thus, if there exists a requirement of specific findings on the mitigating circumstances submitted, it must arise from a constitutional guarantee.

In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976), the United States Supreme Court upheld the Georgia statutory scheme for imposition of the death penalty in the face of a constitutional attack because, in its opinion, the Georgia procedure provided a reliable safeguard against arbitrary, excessive and disproportionate death sentences by limiting and guiding the jury's discretion and by providing automatic appellate review of all aspects of the sentencing.

The Georgia procedure is similar to our own statutory scheme. In Georgia courts, once guilt has been determined, the same jury (unless the jury is waived by the defendant) hears evidence concerning the circumstances of the crime and the criminal before making a recommendation as to the sentence. In reaching a sentence recommendation, the jury considers any mitigating circumstances and aggravating circumstances which it

2. The records in the following cases included specific findings on the mitigating circumstances submitted to the jury:

State v. Hamlette, 302 N.C. 490, 276 S.E. 2d 388 (1981); *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981); *State v. Oliver and Moore*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980); *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979); *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979).

finds to exist. Georgia law does not enumerate what circumstances constitute mitigating factors but, instead, allows the jury to determine whether any facts proved at the sentencing hearing mitigate against imposition of the death penalty, limited only by the requirement that the mitigating circumstance be "authorized by law." Ga. Code Ann. § 27-2534.1 (1978). Furthermore, the trial court in its charge to the jury need not single out specific mitigating circumstances. *Spivey v. State*, 241 Ga. 477, 246 S.E. 2d 288, *cert. denied*, 439 U.S. 1039 (1978); *Potts v. State*, 241 Ga. 67, 243 S.E. 2d 510 (1978). With regard to mitigating circumstances, it is enough that the jury be told to "consider all evidence submitted in both phases of the trial in arriving at your verdict, including any and all evidence of mitigating circumstances." *Collier v. State*, 244 Ga. 553, 568-69, 261 S.E. 2d 364, 376 (1979), *cert. denied*, 445 U.S. 946 (1980). This is so even though aggravating circumstances must be submitted to the jury in writing. *Id.* Like the North Carolina statute, the Georgia statute requires the jury to return specific findings only as to the aggravating circumstances submitted. Ga. Code Ann. § 27-2534.1(c).

On appeal, the Georgia Supreme Court is required to review the sentencing procedure to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Ga. Code Ann. § 27-2537(c) (1978). Thus, because the Georgia statute requires specific findings only on aggravating circumstances, appellate review of the above-listed issues is limited to a consideration of the facts of the crime and the aggravating circumstances found by the jury.

As stated above, the United States Supreme Court has examined the Georgia procedure for imposition of the death penalty

and found it to be constitutional. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859. Our statutory scheme is strikingly similar to Georgia's, in that our sentencing review is limited to a consideration of the circumstances of the crime and the aggravating circumstances found by the jury. Georgia's scheme has been fully reviewed by the United States Supreme Court and has been declared constitutional; our statute is likewise constitutional. It follows, then, that there exists no constitutional requirement of specific findings on mitigating circumstances and that failure of the trial court to instruct the jury to make specific findings was not error.

We recognize that in Florida the jury, acting in a purely advisory role, must return specific findings as to both aggravating and mitigating circumstances regardless of what sentence it recommends and that the trial judge must make specific findings on both in writing before he determines the sentence. Fla. Stat. Ann. § 921.141 (Supp. 1980). This requirement, however, is imposed by the Florida statute and the Florida courts have never considered whether the deletion of the requirement for mitigating circumstances would render its procedure unconstitutional.

The State's contention is that it is unquestioned that our statutes and constitution require the jury specifically to indicate its finding on each aggravating circumstance submitted because such procedure provides an exercise of guided discretion to the jury. However, the State believes that the import of our previous decisions is that the jury should remain absolutely unfettered when it comes to considering mitigating circumstances. A requirement that the jury indicate its finding on each mitigating circumstance so submitted to them might, the State contends, unduly constrain the defendant. Requiring the jury to submit in writing which mitigating factors are found, may, the State argues, inhibit the jury and prevent them from considering "other mitigating circumstances." *See Collier v. State*, 244 Ga. 553, 261 S.E. 2d 364. The State's contentions in this respect are not without some persuasion.

We hold that a proportionality review which considers both the circumstances of the murder, the aggravating circumstances found by the jury and the mitigating circumstances submitted with those in other relevant cases satisfies constitutional re-

quirements and adequately protects against arbitrary, capricious, excessive or disproportionate imposition of the death penalty.

Even were we to accept defendant's argument, we perceive no prejudice to defendant here. Even assuming that the jury accepted all sixteen mitigating circumstances submitted as true,[3] we still could not conclude that the death sentence was arbitrary, excessive or disproportionate. The circumstances of this murder are cruel and gruesome almost beyond belief: a young female, a stranger to the defendant, was stopped while walking home in a residential area while it was still daylight. Almost immediately, defendant began beating her and pulling her around by her hair. He forced her into his car and drove to a deserted field. There, by his own admission, he beat her and cut her with a knife until he gained her submission. Then, he raped her and when he was through, left her to die from her wounds, slowly bleeding to death. The jury found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. We are unable to disturb the jury's finding and to conclude otherwise. In summary, we find no statutory provision to support defendant's contention nor do we find such a constitutional requirement. Even if any authority could be found to support defendant's claim, his assignment would be of no avail because he is unable to demonstrate any prejudice whatsoever.

V.

[13] In addition to the aggravating circumstance submitted to the jury as argued in Section IV A. of this opinion, we have also reviewed the other aggravating circumstances presented to the jury in view of the penalty imposed. We conclude that the trial court properly submitted each of these aggravating circumstances. *See State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510; *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569; *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed. 2d 220 (1981).

G.S. 15A-2000(d) directs this Court to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice or any

3. See note 1 *supra*.

other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286; *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510. This mandate serves as a check against the capricious or random imposition of the death penalty. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). Our review function in this regard is limited to those instances where both phases of the trial of the defendant in a capital case have been found to be free from prejudicial error. *State v. Goodman*, 298 N.C. at 35, 257 S.E. 2d at 590-91. In exercising our role in the statutory scheme, we must be sensitive not only to the mandate of the Legislature, but also to the constitutional dimensions of our review. *See Gregg v. Georgia*, 428 U.S. at 204-206, 96 S.Ct. at 2939-2940, 49 L.Ed. 2d at 892-893; *Proffitt v. Florida*, 428 U.S. at 258-259, 96 S.Ct. at 2969-2970, 49 L.Ed. 2d at 926-927.

We consider the responsibility placed upon us by G.S. 15A-2000(d)(2) to be as serious as any responsibility placed on an appellate court. We have, therefore, carefully reviewed the record in this case along with the briefs and oral arguments presented. We conclude that there is sufficient evidence in the record to support the jury's finding as to the aggravating circumstances which were submitted to it. Moreover, as stated above, we find nothing in the record which indicates that the sentence of death was imposed under the influence of passion, prejudice, and any other arbitrary factor.

The record reveals that this defendant committed the most brutal, vile and vicious crime against Ann Marie Roche. Defendant beat Ms. Roche viciously with a tire tool, repeatedly cut her with a knife, ravaged her body in rape, ran over her battered body with an automobile and left her to bleed to death in a lonely field. Defendant's sadistic and bloodthirsty crimes committed against this victim compel the conclusion that the sentence of death is not disproportionate or excessive, considering both the crime and the defendant. We, therefore, decline to exercise our discretion to set aside the death sentence imposed.

In all phases of the trial below, we find

No error.

Justice EXUM concurring in part and dissenting in part.

I concur in the result reached by the majority on the guilt phase of this case. Being of the opinion, however, that it was prejudicial error for the trial court to permit the jury to return its recommendation for a sentence of death without specifying which of the mitigating circumstances it found to exist, I vote to remand the case for a new sentencing hearing. This practice violates G.S. 15A-2000 and seriously prejudices the defendant not only at trial but also on appeal when this Court is required to determine whether his capital sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," or whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A-2000(d)(2).

Properly read G.S. 15A-2000 requires the jury to indicate its findings as to each mitigating circumstance submitted to it. Although the statute does not expressly and specifically so require, when the statute is read contextually, it becomes clear that the legislature intended that the jury specify both the aggravating and mitigating circumstances which it finds to exist in a capital trial. It is our duty to construe G.S. 15A-2000 so that the result comports with the overall design and purpose of the statutory scheme even though the construction may go somewhat beyond the express language of the statute itself. *See, e.g., State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). We said in *State v. Johnson, supra*, 298 N.C. at 56, 257 S.E. 2d at 606, with reference to G.S. 15A-2000:

> "We must *construe* important provisions of the statute. The first maxim of statutory construction is to ascertain the intent of the legislature. To do this this Court should consider the statute as a whole, the spirit of the statute, the evils it was designed to remedy, and what the statute seeks to accomplish." (Emphasis original.)

Section (b) of the statute requires, first, that in all capital cases:

"[T]he judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, *and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.*

"After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life." (Emphasis supplied.)

Section (c) provides:

"(c) Findings in Support of Sentence of Death.—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:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found." (Emphasis supplied.)

Section (e) then lists the available aggravating circumstances, and section (f) suggests a number of mitigating circumstances which the jury may consider but to which it is not limited because of the open-ended language found in section (f)(9).

The statute thus requires that "a written list of issues relating to" the aggravating and mitigating circumstances be submitted to the jury. The jury, before it may recommend a sentence of death, must specify in writing which aggravating circumstances it finds beyond a reasonable doubt; that these circumstances are sufficiently substantial to call for the imposition of the death penalty, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. Thus, as we noted in *State v. Johnson, supra*, 298 N.C. 47, 257 S.E. 2d 597, the statutory process is, as it must be, "directed toward the jury's having a full understanding of both the relevant aggravating and mitigating factors and the necessity of balancing them against each other in determining whether to impose the death penalty." *Id.* at 63, 257 S.E. 2d at 610.

Since the mitigating circumstances are required to be submitted, like the aggravating circumstances, to the jury in the form of "written . . . issues" and the jury is required to find whether "sufficient" aggravating and "sufficient" mitigating circumstances exist and since the jury is further required to show in writing which of the aggravating circumstances it finds, the conclusion is inescapable that the legislature intended the jury should also be required to show in writing which of the mitigating circumstances it finds to exist. What other purpose would there be for submitting the mitigating circumstances to the jury on a written list? To require both the mitigating and aggravating circumstances to be submitted in the form of "written . . . issues" clearly imports a legislative intent that the jury consider and answer them as such. The very term "Issues" as applied to a trial generally refers to factual or legal questions *which must be answered* in order to resolve the dispute. If the issues are factual they are resolved by the trier of fact. "An 'issue' is a disputed point or question . . . upon which [parties to an action] are desirous of obtaining either decision of court on question of law or of court or jury on question of fact." Black's Law Dictionary (5th ed. 1979).

To require the jury to indicate in writing the mitigating circumstances it finds to exist has been the practice followed by our

trial judges in every case tried under the new death penalty statute which has been determined by this Court and in which the jury recommended death except for the instant case; *State v. Taylor*, decided this day and in which I also dissent in part; and *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 388 (1981).[1] The cases are: *State v. Irwin*, No. 26, Fall Term 1981, presently pending in the Court; *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214 (1981); *State v. Silhan, supra*, 302 N.C. 223, 275 S.E. 2d 450; *State v. Oliver and Moore*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, --- U.S. ---, 101 S.Ct. 1731, 68 L.Ed. 2d 220 (1981); *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980); *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979); *State v. Cherry, supra*, 298 N.C. 86, 257 S.E. 2d 551, *cert. denied*, 446 U.S. 941; *State v. Johnson, supra*, 298 N.C. 47, 257 S.E. 2d 597; *State v. Goodman, supra*, 298 N.C. 1, 257 S.E. 2d 569; *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979). Presumably our trial judges in these cases were following the statutory requirements as they understood them to be. This is a strong indicator that the statute should be interpreted to accord with the practice which has evolved pursuant to its provisions particularly when such an interpretation is the more reasonable one when the statute is considered as a whole.

Furthermore this Court has determined that the defendant must prove each mitigating circumstance which he proffers by the greater weight of the evidence and that upon his timely request he is entitled to a peremptory instruction in his favor where "all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist." *State v. Johnson, supra*, 298 N.C. at 76, 257 S.E. 2d at 618. Surely this holding contemplates a statute which requires not only that a written list of mitigating circumstances be submitted, but that the jury indicate on the list its findings as to each such circumstance submitted.

1. In *Hamlette*, however, no specific mitigating factors were proffered. Only the catchall section (f)(9) was used and the jury answered it "none."

Requiring the jury to specify in writing the aggravating, but not the mitigating, circumstances which it finds to exist not only violates G.S. 15A-2000, but it also prejudices the defendant at the sentencing hearing. It encourages the jury to think that the mitigating circumstances are less worthy of consideration than the aggravating circumstances. Under this practice the jury is not required, as it should be, to focus its full attention on each submitted mitigating circumstance individually in order to determine whether it exists. Yet this kind of determination is necessarily prerequisite to the jury's determination whether the mitigating circumstances "are insufficient to outweigh the aggravating circumstances." The danger in not requiring the jury to specify its findings regarding the individual mitigating circumstances is that the jury will not, because it thinks it need not, decide which mitigating circumstances it believes do in fact exist, but will simply determine amorphously that whatever the mitigating circumstances may be, they do not outweigh the aggravating circumstances. This kind of determination fails to give a defendant the benefit of a particularized consideration of each circumstance which might militate against putting him to death.

Such a determination probably violates a capital defendant's constitutional right to "individualized consideration" as that concept was expounded in *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (Burger, C.J.; plurality opinion):

> "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.
>
> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose

> death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the 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." (Emphasis original.)

Under our statutory scheme permitting the jury to return a recommendation for death without requiring it to specify which mitigating circumstances it finds to exist so dilutes the jury's constitutional duty to consider, in the words of *Lockett*, "any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death" and to give them "independent mitigating weight" that it skirts dangerously close to violating these constitutional requirements.

The majority relies on *Gregg v. Georgia*, 428 U.S. 153 (1976) to sustain its interpretation of our statute against constitutional attack. I believe the reliance is misplaced. Our statutory scheme for imposing the death penalty and that of Georgia's are quite different. Our statute not only suggests a list of mitigating circumstances which might be proffered by the defendant but it requires that the list be submitted to the jury in writing along with a written list of the aggravating circumstances. The Georgia statute permits the jury to consider any mitigating factor but none of these factors are enumerated, specified, or otherwise suggested to the jury. Ga. Code Ann. § 27-2534.1. Under our statute, as I have noted, the jury is required to balance carefully various *enumerated* mitigating circumstances with various *enumerated* aggravating circumstances submitted in the form of written issues in determining whether to recommend a sentence of death or life imprisonment. Under Georgia law the jury "is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court . . . but it must find a *statutory* aggravating circumstance before recommending a sentence of death." *Gregg v. Georgia, supra*, 428 at 197. (Emphasis original.) Indeed, in Georgia, the jury may return a death sentence upon finding one or more aggravating circumstances, no

matter how it regards the mitigating circumstances.[2] In contrast, under our statute the jury may return a death sentence recommendation only if it finds: (1) the existence of one or more aggravating circumstances; (2) that the aggravating circumstance(s) found by it are sufficiently substantial to call for the imposition of the death penalty; and (3) that *the mitigating circumstances are insufficient to outweigh the aggravating circumstances.* The clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances.

Under our statute the jury's sentence determination is far more carefully channeled. The entire thrust of our statute is directed toward insuring that the jury fully understand *both* the aggravating *and* mitigating circumstances so that it may carefully balance them against each other in arriving at its sentence determination. *State v. Johnson, supra,* 298 N.C. 47, 257 S.E. 2d 597. Thus the existence or non-existence of mitigating circumstances looms far more crucial to the jury's ultimate determination under our statute than it does under Georgia's. For this reason the majority's conclusion that our statute does not require the jury to answer specifically the written issues relating to mitigating factors but only those relating to aggravating factors may well render the statute violative of the constitutionally required individualized consideration in a capital case even though Georgia's procedure was sustained in *Gregg.* For the jury here is given both lists of aggravating and mitigating issues, in writing, told to answer the issues relating to aggravating factors in writing, and then told to make its life or death decision on the basis of what is essentially a careful balancing of the aggravating against the mitigating circumstances. Yet at the same time the jury is told that it really should not answer in writing the individual issues relating to mitigating circumstances. This procedure is bound to diminish in the jury's mind the importance of its determination with regard to each mitigating factor submitted, a determination which, under our statute, is crucial to its ultimate decision. It

2. Ga. Code Ann. § 27-2534.1. The judge or jury is required simply "to consider any mitigating circumstances." *Id.*

makes it less likely, and I believe unconstitutionally so, that the jury will find the mitigating circumstances sufficient to outweigh the aggravating. Indeed, it makes it less likely that the ultimate sentence determination will be based on that kind of individualized determination that our statute contemplates and the constitution requires.

Furthermore, not requiring the jury to specify which mitigating circumstances it finds to exist prejudices the defendant's ability to obtain that review of his sentence required by G.S. 15A-2000(d)(2), sometimes referred to as our proportionality review, unless the Court is willing to sustain the sentence upon the assumption that the jury answered all mitigating circumstances[3] submitted to it in favor of the defendant. The majority here is apparently willing to sustain this sentence even after making that assumption. I could not vote to sustain the death sentence if the jury had answered all mitigating circumstances in defendant's favor. If this had happened, I, for reasons hereinafter stated, would vote to remand for the imposition of a sentence of life imprisonment, although I, like the majority, am repulsed by the gruesome circumstances of defendant's crimes. Since I cannot on this record know how the jury answered these issues, I must, for this additional reason, vote to remand for a new sentencing hearing at which the jury would be directed to give its answers to these issues.

The statute mandates that we consider whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime *and the defendant*." G.S. 15A-2000(d)(2). (Emphasis supplied.) Obviously the statute contemplates that we compare not only the circumstances under which the crime was committed but that we also look to the nature, character, and background of the defendant committing it. I have already noted the stress which the United States Supreme Court in *Lockett v. Ohio, supra*, 438 U.S. 586, placed on the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual" and "the need for individualized consideration as a constitutional requirement in imposing the death sentence." Generally the mitigating circumstances proffered by a defendant in a capital case will per-

3. These circumstances are listed in the majority opinion at n. 1.

tain to his individual character, personal history, mental and emotional stability, and background; while the aggravating circumstances generally relate to the circumstances of the crime itself. We cannot, therefore, determine whether the sentence of death in any particular case is excessive or disproportionate when compared with similar cases "considering both the crime and the defendant" unless we know both the aggravating and the mitigating circumstances found by the jury to exist. This is particularly true with two of the mitigating circumstances submitted in this case, *i.e.*, that the murder was committed while the defendant "was under the influence of mental or emotional disturbance" and that the capacity of the defendant "to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." G.S. 15A-2000(f)(2) and (6).

An examination of capital cases so far determined by this Court reveal that jury determinations with regard to the existence of these two mitigating circumstances is perhaps the most crucial factor in the jury's ultimate recommendation. In every case in which the jury rejected both of these circumstances, the jury has returned a death sentence recommendation. *Detter, Barfield, Martin, Cherry* and *Irvin*. In the five cases in which the jury considered only one of these mitigating circumstances and rejected it, the jury recommended death in three, *Jones, Goodman*, and *Small*, and life in two. *Crews* and *Atkinson*.[4] On the other hand, of the eleven cases in which either or both of these mitigating circumstances were submitted and answered affirmatively by the jury, *Turpin, Johnson* I, *Spaulding, Poole, Johnson* II, *Taylor, Ferdinando, Myers, King, Adcox*, and *Hutchins*,[5] the jury returned a recommendation for life imprisonment in all but

4. All the listed cases are cited previously except *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979); *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979).

5. All the listed cases are cited previously except *State v. Adcox*, 303 N.C. 133, 277 S.E. 2d 398 (1981); *State v. King*, 301 N.C. 186, 270 S.E. 2d 98 (1980); *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Ferdinando*, 298 N.C. 737, 260 S.E. 2d 423 (1979); *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979); *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979); and *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979) (also reviewing defendant Turpin's trial).

In *State v. Crawford*, 301 N.C. 212, 270 S.E. 2d 102 (1980), the two mitigating factors were not submitted, but the jury nevertheless found that "the financial and emotional burdens and hardships created by his children" were a mitigating circumstance; and it recommended life imprisonment.

four cases, *Johnson* I, *Spaulding*, *Johnson* II and *Hutchins*. Of these four, however, *Johnson* I and *Johnson* II were remanded for a new sentencing hearing because of improper instructions on the diminished capacity circumstance. At the new sentencing hearings in both cases, at which presumably appropriate instructions were given, the juries returned a life imprisonment recommendation. Furthermore *Spaulding* was remanded for a new trial for errors committed in the guilt phase. At Spaulding's retrial life imprisonment was imposed because the jury was unable to reach a unanimous verdict. Consequently of the eleven cases in which either or both of these mitigating circumstances were found in defendant's favor, only one of the defendants, Hutchins, received a death sentence which was ultimately affirmed by this Court. In Silhan's first trial, *State v. Silhan*, *supra*, 302 N.C. 223, 275 S.E. 2d 450, neither of these mitigating circumstances was submitted to the jury and the jury recommended the death sentence. On retrial, however, both circumstances were submitted. The jury rejected the impaired capacity circumstance and found the emotional disturbance circumstance to exist. The jury then being unable to agree, the judge as required by G.S. 15A-2000(b) imposed a sentence of life imprisonment.[6]

This analysis demonstrates that juries in North Carolina almost never recommend the death penalty after they determine that at the time of the crime the defendant was either under the influence of mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct and to conform his conduct to law was impaired. Likewise this Court should be slow to affirm a death sentence in which these mitigating circumstances are present. The law's humanity would seem to dictate that rarely if ever should death be the appropriate punishment for a defendant who kills under the influence of a mental or emotional disturbance and whose capacity to appreciate the wrongness of his act and to conform his conduct to the requirements of law is impaired. Punished he should be. But execution of a defendant whose crime is the product of a mentally and emotionally defective personality and who suffers from an incapacity to con-

6. *State v. Silhan*, No. 79-CRS-1943, 81-17-259 (Columbus Superior Court). With respect to all the North Carolina capital cases discussed in this dissent, information not found in the opinions of this Court may be found in the records on appeal or from the appropriate superior court clerks.

trol his conduct is excessively vindictive. It marks society itself with the same kind of unnecessary barbarity which it claims to be punishing in the defendant. The death penalty, if we are to have it at all, should be reserved for first degree murders which are the products of the meanness of mature, calculating, fully responsible adults.

John Rook, *if* the jury answered all the mitigating circumstances in his favor, would not be that kind of defendant. His evidence presented at the sentencing phase included the testimony of family members and two psychiatrists. Rook, age 21 at the time of the offense, was the product of an abnormally deprived, if not depraved, childhood. Both parents were alcoholics. His father began to give him alcoholic beverages at the early age of three years because he enjoyed watching him become intoxicated. His father regularly and without provocation required Rook to undress and submit to severe beatings. Early in his life Rook began to use alcohol on a regular basis and later became a regular user of a multitude of various illegal drugs such as cocaine, marijuana, and speed. Rook spent much of his early teenage years in juvenile detention facilities, but his problems stemmed from his addiction to alcohol and drugs. When he was not under the influence of these substances he was a loving and affectionate husband and brother. On the date of the offense in question Rook was under the influence of both alcohol and drugs. According to the psychiatrists who testified he was under the influence of a mental and emotional disturbance at the time of the crime and was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. He expressed remorse for his actions to both psychiatrists who examined him and he ultimately cooperated fully with investigators after acknowledging to them that he needed help.

This evidence formed the basis for most of the mitigating circumstances submitted to the jury for its determination. If we assume that the jury answered these mitigating circumstances in defendant's favor, it accepted this evidence as true.

Only three aggravating circumstances were submitted to the jury. Other than the circumstance that the murder was especially heinous, the only other aggravating circumstances were the rape and the kidnapping of the murder victim herself. But if the jury

answered the mitigating circumstances in defendant's favor, these crimes, like the murder, were the products of defendant's mental and emotional disturbance and his diminished capacity to appreciate their criminality and to conform his conduct to the requirements of law. If defendant's evidence is believed the whole awful incident is, really, attributable to the tragic personality defects traceable to a depraved childhood of a young, immature, mental defective spurred on by the influence of alcohol and drugs.

Of the capital cases so far determined by this Court, then, Rook would be the only defendant other than Spaulding and Hutchins for whom the jury after answering upon proper instructions the emotional disturbance or diminished capacity issue in defendant's favor also recommended death. As earlier noted, on Spaulding's second trial the jury could not agree on the sentence, and a life sentence was ultimately imposed. Yet Rook, from the standpoint of his background, is far more deserving of mercy than Spaulding or Hutchins. Spaulding was a mature adult who at the time of the murder in question was already serving a life sentence for two prior murders. Records and Briefs, Spring Term 1979, No. 10, p. 127. Hutchins was also a mature adult.[7] He was convicted by the jury of murdering one after the other three law enforcement officers, all of whom were attempting to apprehend him. The killings were apparently the product of Hutchins' blind rage. Although he contended he suffered from paranoid psychosis, only one mitigating circumstance was answered by the jury in Hutchins' favor, *i.e.*, that he was under the influence of a "mental or emotional disturbance." The jury rejected Hutchins' proffered circumstance that his capacity to appreciate the criminality of his act or to conform his conduct to law was diminished. It also concluded that there were no other unspecified mitigating circumstances in his case.

If we assume the jury believed Rook's evidence in mitigation and answered all mitigating circumstances in his favor, he would be the first defendant finally sentenced to die who at the time of the murder was under the influence of a mental and emotional

7. I dissented in Hutchins and voted to give him a new trial on the merits because of an irreconcilable conflict between him and his trial counsel, a conflict which I also believed probably contributed to the jury's ultimate recommendation of death.

disturbance *and* whose capacity to appreciate the criminality of his conduct or to conform his conduct to law was impaired. Considering this, and considering the many other mitigating circumstances submitted in his favor, *e.g.*, his age, depraved childhood, subnormal intelligence, alcoholism and drug addiction, cooperation with investigators, and the fact that this awful incident is totally out of character for him when he is not under the influence of drugs and alcohol, I would have to conclude that the sentence of death recommended by the jury was disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. My vote would then be to remand the case for the imposition of a sentence of life imprisonment.

Since I cannot know how much of defendant's evidence in support of his proffered mitigating circumstances the jury accepted in view of the jury's failure to answer these issues, I vote to remand the case for a new sentencing hearing at which these issues would be answered.

STATE OF NORTH CAROLINA v. NORRIS CARLTON TAYLOR

No. 108

(Filed 3 November 1981)

1. **Indictment and Warrant § 13.1— no constitutional right to bill of particulars stating aggravating circumstances**

The aggravating circumstances enumerated in G.S. 15A-2000(e), upon which the State may rely in seeking appropriate punishment, provide sufficient statutory notice to meet the constitutional requirement of due process; therefore, the trial judge did not abuse his discretion by denying defendant's motion for a bill of particulars stating the aggravating circumstances upon which the State would rely in seeking the death penalty.

2. **Criminal Law § 135.3; Jury § 7.11— "death qualification" questions of prospective jurors proper—no right to separate jury for penalty phase**

Excluding jurors because of their opposition to the death penalty, "death qualification," is proper, and the same jury should hear both the guilt/innocence and the penalty phases of the trial unless the original jury is "unable to convene." G.S. 15A-2000(a)(2).

3. **Criminal Law § 50.2; Jury § 7.11— opinion testimony—not qualified as an expert**

The trial court did not err in failing to allow defendant's witness to testify as to his opinion of the prejudices white jurors unopposed to capital punish-

ment would be likely to harbor against a black criminal defendant as the testimony was quite clearly his own opinion, and thus admissible only if he was qualified as an expert witness by the trial court, and the witness was never offered as an expert or qualified as such.

4. Jury § 5.2— testimony concerning make-up of jury list properly excluded

The court properly sustained the State's objection to a question of the chairman of a county's jury commission asking him how he could explain the fact that 23% of the county's population was black but only 17% of the jury list was black as any answer would have been based on speculation or conjecture.

5. Jury § 5.2— no systematic discrimination in jury pool

Defendant failed to establish a *prima facie* violation of the Sixth Amendment fair cross-section requirement for juries where the disparity in the racial composition of the jury was only 6.3% and the jury pool was compiled as required by G.S. 9-2.

6. Bills of Discovery § 6; Constitutional Law § 30— due process right to discovery at sentencing phase

Defendant's due process right to discover elements of the State's case at the sentencing phase does not exceed such due process right at the guilt/innocence phase of trial. Any constitutional due process right of discovery which defendant might have had was satisfied by the district attorney's providing defendant with his "entire file," with specific notice as to which of the aggravating circumstances the State would rely upon, and with an outline of the evidence the State would present. G.S. Chapter 15A, Article 48.

7. Jury § 6.2— examination of prospective jurors—hypothetical questions

The trial court did not abuse its discretion in refusing to allow defendant to ask questions of prospective jurors concerning the death penalty which were overly broad and thus improper because, as hypotheticals, they were incomplete.

8. Jury § 7.11— refusal of jurors to consider death penalty

Fifteen prospective jurors who responded that they could never consider the death penalty were properly excused for cause.

9. Criminal Law § 168.2— error in instructions to jury pool corrected

Incomplete instructions to the jury pool concerning their duty should the trial reach the sentencing phase were not prejudicial error as correct instructions were given to the jury during the sentencing phase.

10. Criminal Law § 66.1— competency of witnesses' in-court identifications

All three in-court identifications of the defendant by the State's witnesses were competent as two of the three were witnesses to the shooting of one of the victims and watched the defendant under good light conditions at a short distance, and the third witness was a taxi driver who transported the defendant in his cab for about 15 minutes and observed defendant's face for about 3 minutes.

11. Criminal Law § 169.3— inflammatory testimony admitted without objection

When evidence that one of the victims was pregnant at the time she was shot was admitted without objection, the benefit of a later objection was lost.

12. Criminal Law § 34.2— admission of evidence of other crimes harmless error

Testimony about statements made by defendant to a witness about other crimes he had committed and statements made by defendant to police concerning his kidnapping of the witness were improperly admitted; however, given the overwhelming evidence against defendant, it was clear that the error was harmless beyond a reasonable doubt. G.S. 15A-1443.

13. Criminal Law § 82.2— examination of criminal defendant by psychiatrist—no physician-patient privilege

A psychiatrist appointed by the court to determine whether defendant was competent to stand trial, whether there were any mitigating circumstances for defendant, and whether defendant could possibly plead insanity was a witness for the court; therefore, there was no error in allowing the written evaluation of defendant to be released to the district attorney as no physician-patient privilege existed. G.S. 15A-1002(d), as it appeared at the time of trial, vested an implicit power in the trial court to order the report released. G.S. 8-53.

14. Kidnapping § 1.3— vagueness of charge to jury—possible variance between indictment and charge

Where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory. Therefore, where the indictment charged that defendant kidnapped Biles for the purpose (1) of committing armed robbery and assault on him, and (2) to facilitate his flight after committing the felonies of armed robbery and murder in his crimes against Mrs. Murchison, and in charging the jury the trial judge did not specify either purpose expressed in the indictment, there was error in the vagueness of the judge's charge because the jury could have convicted the defendant of kidnapping Biles to facilitate his flight after the armed robbery of *Biles*, a charge not named in the indictment. G.S. 14-39.

15. Homicide § 25.1— felony-murder rule—instruction

In felony murder cases, the law in this State is that premeditation and deliberation are presumed; therefore, an instruction that the intent of the defendant did not matter was not erroneous.

16. Criminal Law § 135.4— admission of testimony refuting mitigating circumstances harmless error

Admission of testimony offered by the State solely to refute mitigating circumstances upon which defendant might later rely was error; however, it was harmless beyond a reasonable doubt as (1) much of the testimony objected to by defendant, in addition to rebutting mitigating circumstances, also was competent as evidence of aggravating circumstances, and (2) a review of the evidence shows that the jury had before it a clear record of what must be described as defendant's unconscionable acts toward many of his victims. G.S. 15A-2000(e)(4), G.S. 15A-2000(f), and G.S. 15A-1443(b).

17. Criminal Law § 66.3— in-court identification—failure to disclose out-of-court procedures—opportunity to test credibility of witnesses

Defendant's argument that he was unable to refute the testimony of two witnesses who made in-court identifications of him because the State did not disclose information concerning the procedures used when these witnesses made out-of-court identifications is without merit since defendant had every opportunity to test the credibility of the witnesses or to call as witnesses the investigating officers during the voir dire hearing held before their testimony was received.

18. Criminal Law § 135.4— sentencing phase—evidence of prior crime admissible

Upon the conviction of first degree murder, evidence that defendant was convicted for the crime of rape in Virginia in 1969 and was sentenced to ten years in prison was admissible at the sentencing phase to support the aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence to the person." G.S. 15A-2000(e)(3).

19. Criminal Law § 135.4— sentencing phase—testimony concerning previous crimes after stipulation of guilt by defendant not error

Both the defendant and the State should be allowed to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation in the sentencing proceeding. Therefore, testimony by a forensic pathologist who performed an autopsy on a victim whom defendant was convicted of murdering in 1978 was properly admitted even though defendant stipulated that he had been found guilty of that murder. G.S. 15A-2000(e)(2).

20. Criminal Law § 85.2— cross-examination of "character" witness—broadened by direct examination

Testimony of defendant's character witness concerning defendant's troubled youth, his being sent to reform school, and his marriage and children moved her testimony beyond the bounds of merely being a character witness and thus expanded the scope of permissible cross-examination. Therefore, questions asked of her by the district attorney concerning particular acts of misconduct by defendant and questions about her possible bias were proper.

21. Criminal Law §§ 63, 169.7— improper admission of testimony cured by subsequent admission of similar evidence

It was error to permit the district attorney to cross-examine defendant's psychiatrist using a report about defendant's competency to stand trial made by a second psychiatrist who did not testify; however, the improper admission of the testimony was cured when substantially the same evidence was later admitted on redirect examination by the defendant.

22. Criminal Law § 135.4— sentencing proceeding—cross-examination of prison warden concerning security

Where defendant offered the testimony of the Deputy Warden at Central Prison concerning security procedures used to manage prisoners for the purpose of assuring the jury that, should they recommend a sentence of life, defendant would not be able to harm any of his fellow inmates, cross-

examination of the witness about a specific murder committed in Central Prison placed before the jury irrelevant evidence of an unrelated crime but did not constitute prejudicial error.

23. Criminal Law § 135.4— sentencing hearing—inadmissibility of affidavits concerning death penalty

The trial court did not err under G.S. 15A-2000(f) by excluding testimony by defense witnesses on the religious, ethical, legal and public policy perspectives of capital punishment as it was totally irrelevant and of no probative value as mitigating evidence in the sentencing phase of defendant's trial.

24. Criminal Law § 135.4— conviction under felony-murder rule—underlying felony not aggravating circumstance

The trial court erred in submitting as one of three aggravating circumstances the question: "Was this murder committed while Norris Carlton Taylor was engaged in the commission of the felony of robbery?" as "when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the the trial the aggravating circumstance concerning the underlying felony." However, the error was harmless beyond a reasonable doubt as overwhelming evidence supporting other statutory aggravating factors convinced the Court that the weighing process in the jury's decision to impose the death penalty was not compromised.

25. Criminal Law § 135.4— murder committed in perpetration of robbery—submission of aggravating circumstance of commission for pecuniary gain

In a felony-murder case in which the underlying felony was robbery, it was not error for the trial court to instruct the jury that they could consider as an aggravating circumstance that the murder was committed for pecuniary gain as this circumstance examines the motive of defendant rather than his acts.

26. Criminal Law § 135.4— sentencing proceeding—instructions on mental or emotional disturbance as mitigating circumstances

The trial court's instructions on the mitigating circumstances found in G.S. 15A-2000(f)(2) and (6), mental or emotional disturbance and impaired capacity of the defendant, were sufficient where the jury was instructed that, in order to find a mitigating circumstance, they must find by a preponderance of the evidence that defendant was "in any way affected or influenced by a mental or emotional disturbance," and the jury could find a second mitigating circumstance if it determined that the defendant "was for any reason less able than a normal person to do what the law requires or to refrain from what the law forbids."

Justice EXUM concurring in part and dissenting in part.

APPEAL by defendant from judgments entered by *Judge Gavin* at the 28 May 1979 Special Criminal Session of Superior Court, NEW HANOVER County. This case was docketed and argued as No. 8, Spring Term 1981.

Upon pleas of not guilty, defendant was tried upon two bills of indictment, proper in form, charging first degree murder and armed robbery (79CRS6425) and aggravated kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious bodily injury (79CRS6426). Defendant was found guilty as charged. For his conviction of first degree murder under the felony murder rule, defendant was sentenced to death. For his conviction of kidnapping, defendant was sentenced to a term of eighty years minimum, eighty years maximum. For his conviction of armed robbery (second count), defendant was sentenced to a term of eighty years minimum, eighty years maximum to begin at the expiration of and run consecutively to the sentence imposed on the count of kidnapping. For his conviction of assault with a deadly weapon with intent to kill inflicting serious bodily injury, defendant was sentenced to a term of twenty years minimum, twenty years maximum to commence at the expiration of and run consecutively to the sentence he received on the count of armed robbery. From the judgments and commitments entered, the defendant appealed. Defendant's motion to bypass the Court of Appeals on the convictions for armed robbery (second count), kidnapping and assault with a deadly weapon with intent to kill inflicting serious bodily injury was allowed 19 November 1980.

Rufus L. Edmisten, Attorney General by Assistant Attorney General Donald W. Stephens and Special Deputy Attorney General Isaac T. Avery III for the State.

Mary Ann Tally, Public Defender, for the defendant.

MEYER, Justice.

This appeal presents sixty-two assignments of error for our review. No meaningful summary statement of these numerous assignments is possible. Each of the assignments susceptible of merit is treated separately. Our conclusion is that defendant is entitled to a new trial on the kidnapping charge. On all other charges, we find no error.

In relevant summary the facts are: On 30 August 1978, Patty Bazemore was accosted by the defendant in Woodland, North Carolina. At gunpoint, he forced her to drive with him, in her automobile, to Fayetteville, where they spent the night in the park. The next day defendant told Bazemore that they would

leave her car and try to obtain another, because defendant was afraid the police would be looking for the Bazemore automobile. Defendant was unsuccessful in his efforts to secure another car, and that night, 31 August 1978, Bazemore and defendant slept on a railroad track. On the morning of 1 September 1978, defendant left Bazemore in a downtown park, warning her not to move, and went to obtain a car.

Clarence Edward Davis testified for the State that he was in the parking lot of the Cardinal Building in Fayetteville on the morning of 1 September 1978. As he watched, he saw a man whom he identified as defendant come out from behind the building, cross a wall and approach a young woman, later identified as Mrs. Murchison, who had just parked her car. Davis testified that the two argued, the defendant apparently wanting her pocketbook and car keys. As Mrs. Murchison turned away, Davis said he heard two gunshots and saw Mrs. Murchison stagger. Defendant fled in Murchison's car, a tan 1976 Buick Electra 225 with two doors, passing within fifteen to twenty feet of Davis.

Defendant then returned to where he had left Bazemore and ordered her into the car. Within five minutes defendant and Bazemore abandoned the car, went to the bus station nearby and took a taxi to Eutaw Shopping Center. Across the street from the shopping center was a Winn Dixie grocery store, and in the parking lot of that store defendant approached Malcolm Biles. Defendant told Biles that he had had car trouble, and Biles offered to help. Once in Biles' car, a 1974 Cadillac Coupe de Ville, defendant brandished a handgun and ordered Biles to drive. After driving for a time, defendant ordered Biles to stop the car. Defendant then locked Biles in the trunk of the car and began driving. Biles became uncomfortable in the trunk and began to make noise by beating on the trunk with the tire iron. Defendant stopped the car, ordered Biles into the back seat, and drove on. A short time later defendant turned off onto a dirt road, forced Biles into the woods and shot him.

Defendant then drove into the town of Woodland, North Carolina, and released Patty Bazemore. As defendant drove out of town, he was observed by Roosevelt Britt, a part-time Woodland police officer. Defendant was captured after a high-speed chase and taken to the Sheriff's Department in Jackson, North Carolina.

Other facts necessary for an understanding of the questions posed on appeal are included in the body of the opinion.

We now consider defendant's assignments of error:

GUILT/INNOCENCE PHASE

I.

[1] Defendant brings forward as his assignment of error number 1 the denial by the trial court of his motion for a bill of particulars stating the aggravating circumstances upon which the State would rely in seeking the death penalty.[1] Defendant made that motion in pretrial proceedings, and renewed it immediately after the jury returned a verdict of guilty of first degree murder. Judge Canady denied the earlier motion, and upon the later motion Judge Gavin found that the State had fully complied with the statutory discovery procedures and therefore also denied the motion.

By his brief, defendant argues that in a trial for first degree murder where the State seeks the death penalty, the defendant is entitled as a matter of constitutional right, guaranteed by the sixth, eighth and fourteenth amendments to the United States Constitution, to notice, prior to trial, of any and all aggravating circumstances upon which the State intends to rely in seeking the death penalty. Failure to require the State to give such particularized notice, says defendant, violates due process requirements that a defendant be fully apprised of the charge against him, and also interferes with defendant's right to effective assistance of counsel.

Defendant's first contention arises from his characterization of this State's capital punishment law as "an enhanced punishment law." The defendant contends that the presumed punishment for first degree murder in North Carolina is life imprisonment. Therefore, if the State intends to rely on a statute providing for enhanced punishment, *i.e.* death, such a statute

1. Defendant's assignment of error number 1 is very similar to assignment number 33, which charges error in the trial court's denial of defendant's oral motion to disclose aggravating circumstances and information relevant to sentencing, made by defendant immediately prior to the penalty phase. Accordingly, these two assignments are treated together.

should, as a matter of constitutional law, require separate pleadings with respect to the enhancing circumstance. The practical effect of agreeing with defendant's argument would be paramount to saying that by proceeding on a theory of aggravation the State has in effect brought a separate charge against defendant, requiring separate pleadings. We decline to reach such a result.

To begin with, we do not find defendant's characterization of life imprisonment as the "presumed" punishment to be accurate. It is true that life imprisonment is, under G.S. 15A-2000, the minimum punishment, but no sentence can be imposed until after a separate sentencing phase. The factors enumerated in G.S. 15A-2000 are not elements of the offense but rather are guidelines defining the parameters of the jury's discretion in determining punishment. The only aggravating circumstances upon which the State may rely are enumerated in G.S. 15A-2000(e). Consistent with the holding in *Spinkellink v. Wainwright*, 578 F. 2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed. 2d 796 (1979), we hold that this statutory notice is sufficient to meet the constitutional requirement of due process. *See Clark v. State*, 379 So. 2d 97 (Fla. 1979), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed. 2d 371 (1981); *Bowden v. Zant*, 244 Ga. 260, 260 S.E. 2d 465 (1979); *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1068, 62 L.Ed. 2d 788 (1980); *Houston v. The State*, 593 S.W. 2d 267 (Tenn. 1980); *State v. Berry*, 592 S.W. 2d 553 (Tenn. 1980).

Defendant is not entitled to notice of the evidence which the State intends to offer in support of and to prove aggravating circumstances. Although some other states which also leave the question of punishment to the jury do require the prosecution to provide evidence to defendant of the aggravating circumstances the State will pursue, such a requirement is purely statutory. *See e.g.* Delaware Code Ann. 11 § 4209(c)(1) (1979); Georgia Code Ann. § 27-2503 (1978); Maryland Code Ann. Art. 27, § 412(b) (Cum. Supp. 1978). Our legislature has not enacted such a requirement. G.S. 15A-925 provides that a defendant may move for a bill of particulars requesting items of factual information which "pertain to the charge" and without which "the defendant cannot adequately prepare or conduct his defense . . . ." The indictments were sufficient to provide defendant with a factual basis necessary to

understand the State's cases against him. Defendant was adequately apprised of the charge by the State and was provided with evidence necessary to the preparation of his defense. A motion for a bill of particulars is addressed to the sound discretion of the trial court and not subject to review except for palpable and gross abuse of discretion. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981); *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). We find no abuse of that discretion here. Accordingly, this assignment of error is overruled.

II.

Defendant next contends in assignment of error number 2 that the trial court erred in allowing an assistant district attorney to testify as to a material fact during a hearing on a motion to suppress statements of the defendant. Defense counsel argues that this testimony violated professional ethical standards because the assistant district attorney is in effect a member of the "law firm" prosecuting this defendant. This argument was considered and dismissed as meritless by this Court in a previous opinion involving this same defendant. *See State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980). Once again we deem this argument completely without merit.

III.

Defendant's assignment of error number 3 charges error in the denial by the trial court of defendant's motion to suppress certain statements made by defendant. The record before us shows that at the time defendant was arrested, he was ordered at gunpoint to lay on the ground as he was handcuffed and read his *Miranda* rights. A hostile crowd began to gather. After defendant was read his rights and defendant acknowledged that he understood them, Chief Sandlin, the arresting officer, asked where Miss Bazemore and Malcolm Biles were. Defendant answered that he had released Miss Bazemore unharmed and had shot Mr. Biles on Highway No. 97. Defendant now complains that his statements to Chief Sandlin were not voluntarily made since he was being held at gunpoint and was surrounded by a hostile crowd. This contention, and defendant's companion objections to the admissibility of statements later made by defendant to police investigators were treated in our opinion in *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980). We deem it unnecessary to

retread ground so ably covered by Justice Carlton in that opinion. Accordingly, this assignment is overruled.

IV.

[2] By assignments of error numbers 4 and 5, defendant complains first of the trial court's denial of his motion for separate juries in the guilt/innocence and penalty phases of the trial; and second, of the court's denial of his motion challenging "death qualification" *voir dire* questions of the jury by the district attorney.

In essence, defendant contends that allowing the State to exclude jurors from the guilt/innocence phase of trial because of their opposition to the death penalty which might be imposed in the sentencing phase is unconstitutional. Such a procedure, says defendant, eliminates a substantial group of jurors who would be able to determine guilt or innocence at the first phase of trial. Defendant argues that empirical evidence shows that this exclusion produces a jury more punitive in legal matters and less tolerant of minorities.

To begin with, this Court has previously held that so-called "death qualification" of jurors is proper. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979). In *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980), this Court found unpersuasive the argument that "death qualification" of jurors during the guilt phase of trial produces a "prosecution prone jury skewed against Negroes and the lower economic classes." *Id.* at 137, 261 S.E. 2d at 810. There Justice Brock cited *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776, *rehearing denied*, 393 U.S. 898 (1968), wherein the U.S. Supreme Court said that it could not "conclude either on the basis of the record . . . or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." 391 U.S. at 517, 518, 88 S.Ct. at 1774, 1775, 20 L.Ed. 2d at 782. So it is here. *See State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981).

The record before us contains the testimony of a witness, Dr. James Luginbuhl, that exclusion of those opposed to the death penalty results in the systematic exclusion of black jurors. Dr. Luginbuhl's testimony consisted of his own observations and the

results of a survey he conducted of 186 persons in New Hanover County prior to this trial. That survey, according to the record, was completed in two days. There is no evidence as to how those surveyed were chosen, or what the make-up of the survey pool was in terms of age, race, education or economic position. As apparently was the case with the trial court, we attach little weight to Dr. Luginbuhl's personal conclusion that blacks are systematically excluded by "death qualification" jury selection.

Under Article 100 of Chapter 15A of the General Statutes of North Carolina, it is intended that the same jury should hear both phases of the trial unless the original jury is "unable to reconvene." G.S. 15A-2000(a)(2); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979). This assignment is overruled.

V.

[3] Defendant next assigns as error (assignment of error number 6) the trial court's failure to allow defendant's witness, Dr. Luginbuhl, to testify during the evidentiary hearing on defendant's motion to challenge the composition of the *petit* jury as to his opinion of the prejudices white jurors not opposed to capital punishment would be likely to harbor against a black criminal defendant. We affirm the action of the trial court.

We note at the outset that the witness was never offered as an expert, nor was he qualified as such. By his own testimony, we surmise that he was prepared to offer an opinion on the complex question raised by this assignment based on his personal experience in observing an unspecified number of capital trials and on the survey discussed in Number IV above. Dr. Luginbuhl's testimony was quite clearly his own opinion, and thus admissible only if he was qualified as an expert witness by the trial court. The competency of a witness to testify as an expert is a question addressed to the discretion of the trial court and is thus not disturbed on appeal unless there is an abuse of that discretion. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). We find no error in the exclusion of that testimony because of the failure of the party proffering the witness to qualify him as an expert. *See State v. Peterson*, 225 N.C. 540, 35 S.E. 2d 645 (1945), *overruled on other grounds* in *State v. Hill*, 236 N.C. 704, 73 S.E. 2d 894 (1953).

VI.

[4] Defendant argues in his assignment of error number 7 that reversible error occurred when the trial court failed to compel the chairman of the New Hanover County Jury Commission to answer for the record how he would explain alleged under-representation of blacks in jury pools in that county. We disagree.

Defendant had earlier offered evidence that, according to the 1970 census, blacks comprised 22.5% of the total population of New Hanover County. Further evidence was offered by defendant to the effect that currently 23.5% of the total population available for jury service in the County was black, but that, despite this, a sample of the jury pool conducted by defendant's witness James M. O'Reilly showed that only 17.3% of the available persons in the jury pool were black.

Mr. C. P. Farrell, Chairman of the New Hanover County Jury Commission, presented evidence for the State that the jury pool was determined by choosing every second name from the voter registration list and every third name from the county tax list. The Chairman further stated that those lists did not indicate the race of the individuals, nor does the Commission make any effort to determine race.

During cross-examination of this witness, the following exchange occurred:

> Q. How can you explain the fact that although the population of New Hanover County is made up of 23 percent black people, the jury lists that you have come up with is constituted of only 17 percent black people?
>
> MR. GRANNIS: Objection.
>
> COURT: Sustained.
>
> Exception.
>
> MRS. TALLY: I would like to make an offer of proof.
>
> COURT: The objection is sustained.

Defendant contends the court committed reversible error by sustaining the State's objection and by not allowing defendant to make an offer of proof. We do not agree.

The objection was properly sustained because any answer this witness could have given would have been based on speculation and conjecture. For the same reason, the trial judge acted within his authority in not allowing defendant to include the testimony in the record because it is clear that the testimony would not have been admissible on any grounds. Such matters are properly left, in the first instance, to the discretion of the trial judge. *See generally* 9 Strong's N.C. Index 3d, Trial § 9. Mr. Farrell had earlier stated that, in his opinion, the jury pool list reflected a fair cross-section of the community. It should be clear then that any statement he might make as to the alleged underrepresentation of blacks could only be based on conjecture. This assignment is overruled.

VII.

[5] Defendant next assigns as error (assignment number 8) the failure of the trial court to quash the *petit* jury *venire* on the basis of alleged unconstitutional systematic exclusion of blacks. Similar contentions have been before this Court in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980) and *State v. Price*, 301 N.C. 437, 272 S.E. 2d 103 (1980).

In *Avery*, as here, evidence for the defendant showed that the Mecklenburg County Jury Commission used only voter registration and tax lists in compiling the jury pool. The evidence further showed that blacks constituted roughly 24% of the total population of eligible jurors in Mecklenburg County, while the jury pool reflected black representation of approximately 15%. This Court held that the mere showing of a disparity of 9% in the racial composition of juries did not, in itself, show unconstitutional discrimination, because it did not prove that there was a systematic exclusion of black jurors. "[T]he fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause." 299 N.C. at 130, 261 S.E. 2d at 806, *quoting Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed. 2d 597, 607 (1976).

In order for defendant to establish the necessary *prima facie* violation of the sixth amendment's fair cross-section requirement, this Court in *Avery*, relying on *Duren v. Missouri*, 439 U.S. 357,

99 S.Ct. 664, 58 L.Ed. 579 (1979), said that the defendant must show: (1) that the group alleged to be excluded is a distinctive group; (2) that the representation of the group within the *venire* is not fair and reasonable with respect to the number of such persons in the community; (3) that the underrepresentation is due to systematic exclusion in the jury selection process. 299 N.C. at 134, 261 S.E. 2d at 808.

Applying that standard to this case, we first note that the disparity here is only 6.3%, whereas in *Avery* it was 9%. Thus, we cannot say that the proportion of blacks is not fair and reasonable. Furthermore, the testimony of Chairman Farrell clearly shows that the jury pool was compiled as required by G.S. 9-2. As a result, we cannot say that the possible underrepresentation which defendant has shown is the product of systematic discrimination. *State v. Price*, 301 N.C. 437, 272 S.E. 2d 103 (1980). This assignment of error is overruled.

VIII.

Defendant's assignment of error number 9, charging error in the trial court's consolidating defendant's several offenses for trial, is also without merit. The record shows that the offenses joined were not "so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant." *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972). We find here a sufficient "transactional connection" between the crimes committed by defendant against Mildred Murchison and against Malcolm Biles, because those crimes were clearly part of a single scheme or plan. *State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979); *see also State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981); *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981).

IX.

[6] Defendant next contends by his assignment number 10 that the trial court erred in deferring action on a motion by defendant, made prior to trial and again after the jury returned a verdict of guilty of first degree murder, to compel the State to disclose information relevant to sentencing. This assignment closely follows No. I above; in essence defendant argues that due process required that at the guilt phase he be notified of specific aggravating circumstances upon which the State would rely in seek-

ing the death penalty in the sentencing phase, and further that he be fully advised of all information relevant to the sentencing phase. It is clear that the State is not required to supply such detailed facts in the guilt/innocence phase of the trial. Thus, defendant urges us to hold in effect that defendant's due process right to discover elements of the State's case at the sentencing phase exceeds such due process right at the guilt/innocence phase of trial, where guilt is determined. This we decline to do.

We have already determined, in No. I above, that defendant had appropriate notice of the aggravating circumstances the State would rely on by virtue of their enumeration in 15A-2000(e). Thus defendant's due process right to know the aggravating circumstances which may be used against him is sufficiently safeguarded. *See Spinkellink v. Wainwright*, 578 F. 2d 582 (5th Cir. 1978), *cert. denied* 440 U.S. 976 (1979). Going beyond that, defendant says that the State should be compelled to disclose the evidence underlying the aggravating circumstances, in order for the defendant to prepare a defense.

The record before us shows that the prosecution had fully satisfied defendant's right to discover evidence as outlined in G.S. Chapter 15A, Article 48. In fact, the district attorney informed the court that he had allowed defendant's attorneys to see his "entire file." This file included a copy of defendant's prior criminal record, statements of witnesses and other relevant information. Most important for our purposes, though, is the fact that the substance of the testimony of witnesses offered at the guilt phase was included in that file. Thus, defense counsel was afforded the opportunity, at a time prior to the sentencing hearing, to ascertain the evidence upon which the State would rely. (Record p. 303).

We further note that prior to the sentencing hearing, the district attorney gave specific notice as to which of the aggravating circumstances the State would rely upon (Record p. 302), and then gave an outline of the evidence the State would present (Record p. 305). Any constitutional due process right of discovery, not otherwise conferred by statute, which defendant might have had was satisfied by the district attorney's providing this evidence at the time of trial. *See State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

X.

[7] Defendant's next assignment of error (number 11) involves two separate questions. First, defendant assigns error to the court's denying defendant the right to question jurors as to whether they felt that the death penalty was "the only appropriate punishment" upon a conviction of first degree murder. As a related question, defendant attempted to ask the jurors whether they could consider a sentence of life imprisonment upon conviction of first degree murder.

Defendant sought to ask some seventeen questions of five different jurors, with the intention of showing that those jurors would automatically vote for the death penalty if defendant was found guilty. Representative of the seventeen questions asked are the following:

> Q. Mr. Warwick, if the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned that verdict guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?
>
> Q. Mr. Warwick, if you had sat on the jury and had returned a verdict of guilty of first degree murder, would you then presume that the penalty should be death?
>
> Q. At the first stage of the trial and because of that you voted guilty for first degree murder, then do you think that you could at that time consider a life sentence or would your feelings about the death penalty be so strong that you couldn't consider a life sentence?
>
> Q. If there was a situation with a robbery and a killing, as you have described, do you think that in that situation that the death penalty would be the appropriate punishment?
>
> Q. What do you feel is the appropriate punishment for someone who deliberately and with premeditation takes the life of another human being?

To begin with, these questions were overly broad and thus improper because, as hypotheticals, they were incomplete. As the district attorney noted, no mention of mitigating or aggravating factors is made. "On the voir dire examination of prospective

jurors, hypothetical questions . . . containing incorrect or inadequate statements of the law are improper and should not be allowed." *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975). Although counsel is allowed wide latitude in examining jurors on *voir dire*, the form of the questions is within the sound discretion of the court. *Id.* at 336, 215 S.E. 2d at 68. We find no abuse of that discretion here.

XI.

[8] Defendant next charges error in the trial court's excusing for cause fifteen prospective jurors. (Assignment number 12). The jurors were excused after they expressed opposition to the death penalty. A close examination of the record belies defendant's contentions that the responses of the jurors that they could never consider the death penalty were not sufficiently unequivocal. As we stated in *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979):

> A prospective juror is properly excused for cause when his answers on voir dire concerning his attitudes toward the death penalty, although equivocal, show when considered contextually that regardless of the evidence he would not vote to convict the defendant if conviction meant the imposition of the death penalty. (Citations omitted).

Id. at 324, 259 S.E. 2d at 526.

There is no merit in this assignment.

XII.

[9] Defendant next charges that the trial court committed reversible error when, during the *voir dire* of prospective jurors, it gave incomplete instructions to the jury pool concerning their duty should the trial reach the sentencing phase. (Assignment number 14). Specifically, Judge Gavin, in questioning the jury before they were impaneled, after explaining aggravating and mitigating circumstances, stated that should the jury find the aggravating circumstances outweighed the mitigating circumstances, then the jury should vote to impose the death sentence. Omitted at that time was any instruction that the jurors must also determine that the aggravating circumstances are sufficiently substantial to warrant imposition of the death penalty.

We do not find this omission prejudicial. The instructions were given solely so that prospective jurors could be asked if they could impartially consider aggravating and mitigating circumstances and properly apply the law. Defense counsel did not ask for a more complete instruction. More importantly, the record discloses that the jury *was* properly instructed during the sentencing phase. In light of the length of the trial and the fact that, at the appropriate time, correct instructions were given the jury, we find this assignment to be without merit.

XIII.

By his next five assignments (numbered 15 through 19), defendant questions the refusal of the trial court to excuse five jurors for cause. Defendant sought to excuse each of the five jurors because of bias or because each juror seemed likely to vote for the death penalty if defendant were found guilty of first degree murder. We have carefully reviewed the record and in each instance find no error warranting reversal. The trial judge is vested with broad discretionary powers in determining the competency of jurors, and that discretion will not ordinarily be disturbed on appeal. *State v. Lee*, 292 N.C. 617, 234 S.E. 2d 574 (1977); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698 (1972). These assignments are overruled.

XIV.

[10] By his assignment of error number 20, defendant challenges the admission into evidence, over defense objections, of the in-court identification of the defendant by State's witnesses Davis, Gerald and Rowland.

Clarence Davis was a witness to the shooting of Mrs. Murchison in the parking lot of the Social Security building where she worked. Paul Gerald was Mrs. Murchison's superior at work. The record clearly shows that both men had an adequate opportunity to observe the defendant either as he approached Mrs. Murchison, as he argued with her, or as defendant drove by in Mrs. Murchison's car after shooting her. Defendant argues that the witnesses did not have sufficient opportunity to observe the defendant, and thus, under *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967), the testimony should have been excluded.

This argument is clearly specious when set against the factual record in *Miller*. There this Court found "inherently incredible" identification testimony offered by a witness who did not know the person identified and saw him only briefly, at night, from a distance of 268 feet. In contrast, these witnesses saw the defendant for a much longer time than the witness in *Miller*, and much closer to defendant. Witness Davis saw defendant approach Mrs. Murchison, heard them argue, heard two shots, and then watched as defendant drove past him out of the parking lot, at a distance of about 15 to 20 feet. Davis testified that the weather was fair and the light conditions good. Paul Gerald, looking out of the back door of the Cardinal Building, first saw defendant sitting in the Murchison car, at a distance of about 40 feet. As defendant drove away, the car passed within 5 or 6 feet of where Mr. Gerald was standing. Although Mr. Gerald closed the door of the building as defendant drove by, he testified that he saw the defendant's face for "about 15 or 20 seconds." Any question as to the reliability of this testimony goes to its weight and not its admissibility, since the testimony was clearly admissible. *Cf. State v. Davis*, 297 N.C. 566, 256 S.E. 2d 184 (1979) (witness's identification based on 5-second observation of defendant a few feet away held admissible.) This assignment is overruled.

We likewise find no merit in defendant's contention that witness Roland's identification of defendant was "unreliable." Roland was the taxi driver who picked up defendant and Ms. Bazemore at the Greyhound Bus Station. He testified that the defendant was in his cab for about 15 minutes, and that he observed defendant's face for about 3 minutes. The following day Roland saw a picture of defendant in the Fayetteville newspaper. Based on Roland's *voir dire* examination, the trial court held Roland's identification testimony admissible. As there were sufficient facts to support Judge Gavin's conclusions of law, they are binding on appeal. Accordingly, this assignment is overruled.

XV.

[11] Defendant argues that testimony by a medical examiner that Mrs. Murchison was pregnant at the time she was shot was inflammatory and prejudicial, and thus should have been excluded. (Assignment number 21). The record shows that similar testimony was earlier elicited from Mr. Murchison without a

defense objection. In this jurisdiction, when evidence is admitted without objection and later admitted over objection, the benefit of the objection is lost. *State v. Logner*, 297 N.C. 539, 256 S.E. 2d 166 (1979); *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975); Strong's N.C. Index 3d, Criminal Law § 169.3. So it is here.

XVI.

[12] On direct examination, Patty Bazemore testified that defendant told her he had previously abducted a white girl and shot at her when she tried to run. Defendant assigns error to the admission of this testimony, saying it was irrelevant and prejudicial. (Assignment number 23). Defendant also assigns as error the admission into evidence of statements made by defendant to police wherein defendant described his kidnapping of Ms. Bazemore. (Assignment number 24). These statements were made to police officers during the course of interviews of defendant by police officers at the Northampton County Jail on the evening of defendant's arrrest.

Simply put, defendant's argument is that the prosecution introduced this evidence solely to show the character of the defendant and to show his propensity to crime. If indeed the evidence was offered solely for that purpose, it would violate the rule in this jurisdiction that the State cannot introduce evidence tending to show that the accused has committed another distinct, independent or separate offense. *E.g.*, *State v. Duncan*, 290 N.C. 741, 228 S.E. 2d 237 (1976); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

The State argues that the statements made by defendant concerned a series of acts interwoven one with another so closely that, together, they constitute an overall plan by this defendant to steal cars and to kidnap and rape women. It is the State's contention that under *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980), the statements are therefore admissible. In *State v. Taylor*, the prosecutrix testified about threatening statements made by the defendant to her about crimes he had previously committed. We held the statements were admissible as part of defendant's overall scheme to kidnap and subdue the will of Jewel Taylor.

State v. Taylor does not control here because defendant was not on trial for any crimes he may have committed against Ms.

Bazemore. Our determination in an earlier *Taylor* opinion that defendant's statements were admissible as "part of a common scheme or plan" was only made in reference to defendant's plan to kidnap and rape Jewel Taylor. The State cannot, under that language, introduce evidence of a series of crimes allegedly committed by defendant but for which he is not on trial unless such evidence is admissible under one of the exceptions to the general rule that such evidence is not admissible. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). This evidence does not fit within any of the exceptions. For that reason, we agree with defendant that Patty Bazemore's testimony about statements made to her by defendant about other crimes he had committed and statements made by defendant to police concerning his kidnapping of Ms. Bazemore were improperly admitted.

We do not, however, consider the erroneous admission of this evidence to be prejudicial error. G.S. 15A-1443 provides:

> *Existence and showing of prejudice.*—(a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

Given the overwhelming evidence against defendant, it is clear that the error was harmless beyond a reasonable doubt and that defendant has not shown, indeed could not show, "a reasonable possibility that . . . a different result would have been reached at the trial out of which the appeal arises." Accordingly, defendant is not entitled to relief from this error.

XVII.

By his next assignment (number 25), defendant concedes that certain statements of the defendant made to State's witness Officer Jimmy Cook would be admissible as substantive evidence, yet defendant charges error in their admission solely as corroborative evidence. Defendant contends that admitting as cor-

roborative evidence only evidence which could have been admitted as substantive evidence unfairly bolsters the State's case because corroborative evidence is not received with the same safeguards as substantive evidence. We see no merit in this argument; in fact, it is more logical that the limiting instruction was favorable to defendant.

XVIII.

[13] Defendant's next assignment of error (number 26) is that the trial court committed prejudicial error in ordering that a written report evaluating the defendant compiled by a State-appointed psychiatrist be released to the District Attorney. The report was given to the prosecution prior to a competency hearing at which the psychiatrist, Dr. Rollins, testified, and after which the court found defendant competent.

Defendant's argument is in two parts. First, defendant argues that G.S. 15A-1002(d), as it appeared at the time of trial, did not authorize the court to order the full report released. G.S. 15A-1002(d) at that time provided in part that "[t]he full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court." We find in that language an implicit power vested in the trial court to order the report released.

The second element of defendant's argument is that disclosure of the report violated the confidential relationship of physician-patient. This Court has previously held, in *State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979), that no physician-patient privilege is created between a physician and a criminal defendant examined by the physician for the purpose of passing on defendant's ability to proceed to trial. Furthermore, as Chief Justice Branch explained in *Mayhand*, G.S. 8-53 creates only a limited physician-patient privilege, because a trial judge may compel disclosure and deny defendant the benefit of the privilege if this is necessary "for the proper administration of justice." *Id.* at 429, 259 S.E. 2d at 239.

Defendant's further objection is that, in preparing his report pursuant to an order entered by Judge Canady, Dr. Rollins was instructed by the court to determine whether there were any mitigating circumstances for this defendant and whether defendant could possibly plead insanity. As this inquiry exceeded a sim-

ple evaluation of competency to stand trial, defendant argues that *Mayhand* does not control here, and thus that at least part of Dr. Rollins' report was privileged.

A similar issue was before the Georgia Supreme Court in *Thadd v. State*, 231 Ga. 623, 203 S.E. 2d 230 (1974). There the defendant argued that the doctor in question was a witness for the prosecution, not a witness for the court. Trial transcripts showed, however, that defendant was admitted for psychiatric examination under court order. Given that fact, the Supreme Court of Georgia reaffirmed its holding in *Massey v. State*, 226 Ga. 703, 177 S.E. 2d 79 (1970):

> The psychiatrist appointed by the court for a sanity examination of the defendant may not be regarded as a prosecution witness, but is instead a witness for the court. *Jackson v. State*, 225 Ga. 790, 793, 171 S.E. 2d 501. Hence, the requisite relationship did not exist and it was not error to admit in evidence the psychiatrist's testimony as to statements made to him by the defendant during the course of his examination of the defendant.

Id. at 704-05, 177 S.E. 2d at 81.

We agree with that rationale and result. Accordingly, this assignment is overruled.

XIX.

[14] Defendant next assigns error to the trial court's instructions to the jury on the charge of kidnapping. (Assignment number 27). The jury instructions to which defendant objected were as follows:

> *[THIRD: That the defendant removed Malcolm Biles for the purpose of facilitating his, the defendant, Norris Carlton Taylor's commission of a felony and flight after committing a felony.]*
>
> FOURTH: That the removal was a separate, complete act, independent and apart from a felony.
>
> So, I charge that if you find from the evidence beyond a reasonable doubt that on or about September 1st, 1978, Norris Carlton Taylor, unlawfully removed and carried Malcolm

Biles from the vicinity of Fayetteville, North Carolina, to the vicinity of Tarboro, North Carolina, and that Malcolm Biles did not consent to that removal and that [*removal was done for the purpose of facilitating the commission of a felony or flight after committing the felony, and that it was a separate, that is that kidnapping was a separate, complete act, independent of and apart from a felony, it would be your duty to return a verdict of guilty of kidnapping.*]

Defendant complains that the charge was erroneous because it did not specify the felony which Taylor was supposed to have committed. Proof of commission of a felony is an essential element under G.S. 14-39. The question is whether the failure of the trial court to specifically name the felony in its charge to the jury constituted prejudicial error warranting vacation of the sentence defendant received for kidnapping.

This question of the proper form of a judge's charge on kidnapping was before this Court in *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980). There we accepted a similar argument by the defendant and awarded a new trial on the kidnapping conviction. In that case, the indictment charged defendant with "unlawfully removing" the prosecutrix, "for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of the defendant, Norris Carlton Taylor following the commission of a felony." In charging the jury, the trial judge's language differed significantly from the language of the indictment. The jury was charged that the State had to prove that defendant "unlawfully confined" the prosecutrix or "removed her by force" or "confined or restrained" her "for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle."

In finding that instruction erroneous, Justice Carlton began his analysis by citing *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977), for the proposition that "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." Applying that standard, Justice Carlton found several prejudicial errors in the jury instructions. First, he noted the variance between the language of the bill of indictment, charging defendant with unlawfully "removing" Jewel Taylor, and the trial court's instruc-

tion in terms of the defendant having unlawfully "confined" and "restrained" the prosecuting witness.

Second, while the indictment charged defendant removed Ms. Taylor "for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of the defendant . . . following the commission of a felony" the court instructed the jury that defendant would be guilty of kidnapping if, *inter alia*, the jury found that "the defendant confined or restrained Jewel Taylor for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle." The error here was in the trial court's instructing with respect to "another crime" and in referring to "obtain[ing] the use of her vehicle." The former was erroneous because "another crime" is much broader than the statutory requirement that that crime be a felony. The instruction concerning obtaining the use of the vehicle was erroneous because that charge was not mentioned in the bill of indictment.

Third and finally, the trial court in the earlier Taylor case erred in stating "that the removal was a separate and complete act, independent and apart from his obtaining the vehicle or any other criminal act on his part . . . ." As discussed above, reference to "obtain[ing] the vehicle" was misleading; that charge had been dismissed and was not part of the case before the jury.

The error committed by Judge Gavin in this case was his failure to specify the felony which was facilitated or accomplished by the removal or the felony from which defendant Taylor was fleeing. Our inquiry, then, must be whether his failure to so specify resulted in prejudicial error.

It is clearly the rule in this jurisdiction that the trial court should not give instructions which present to the jury possible theories of conviction which are either not supported by the evidence or not charged in the bill of indictment. In *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977), this Court deemed the trial court's instructions erroneous and prejudicial for several reasons and awarded the defendant a new trial. Likewise in *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980), the instructions presented theories of the crime "which were neither supported by the evidence nor charged in the indictment." The instructions also permitted the jury to consider whether defendant removed the

victim for the purpose of sexually assaulting her, a possible theory supported by the evidence but not charged in the indictment. We read *Dammons* and *Taylor* as holding that where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory. Prejudicial error occurs when, as in *Taylor* and *Dammons*, the judge's instructions allow the jury to convict upon some abstract theory supported by the evidence but not alleged in the bill of indictment.

Applying that standard to the facts of this case, we are compelled to conclude that the failure of the trial court to instruct on the theories expressed in the bill of indictment was prejudicial error. The indictment charged that defendant kidnapped Biles for the purpose (1) of committing armed robbery and asault on him, and (2) to facilitate his flight after committing the felonies of armed robbery and murder in his crimes against Mrs. Murchison. In charging the jury the trial judge did not specify either purpose expressed in the indictment. We find error in the vagueness of the judge's charge because the jury could have convicted the defendant of kidnapping Biles to facilitate his flight after the armed robbery of *Biles*, a charge not named in the indictment. Because of this possible variance between the indictment and the charge, defendant is entitled to a new trial on the crime of kidnapping.

XX.

[15] There was no error in the trial court's instructions to the jury concerning the question of intent in the charge of first degree murder. (Assignment number 28). The judge instructed:

> Now, members of the jury, under that statute, premeditation and deliberation are presumed. The fact that you shoot and kill a person while committing the crime of armed robbery is deemed to be murder in the first degree. It does not matter what the intent of the defendant might be under such circumstances. (R p 288).

Nowhere, as defendant claims, did the court say that defendant's intent was "irrelevant." In felony murder cases, the law in this State is that premeditation and deliberation are presumed. *State v. Wright*, 282 N.C. 364, 192 S.E. 2d 818 (1972). The killing

of a human being by a person engaged in the perpetration of an inherently dangerous felony is murder, "whether intentional or otherwise." *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976).

PENALTY PHASE

XXI.

[16] Defendant next assigns error in the admission of certain testimony offered by the State during its case in chief at the opening of the penalty phase of defendant's trial. (Assignment number 35). Defendant's objections are too numerous to detail here; we will instead address only those we feel necessary to elucidate our holding on this assignment.

Specifically, defendant objects to the State's being allowed to introduce evidence rebutting one mitigating circumstance possibly favorable to the defendant when the defendant never intended to rely on that mitigating circumstance. (Assignment 35). The record shows that the State offered the testimony of several witnesses for the sole purpose of refuting the mitigating circumstance that defendant had "no significant history of prior criminal activity." G.S. 15A-2000(f).

Illustrative of the testimony offered by the State, not for proving any of the aggravating circumstances but rather to disprove a mitigating one, was the testimony of Tina Baker. Ms. Baker testified that on 31 October 1976 she was kidnapped by defendant and another man and that she was raped by defendant at least three times, and beaten and stabbed ten times. The attorney general concedes that this testimony served only to refute G.S. 15A-2000(f).

We agree with defendant that it was error for the trial court to admit such testimony. The proper order for the introduction of evidence of aggravating and mitigating circumstances is that the State first offer evidence of the statutory aggravating factors listed in G.S. 15A-2000(e). Defendant then offers evidence of mitigating circumstances listed in G.S. 15A-2000(f). Only then is the State entitled to offer evidence intended to rebut defendant's proffered mitigating circumstances. *See e.g. State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981).

The State contends that if it is not allowed to refute a mitigating circumstance in its case in chief, and defendant does

not offer any evidence of that mitigating circumstance, then, under *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979), the defendant is entitled to a peremptory instruction on any mitigating circumstance which the evidence shows may exist when the evidence is viewed in the light most favorable to defendant. Such is not the case. Although there is language to that effect in *Johnson*, that opinion also nonetheless places the burden of raising and proving a mitigating circumstance on the defendant. If the defendant does not offer any evidence to show the existence of a mitigating circumstance, it is clear *a fortiori* that he does not carry this burden, and thus is not entitled to an instruction on a mitigating circumstance.

We agree with defendant, then, that the admission of testimony offered by the State solely to refute mitigating circumstances upon which defendant might later rely was error. Our inquiry must next be whether that error was prejudicial. We hold that it was not.

Defendant, through seventy-five exceptions grouped under one assignment of error, contends that the admission of this testimony violated his due process rights under the eighth and fourteenth amendments. G.S. 15A-1443(b), the controlling statute, provides as follows:

> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

Our careful review of all of the testimony offered and the arguments presented shows that the State has met its burden for two reasons. First, much of the testimony objected to by defendant, in addition to rebutting mitigating circumstances, also was competent as evidence of aggravating circumstances.

For example, the testimony of Jewel Taylor, the prosecuting witness in *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980), decided by this Court last fall, was offered in part to rebut a mitigating circumstance, but it was also admissible to show that "the capital felony [the murder of Mrs. Murchison] was committed for the purpose of avoiding or preventing a lawful arrest . . . ."

G.S. 15A-2000(e)(4). Mrs. Murchison's murder was one in a series of actions by defendant through which he sought to avoid capture.

Second, 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. A review of that evidence shows that the jury had before it a clear record of what must be described as this defendant's unconscionable acts toward so many of his victims. Although we recognize the gravity of the sentence which defendant received, we nonetheless, after much careful consideration of the entire record before us, conclude that such error was harmless beyond a reasonable doubt and hold that defendant is not entitled to a new sentencing hearing, nor should his sentence be reduced. This assignment is overruled.

XXII.

[17] Defendant objects to the in-court identification of defendant by witnesses Tina Baker and Robert Rawls as part of their testimony during the penalty phase of the trial. (Assignment number 36). Apparently defendant argues that the State did not disclose information concerning the procedures used when these witnesses made an out-of-court identification, and thus defendant was unable to refute their testimony.

This assignment is without merit. Before the court received the testimony of the two witnesses a *voir dire* was held. Defendant had every opportunity to test the credibility of the witnesses at that point or to call as witnesses the investigating officers. Failure of the defendant to do so cannot now be a grounds for reversal. In any event, the trial court concluded that the identification of defendant by each of these witnesses was based upon seeing the defendant on the night of the offenses committed against the witnesses, not upon any pretrial or in-court identification. Such findings are supported by competent evidence and therefore binding on appeal. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975).

XXIII.

[18] Also received into evidence at the penalty phase of this trial was testimony by William F. Parks, an investigator for the Virginia Beach Police Department, concerning defendant's convic-

tion for the crime of rape. Defendant was convicted in Virginia in 1969 and sentenced to ten years in prison. Defendant complains that testimony about the sentence he received was improperly admitted. (Assignment Number 40).

The State contends that this evidence is admissible to support the aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence to the person." G.S. 15A-2000(e)(3). We agree. The testimony concerning defendant's sentence would be relevant to show he had been convicted of what would be considered a felony in North Carolina. Nothing else appearing, rape involves the use or threat of violence to the person. We find no error here.

XXIV.

[19] Defendant next objects to the testimony of John D. Butts, a forensic pathologist who performed an autopsy on Kathi King. (Assignment number 41). Defendant was charged with the 3 January 1978 murder of Ms. King and convicted in October of 1978. Our review of that conviction appears at 298 N.C. 405, 259 S.E. 2d 502 (1979). Defendant stipulated that he had been found guilty of that murder.

The objection made by defendant is that, as he had stipulated the fact of his prior conviction, the State should not have been allowed to introduce testimony concerning the murder. The State argues that when proving as an aggravating circumstance that defendant was previously convicted of a capital felony or of a felony involving the use or threat of violence to the person (G.S. 15A-2000(e)(2) and (3)), the State should not be limited to admission of the court record of conviction.

We think the better rule here is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation. If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed. Conversely, it could be to defendant's advantage that he be allowed to offer additional evidence in support of possible mitigating circumstances, instead of being bound by the State's stipulation.

In *Elledge v. State*, 346 So. 2d 998 (Fla. 1977), the Supreme Court of Florida addressed the same question. There, as here, appellant's counsel stipulated to the admissibility of a prior conviction of defendant for murder. At the sentencing hearing, the widow of the victim was nonetheless allowed to testify in detail about events surrounding the crime. In deeming the testimony properly admitted, the court said:

> This is so because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is matter that can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate 'total arbitrariness and capriciousness in [the] imposition' of the death penalty. (Citation omitted).

Id. at 1001.

This assignment is overruled.

XXV.

[20] By his assignment of error number 45, defendant charges error in the scope of the prosecutor's cross-examination of defendant's witness Marzella Motley. Ms. Motley is defendant's sister, and defendant claims that she was called as a character witness for defendant. As she was a character witness, says defendant, questions asked of her by the district attorney concerning particular acts of misconduct by defendant and questions about her possible bias were improper.

The testimony of Ms. Motley on direct examination was not confined to the issue of character. Under the law in this jurisdiction, character can be proved by the opinion of one who knows the defendant, by reputation or by specific acts. 1 Stansbury's N.C. Evidence (Brandis Rev. 1973) § 110. None of these methods were used in eliciting testimony from the witness. Instead, the witness, on direct examination, testified about defendant's troubled youth, his being sent to a reform school, his marriage and his children. Such wide-ranging testimony, we think, moved her testimony beyond the bounds of merely being a character

witness. The expanded breadth of her testimony, under our adversary system, brings with it a concomitant expansion of the scope of permissible cross-examination. Accordingly, this assignment is overruled.

XXVI.

[21] Defendant assigns as error (assignment number 47) the court's permitting the district attorney to cross-examine defendant's psychiatrist using a report about defendant's competency to stand trial made by a second psychiatrist. The second psychiatrist, Dr. Rollins, was not called at trial, but the State nonetheless used his psychiatric evaluation of defendant to cross-examine defendant's witness Dr. Fisscher.

We agree with defendant that this procedure was improper for the simple reason that it allowed the State to get Dr. Rollins's testimony before the jury at the same time it cross-examined Dr. Fisscher. We do not find reversible error, however, because on redirect examination the defendant asked his witness questions concerning the same report, that is, the one prepared by Dr. Rollins. Thus the improper admission of the testimony was cured when substantially the same evidence was later admitted. *See State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Little*, 278 N.C. 484, 180 S.E. 2d 17 (1971); *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971). This assignment is overruled.

XXVII.

[22] Defendant next assigns error to certain of the questions asked by the State on cross-examination of defendant's witness Nathan Rice, the Deputy Warden at Central Prison. (Assignment number 49.) On direct examination, Mr. Rice testified about the various security procedures used to manage the prisoners in Central Prison, and the fact that, if a maximum security prisoner injured or threatened another person in the prison, he would be placed in intensive management—a security level more restrictive than maximum security. Mr. Rice also testified that between defendant's initial confinement in Central Prison and the time of trial, defendant had committed no infractions of prison rules.

On cross-examination, the following colloquy occurred:

> Q. Now, even within—well, let me just ask you this. Insofar as I and J blocks are concerned, would it be fair for this

jury to believe that you all have done everything to maximize security with regard to those few inmates there that you possible [sic] can in light of the twentieth century technology that we have today?

MRS. TALLY: Objection, to the form of the question.

THE COURT: Overruled.

EXCEPTION.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 231

A. I certainly think so, seeing that we have put close [sic] circuit T.V., monitoring system, placed inmates in individual cells, etc., I think that we have done basically everything that we can to maintain some control over these people.

Q. And even with all of these efforts that you have made with regard to I and J block, you still have instances within I and J block, do you not, in which murders occur, do you not?

MRS. TALLY: Objection, on the grounds of relevancy.

THE COURT: Overruled.

EXCEPTION.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 232

A. The last murder we had occurred on a recreational field of I and J.

Q. And that was a man named Cordell Spaulding, who was located in I and J block who had a weapon and killed an inmate even after he's gone through all the security that you've described, did it not?

MRS. TALLY: Objection, on the grounds of relevancy.

THE COURT: Overruled.

EXCEPTION.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 233

A. That is correct.

Q. Can you tell the jury what happened in that instance?

MRS. TALLY: Objection on the grounds of relevancy.

THE COURT: Overruled.

EXCEPTION.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 234

A. The population on that particular corridor had been turned out to recreate, that being the third tier. They had to come off of the third tier and go down the second tier into a sallyport where he would be given his clothes to put on and then the officer standing by would pull a lever and open the door and, of course, let him out on recreation. In this particular case, all of the people had gone out and been searched and the guy in question was the last one to go out. After he got his clothes on and got ready to exit the door and the lever had been pulled and the door had been opened, he, being a rather large individual, put his foot against the door and jammed it long enough for another inmate in the block to throw a weapon to him and in spite of the yelling and hollering and spraying mace and so forth to try to get him to stop, he went outside and stabbed another prisoner to death in the recreation field.

Q. How many other people had that man killed in the prison system?

MRS. TALLY: Objection on the grounds of relevancy.

THE COURT: Overruled.

EXCEPTION.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 235

A. That's the second one he's been convicted of.

Defendant charges error in the admission of that line of questioning.

Apparently defendant offered the testimony of Mr. Rice, in part, to assure the jury that, should they recommend a sentence of life, defendant would not be able to harm any of his fellow inmates. The State's cross-examination, using the example of Mr. Spaulding, was designed to refute this contention. While we agree with defendant that the State was allowed to go far in placing before the jury irrelevant evidence of an unrelated crime, we

nonetheless cannot find this to be error prejudicial to defendant. The questions excepted to by defendant's exceptions numbered 231 and 232 appearing in the foregoing quotation were clearly competent and within the scope of permissible cross-examination. Given that, we cannot say that the trial judge's rulings on the succeeding exceptions rise to the level of prejudicial error.

XXVIII.

[23] Assignment of error number 50 presents the question of whether the trial court erred in excluding testimony by defense witnesses on the religious, ethical, legal and public policy perspectives of capital punishment. Various witnesses would have testified that capital punishment does not deter crime, that capital punishment is contrary to the Scriptures and general religious principles, and that capital punishment is imposed in a racially discriminatory and inconsistent fashion. We hold that the trial court acted properly in excluding the testimony.

This issue has previously been before us. In *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), defendant offered similar evidence: affidavits saying that innocent people were sometimes executed, that capital punishment did not deter crime, and that capital punishment was objectionable on religious grounds. In *Cherry*, we rejected defendant's contentions that G.S. 15A-2000(a)(3) in effect altered the usual rules of evidence or impaired the trial judge's power to rule on the *admissibility* of evidence. Instead, we made it clear in *Cherry* that factors to be considered in sentencing are "the *defendant's* age, character, education, environment, habits, mentality, propensities and record." (Emphasis in original). *Id.* at 98, 257 S.E. 2d at 559.

Beyond that, evidence such as that offered in *Cherry* and here is totally irrelevant and of no probative value as mitigating evidence in the sentencing phase of defendant's trial. We recognize that G.S. 15A-2000(f) states that the statutory list of mitigating factors is not exclusive, but that does not give defendant *carte blanche* to offer evidence having no direct connection with *this* defendant. Any evidence allegedly probative on the issue of mitigating factors must also be, in the view of the court, relevant. Evidence such as that offered here is not. This assignment is overruled.

XXIX.

Nor was there error in the trial court's refusing to submit a specific verdict form to the jury as proposed by the defendant. (Assignment number 52). To begin with, defendant's proposed form did not expressly mention the possible mitigating circumstances, which we said in *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979), would be the preferred practice.

Second, we find no merit in defendant's contention that since the jury had to answer each aggravating circumstance specifically but did not have to answer which mitigating circumstances they found, that placed undue emphasis on the aggravating circumstances. The judge's instructions made clear to the jury the proper method for weighing the aggravating and mitigating circumstances in reaching its verdict. We presume the jury followed those instructions. This assignment is overruled.

XXX.

[24] Defendant's conviction of first degree murder at this trial was based upon the felony murder rule. The underlying felony was the robbery of Mrs. Murchison. One of three aggravating circumstances submitted to the jury was as follows: Was this murder committed while Norris Carlton Taylor was engaged in the commission of the felony of robbery? The jury replied in the affirmative. Defendant assigns as prejudicial error the submission of this aggravating circumstance. (Assignment number 53).

We agree with defendant that the trial court erred in submitting this aggravating circumstance. As we said in *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), "when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony." *Id.* at 113, 257 S.E. 2d at 568. However, nothing in Cherry or any of our other decisions states that such an error is prejudicial *per se*. Our next inquiry, then, is whether the error here was prejudicial.

In assessing whether the erroneous submission of this aggravating circumstance was harmless error, this Court has previously stated that the proper test is whether there is a *reasonable possibility* that the evidence complained of might have

contributed to the imposition of the death penalty. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). In *Goodman*, we found submission of the underlying felony to be error largely because of the highly questionable quality and credibility of the State's primary evidence. We found similar prejudicial error in *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979) simply because we were unable to say that under the facts of that particular case the submission of the underlying felony constituted harmless error. In *Cherry*, absent the erroneously submitted aggravating circumstances, we could not say that the jury would have decided that the aggravating circumstances were "sufficiently substantial to call for imposition of the death penalty." 298 N.C. at 114, 257 S.E. 2d at 568.

Contrasting those two decisions with the case before us, we note at the outset that the State offered overwhelming and conclusive proof that the defendant committed all of the crimes with which he was charged. Several eyewitnesses testified about the robbery and murder of Mrs. Murchison. Malcolm Biles survived his wounding at the hands of defendant and testified about his abduction, robbery and assault. Patty Bazemore, who basically accompanied defendant throughout the course of these events, also testified about events within her personal knowledge. Other witnesses for the State offered additional pieces of information, which when connected, gave the jury a clear and concise account of defendant's actions. As a result, we are not troubled by the quality of the State's evidence as we were in *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

Nor do we feel we are unable to say that submission of the underlying felony here was harmless error. In contrast to *Cherry*, we are here convinced that the error was harmless beyond a reasonable doubt and that the result of the weighing process used by the jury would not have been different had the impermissible aggravating circumstance not been present. Our review of the voluminous evidence offered by the State convinces us that submission of the aggravating circumstance that the murder was committed while committing the robbery was not prejudicial error.

Most instructive in reaching this conclusion is a comparison of the record in the sentencing phase in *Cherry* with the record in

this case. In *Cherry*, defendant, in the course of robbing a store, shot and killed an employee of that store. There was some evidence that the victim and defendant struggled over the gun, and the gun discharged, fatally wounding the victim. The jury found defendant guilty of first degree murder.

At the penalty phase of *Cherry's* trial, the State offered as additional evidence of aggravating circumstances *only* the stipulation that defendant had a prior conviction for armed robbery. Defendant offered the testimony of his mother, father, wife and a good friend as evidence of mitigating circumstances. The State offered no rebuttal. The jury found three aggravating circumstances and recommended the death penalty. This Court, fearing that the erroneous submission of the underlying felony as an aggravating circumstance might have tipped the balance in the jury's decision to impose the death penalty, remanded the case for a new sentencing hearing.

In contrast, the record in the case now before us contains extensive testimony offered at the sentencing phase in support of several of the statutory aggravating circumstances. A brief overview of the evidence should demarcate with sufficient clarity the enormous factual qualitative and quantitative differences between the evidence offered in *Cherry* and the evidence offered in this case.

Patricia Ann Sullivan testified that on 30 August 1978 she was kidnapped by defendant at knife point, that she was able to escape from defendant and that he shot her as she ran. The murder of Mrs. Murchison occurred two days later. Ms. Sullivan's testimony was therefore admissible under G.S. 15A-2000(e)(4), because the murder of Mrs. Murchison may have been committed "for the purpose of avoiding . . . a lawful arrest." *Id.* Defendant had for several days prior to the murder been stealing cars and moving about the countryside. Mrs. Murchison's murder was simply one part of defendant's flight to avoid arrest.

In a similar vein, the testimony of Richard Lee Taylor, that he was kidnapped by defendant, was admissible as evidence that the murder of Mrs. Murchison was one chapter in defendant's efforts to avoid capture. Jewel Taylor, the prosecuting witness in an earlier case involving this defendant, was likewise properly allowed to testify about her abduction and mistreatment at the

hands of defendant. The events involving Mrs. Taylor occurred on 28 and 29 August 1978 and included driving the defendant to Petersburg, Virginia. Her testimony was therefore relevant as evidence of defendant's ongoing efforts to avoid capture.

Other testimony, including defendant's admission of other crimes to police officers, was properly offered and received as also supporting the State's theory that the capital felony was committed for the purpose of avoiding a lawful arrest.

In addition to considering the evidence supporting the proffered aggravating circumstances, the jury was of course aware of the evidence offered at the guilt/innocence phase of the trial. Thus, even though the submission of the underlying felony was error, overwhelming evidence supporting other statutory aggravating factors convinces us that the weighing process has not been compromised. *Compare Elledge v. State*, 346 So. 2d 998 (Fla. 1977) with *Brown v. State*, 381 So. 2d 690 (Fla. 1980), *cert. denied* --- U.S. --- , 101 S.Ct. 931, 66 L.Ed. 2d 847 (1981). Accordingly, this assignment is overruled.

XXXI.

[25] Defendant's assignment of error number 54 alleges error in the trial court's instructing the jury that they could consider as an aggravating circumstance that the murder was committed for pecuniary gain. Defendant argues that since the felony underlying a felony murder conviction cannot be submitted as an aggravating circumstance, instruction on any element of that felony is also precluded. Defendant relies on *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), for the proposition that the submission of two aggravating circumstances arising from the same act was error.

We need not pause to distinguish defendant's *Goodman* argument, because we have recently resolved this question in *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). In *Oliver*, in discussing whether pecuniary gain was improperly submitted as an aggravating circumstance, we said:

> Neither is there any error in submitting this circumstance in a felony murder case in which the underlying felony is robbery notwithstanding the rule that the robbery itself cannot be submitted as such a circumstance. The robbery constitutes an essential element of felony murder. In a

capital case tried solely on the felony murder theory a jury, in absence of this element, could not find defendant guilty of the capital offense. (Footnote omitted). The circumstance that the capital felony was committed for pecuniary gain, however, is not such an essential element. This circumstance examines the motive of the defendant rather than his acts. While his motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence.

Id. at 62, 274 S.E. 2d at 204.

This assignment is overruled.

XXXII.

[26] Assignment of error number 57 is addressed to the trial court's instructions on the mitigating circumstances found in G.S. 15A-2000(f)(2) and (6)—mental or emotional disturbance and impaired capacity of the defendant. On those issues, the court instructed the jury as follows:

Consider whether this murder was committed while Norris Carlton Taylor was under the influence of mental or emotional disturbance.

A defendant is under such influence even if it does not justify or excuse his killing, if he is in any way affected or influenced by a mental or emotional disturbance.

There has been some evidence in this case to the effect that the defendant was suffering from paranoid psychosis. I say to you that that would be a mental disturbance.

The second matter which you should consider under Issue No. 3 is whether or not Norris Carlton Taylor's capacity to conform his conduct to the requirements of the law was impaired.

The defendant's capacity to conform is impaired even if his killing is not justified or excused, and even if he is able to appreciate the criminality of his conduct if he is for any reason less able than a normal person to do what the law requires, or to refrain from what the law forbids. (R p 468).

Relying in large part on the decision of this Court in *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979), defendant alleges these instructions were prejudicially inadequate.

Defendant is correct that in *Johnson* we found error in the trial court's cryptic reference to the mitigating circumstances enumerated in G.S. 15A-2000(f)(6). But that holding does not control the result here. To begin with, defendant in *Johnson* pleaded guilty to first degree murder. Furthermore, defendant did not have a defense of insanity under the laws of this State, but there was abundant evidence of defendant's schizophrenia. As defendant could not rely on a defense of insanity in the guilt phase of the trial, because he was not insane under the M'Naghten test, defendant relied heavily on the mitigating circumstances of G.S. 15A-2000(f)(6) to convince the jury that he should be sentenced to life imprisonment rather than death. On that state of the record, then, we said it was "fair to say that this mitigating circumstance was almost 'the whole case' so far as defendant was concerned on the question of punishment." *Id.* at 69, 257 S.E. 2d at 614. Given that, and the complexity of the psychiatric evidence offered by defendant, we could only conclude in *Johnson* that defendant was entitled to a fuller instruction on that issue.

Based on our examination of the record now before us, we conclude that the trial judge's instructions were sufficient to explain the law arising on the evidence. Defendant's expert psychiatric testimony established that defendant did know right from wrong, but that defendant was under the influence of a mental or emotional disturbance at the time of the offense, and that defendant suffered from impaired capacity to conform his conduct to the requirements of the law at the time of the offense. As in *Goodman*, we find this instruction sufficient on the facts of this case. The jury was instructed that, in order to find a mitigating circumstance, they must find by a preponderance of the evidence that defendant was "in any way affected or influenced by a mental or emotional disturbance." The jury could find a second mitigating circumstance if it determined that the defendant "was for any reason less able than a normal person to do what the law requires or to refrain from what the law forbids." Those instructions were sufficient on the evidence offered. This assignment is overruled.

XXXIII.

Defendant offers numerous other assignments, most of which have either previously been answered by this Court or are spurious at best. They are dismissed without discussion.[2]

In order to be certain that the death penalty is not imposed randomly or capriciously, this Court is directed by statute to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. G.S. 15A-2000(d); *see State v. Martin*, --- N.C. --- , 278 S.E. 2d 214 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979).

We have carefully reviewed a record of approximately five hundred pages, briefs totaling over three hundred eighty pages, and the defendant's sixty-two assignments of error. After full and cautious deliberation, we conclude that there is sufficient evidence in the record to support the findings of the jury and its determination of sentence based thereon. There is nothing in the record to indicate that the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

While the jury can consider all evidence properly presented to it at trial in reaching a determination as to punishment, (G.S. 15A-2000(a)(3)), that evidence can only be considered insofar as it supports a finding of an aggravating circumstance. G.S. 15A-2000(c). Here the jury had before it clear evidence that defendant had been previously convicted of a felony involving the use or threat of violence to the person. The jury also properly determined that the murder was committed for pecuniary gain.

2. All assignments of error brought forward by defendant have been carefully scrutinized by this Court. We elect not to discuss many of them because they involve questions of law well-settled by our earlier opinions, are merely formal objections, or else are so clearly meritless that we see no point in cluttering the pages of our reports with a recitation of their content. Accordingly, the following assignments of error are dismissed, after thorough review, without discussion: 13, 22, 29, 30, 31, 32, 34, 37, 38, 39, 42, 43, 44, 46, 48, 51, 55, 56, 58, 59, 60, 61, 62.

Given those facts, and that the murder of Mrs. Murchison was, simply put, a cold-blooded killing of an innocent woman on her way to work, we see no reason to reverse the judgment of the jury. The sentence of death is not excessive or disproportionate, considering both the crime and the defendant. We, therefore, decline to exercise our authority to set aside the sentence imposed.

For the reasons stated above, we hold that defendant is entitled to a new trial on the kidnapping charge. In all other respects, defendant had a fair trial, free from prejudicial error. In the convictions of first degree murder, armed robbery and assault with a deadly weapon inflicting serious bodily injury, we find no error.

Case No. 79 CRS 6425, First degree murder, no error.

Case No. 79 CRS 6426, Aggravated kidnapping, armed robbery, assault with a deadly weapon with intent to kill inflicting serious bodily injury, reversed and remanded in part for a new trial on the kidnapping charge only—no error otherwise.

Justice EXUM concurring in part and dissenting in part.

I concur in the result reached by the majority on the guilt phase of this case.

I am unable to join, however, in the majority's conclusion that the cumulative effect of the several errors acknowledged by the majority to have been committed in the sentencing phase was not prejudicial. In face of these errors and with his life hanging in the balance, defendant is entitled to a new sentencing hearing.

Also, for the reasons stated in my dissent in *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), I believe it to be prejudicial error not to require the jury to specify those mitigating circumstances which it finds to exist. For this additional reason defendant is entitled to a new sentencing hearing.

My vote, therefore, is to remand the case for a new sentencing hearing.

STATE OF NORTH CAROLINA v. ARDELL STURDIVANT

No. 1

(Filed 3 November 1981)

1. **Criminal Law § 84; Indictment and Warrant § 6.2— probable cause for issuance of arrest warrant—evidence obtained from defendant's person**

A warrant issued for defendant's arrest for rape was based on probable cause where an officer submitted an affidavit to the issuing magistrate detailing the victim's statements to him about the sexual assaults and the description of the assailant and stating that the officer had driven the victim around the area of the alleged incident and that she had pointed out defendant's house, the dirt road she had driven on and the tobacco barn where she had been raped. Since defendant was arrested pursuant to a warrant based upon probable cause, evidence obtained from his person after he was lawfully taken into custody was constitutionally admissible at his trial.

2. **Rape § 1— first degree rape—employment of deadly weapon**

The rape statute, G.S. 14-27.2, no longer requires an express showing by the State that a deadly weapon was used to overcome the victim's resistance or to procure her submission to make out a case of the crime in the first degree; rather, the current statute simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape.

3. **Rape § 5— first degree rape—employment of deadly weapon—sufficiency of evidence**

The State's evidence was sufficient to convict defendant of first degree rape upon the theory alleged in the indictment that he "did employ a deadly weapon, to wit: a pocket knife" in the commission thereof where it tended to show that defendant used a pocketknife (1) to threaten the victim with death, whereby he effectively discouraged any further resistance to his demands, and (2) to remove an article of her underclothing, whereby he expedited the execution of additional sexual assaults.

4. **Rape § 5— pocketknife as deadly weapon—sufficiency of evidence**

The trial court properly submitted to the jury an issue as to whether a pocketknife allegedly employed by defendant in a rape was a deadly weapon within the meaning of the first degree rape statute where there was evidence tending to show that defendant was approximately six feet tall and weighed over 250 pounds, defendant used the pocketknife prior to the rape to open a can of oil, and defendant later used this same knife to cut off the victim's slip, since the jury could find that such a knife could cause death or great bodily harm when wielded by a man of defendant's physical stature.

5. **Rape § 6— instructions—dangerous or deadly weapon—employment or display**

The trial court's instruction that a verdict of guilty of first degree rape would be warranted if the jury found defendant had "employed or displayed" a dangerous or deadly weapon during an act of forcible sexual intercourse when

the indictment charged only that defendant had "employed" a deadly weapon was not prejudicial error where the trial judge, in the core of his instructions upon this point, did not mention the display of a weapon but properly emphasized that the jury would have to find that defendant had employed a knife during the rapes to convict him of the crime in the first degree, and where the State's evidence clearly supported the conclusion that defendant employed the knife by displaying it to the victim and threatening to kill her with it. Moreover, the trial court's reference to a "dangerous or deadly" weapon was not an impermissible variation from the language of the indictment which referred only to a "deadly" weapon since the terms "dangerous" and "deadly," when used to describe a weapon, are practically synonymous.

6. **Rape § 6— first degree rape—several acts of intercourse—instructions—use of deadly weapon—unanimity of verdict as to one act**

In a trial in which the State introduced evidence tending to show the commission of several acts of forcible intercourse to support a charge of only one count of first degree rape, the trial court effectively prevented the jury from considering evidence of any sexual deed that did not entail the use of a deadly weapon on the first degree rape charge by instructing on the difference between first and second degree rape. Furthermore, the trial court was not required to give *sua sponte* an instruction that the jury had to agree unanimously as to the existence of all of the elements of first degree rape with respect to one particular act of forcible vaginal intercourse in order to return a verdict of guilty of first degree rape.

7. **Kidnapping § 1.2— restraining victim in car by fraud—sufficiency of evidence**

The State's evidence was sufficient to support submission of a kidnapping charge to the jury upon the theory that defendant illegally restrained the victim in her car by restricting her to a car in a place or places other than where she wanted to be by fraud or trickery where it tended to show that the victim had car trouble while driving to her home in South Carolina; after defendant put oil and water in the car engine, defendant entered the car under the fraudulent pretext of seeking a ride to the home of a crippled friend; defendant directed the victim to turn off the highway onto a dirt road, whereupon he cut off the car engine, made physical advances upon her, refused her repeated requests for him to leave the vehicle and later, while still persisting in the pretense of going to the home of a crippled friend, made her drive still further along the dirt road; and defendant then grabbed the keys out of the ignition, pulled the victim from the car into a tobacco barn, and raped her.

8. **Criminal Law §§ 13, 147— validity of indictment—motion for appropriate relief in appellate court**

Defendant's motion for appropriate relief upon the ground that the indictment was fatally defective could properly be made for the first time in the appellate division. G.S. 15A-1415(b)(2); G.S. 15A-1418.

9. **Kidnapping § 1— indictment—absence of allegation of lack of consent**

An indictment for kidnapping was not fatally defective because it failed to allege specifically that the kidnapping was effected without the victim's consent, since the consent element of G.S. 14-39(a) is, in reality, an absolute de-

fense to the charge, and an indictment need not negate a defense to the stated crime. Furthermore, the indictment did not utterly fail to indicate that the kidnapping was accomplished without the victim's consent where it alleged that defendant "unlawfully and wilfully did feloniously kidnap" the victim "by unlawfully restraining her," since one cannot unlawfully kidnap or unlawfully restrain another with his consent.

ON appeal as a matter of right from the judgment of *Hobgood, J.*, entered at the 30 October 1980 Criminal Session, HOKE Superior Court, imposing a life sentence for a conviction of first degree rape. Defendant was also convicted of kidnapping, and a consecutive sentence of thirty years to life was imposed. A motion to bypass the Court of Appeals for review of the kidnapping conviction was allowed on 15 April 1981.

Defendant was charged in separate indictments, proper in form, with the first-degree rape and kidnapping of Elizabeth Sellers Harvey. Defendant entered pleas of not guilty to the charges. The jury returned verdicts of guilty on both counts. The facts, relevant to the issues raised in this appeal, are briefly summarized as follows.

The State's evidence tended to show that Elizabeth Harvey left Fayetteville, North Carolina, at approximately 8:00 p.m. on 11 July 1980, to drive to her home in Bennettsville, South Carolina. Her son was in the car with her and was asleep on the back seat. On the way home, her car started having engine trouble. The oil light was flashing, and the engine was making "knocking" noises. Mrs. Harvey left her regular route of travel to seek assistance and drove toward the town of Raeford, North Carolina. She stopped at a small grocery store with gas pumps and bought a quart of oil.

As Mrs. Harvey was leaving the store, a man came up and offered to help her. She subsequently identified this man as the defendant, Ardell Sturdivant, a very large Indian male with bushy hair. Defendant told Mrs. Harvey that he was a mechanic. With her permission, he examined the engine. He told her that the engine needed some water and that he would fill it up if she drove over to his house, which was located across the field adjacent to the store. She accepted defendant's offer and drove to his house. There, defendant filled her car radiator with water and, at Mrs. Harvey's request, also put in the oil, which she had previous-

ly purchased at the store. He opened the oil can with a knife he was carrying on his person. A woman and some children were in the house observing these events from a window. When he finished working on the car, defendant asked Mrs. Harvey if she would mind driving him "just up the road" to the home of a crippled friend. She agreed to do so, and defendant got back in the car.

Defendant subsequently directed Mrs. Harvey to turn off Highway 401 onto a small dirt road. She first inquired whether he was sure there was a trailer down there. He assured her that the trailer was on that road, and, though she was "concerned a little bit," Mrs. Harvey turned onto the dirt road in accordance with defendant's directions. As soon as she did this, he asked her to turn off the engine. She refused and asked him to get out of the car. Defendant then turned the car off himself. Mrs. Harvey asked him again to leave and to let her and her baby go. He said he would if she would let him touch her. She refused and begged him not to touch her. Defendant nonetheless persisted and felt her legs and breasts with his hands. However, he apparently became angered by Mrs. Harvey's relentless resistance to his advances so he moved back over to the passenger side of the car. He told her to start the car and take him down to the trailer. By this time, Mrs. Harvey had realized that defendant had been drinking so she asked him once more whether he was sure that the trailer was further down on this dirt road. She then drove on.

Shortly thereafter, Mrs. Harvey saw that the road was coming to an end and that there was no trailer, or any other house, in sight. There was only a tobacco barn. Mrs. Harvey suddenly accelerated the engine and turned the steering wheel sharply to the left. The car "got stuck" on the side of the road. Defendant quickly took the keys out of the ignition and put them in his pocket. He then grabbed Mrs. Harvey and told her that she was going to get out of the car and do what he wanted her to do. He pulled her out of the car, took a quilt, which was lying on the front seat, and dragged her to the tobacco barn. Mrs. Harvey's son remained on the back seat of the car asleep.

When they were inside the barn, defendant put the quilt on a bench and forced Mrs. Harvey to lie on it. He raped her. After that act, defendant ordered her to take her clothes off. As she was taking off her dress, she bent over and picked up a tobacco

stick from the floor. She hit defendant with it. He responded by beating her in the face with his fist and telling her that, because she had hurt him, he was going to kill her. He took out the knife which he had previously used to open the oil can. Mrs. Harvey grabbed his hand and entreated him not to kill her. He pushed her back over to the quilt, and while she was leaning over the bench, he took off her bra and cut off her slip from behind with the knife. Defendant then had sexual intercourse with her repeatedly though she continued to plead with him to let her go.

Eventually defendant desisted from committing further illicit sexual deeds, and, after Mrs. Harvey assured him that she would not have him arrested for these crimes, he decided to let her go. They walked back to the car. He gave her the keys and pushed the car out from the side of the road where it had stopped. They drove back to the highway, and defendant got out of the car. Mrs. Harvey drove on and stopped at a lighted trailer, which was the residence of Danny and Alec Norton. She told the Nortons what had happened and described her attacker to them. Alec Norton, who was a detective, therewith notified the Hoke County Sheriff's Department. Additional details about Mrs. Harvey's identification of defendant and his subsequent arrest, which become germane to a discussion of defendant's assignments of error, shall be included in the opinion.

Defendant did not testify, but he presented evidence in his behalf through the testimony of two relatives. In pertinent part, defendant's mother and fourteen-year-old niece testified that they saw defendant and Mrs. Harvey in the back yard of their home in the early evening hours of 11 July 1980. They both said they observed Mrs. Harvey "rubbing" defendant while he put water in her car. Defendant's mother also testified that, as far as she knew, defendant did not have a crippled friend and that she did not believe a crippled person lived in the surrounding area near their home.

The jury found defendant guilty of first degree rape and kidnapping.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General W. A. Raney, Jr. and Associate Attorney G. Criston Windham, for the State.

Assistant Public Defender Malcolm R. Hunter, Jr., for the defendant.

COPELAND, Justice.

Defendant has abandoned assignments of error 1, 2, 5, 6 and 12 by failing to advance any argument to support them in his brief. Rule 28(a), North Carolina Rules of Appellate Procedure. He does, however, properly raise seven other assignments of error for our review. After carefully considering all of defendant's contentions, we conclude that the record reveals no prejudicial error requiring a new trial and, accordingly, affirm the trial court's due entry of judgment upon his convictions.

[1] We shall address the assignments of error relating to the legality of defendant's arrest first. Defendant argues that the trial court erroneously admitted evidence of his photograph and fingerprints because these exhibits were obtained pursuant to his unlawful arrest on 15 July 1980. Simply put, defendant contends that the rape warrant issued for his arrest on 12 July 1980 did not meet the requirements of G.S. 15A-304(d). Herein, defendant makes much ado about nothing.

G.S. 15A-304(d) authorizes a judicial officer to issue an arrest warrant if he has sufficient information to make an independent determination that probable cause exists for believing a crime has been committed by the accused. Probable cause refers to the existence of a reasonable suspicion in the mind of a prudent person, considering the facts and circumstances presently known. *State v. Bright*, 301 N.C. 243, 255, 271 S.E. 2d 368, 376 (1980); *State v. Phillips*, 300 N.C. 678, 684, 268 S.E. 2d 452, 456 (1980). In the instant case, Captain J. R. Riley, of the Hoke County Sheriff's Department, submitted an affidavit to the magistrate, based upon Mrs. Harvey's statements to him, detailing the occurrence of the sexual assaults and describing the assailant. Captain Riley also testified in the affidavit that he had driven the victim around the alleged area of the incident and that she had pointed out defendant's house, the dirt road she had driven on and the tobacco barn where she had been raped. We hold that the magistrate was un-

questionably presented with sufficient information on 12 July 1980 to form a rational belief that defendant had raped Mrs. Harvey several hours earlier and that the magistrate was thereby legitimately empowered to issue a warrant for defendant's arrest under G.S. 15A-304(d), *supra*. Defendant's contentions to the contrary are frivolous. Since defendant was arrested pursuant to a warrant based upon probable cause, evidence obtained from his person, after he was *lawfully* taken into custody, was constitutionally admissible. *See State v. Allen*, 301 N.C. 489, 272 S.E. 2d 116 (1980); *State v. Accord and Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970). Assignments of error three and four are, therefore, overruled.

[2] We shall now direct our attention to the assignments of error relative to defendant's conviction of first degree rape. Defendant maintains that there was insufficient evidence to convict him of first degree rape upon the theory alleged in the indictment that he "did employ a deadly weapon, to wit: a pocket knife" in the commission thereof. At the outset, we note that defendant was convicted of first degree rape pursuant to G.S. 14-27.2 (Cum. Supp. 1979) which became effective 1 January 1980. *See* Law of May 29, 1979, ch. 682, § 14, 1979 Sess. Laws 729. In pertinent part, G.S. 14-27.2 provides that forcible, non-consensual vaginal intercourse constitutes first degree rape if the perpetrator "employs or displays a dangerous or deadly weapon." By its terms, the new rape statute no longer requires an express showing by the State that a deadly weapon was used *in a particular manner* to make out a case of the crime in the first degree. In contrast, the prior statute, G.S. 14-21(1)(b) (Cum. Supp. 1977), obligated the State to show specifically that the weapon was used to overcome the victim's resistance or to procure her submission. *See, e.g., State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980); *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980); *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976). The current statute, however, simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape *period*.[1]

1. We perceive that the Legislature intended to make implicit in G.S. 14-27.2 a matter of ordinary common sense: that the use of a deadly weapon, in any manner, in the course of a rape offense, always has some tendency to assist, if not entirely enable, the perpetrator to accomplish his evil design upon the victim, who is usually unarmed.

[3] Here, the indictment for first degree rape referred to defendant's employment of a deadly weapon to support the charge. Defendant contends that, although the prosecutrix testified that he took the knife out of his pocket and *displayed* it to her in the tobacco barn after the completion of the first act of sexual intercourse, her testimony did not tend to show that he *employed* the knife during any of the illicit sexual deeds. The following excerpt from the victim's testimony refutes any such conclusion:

> He made me lie down on the bench and that is the first time he had sexual intercourse with me against my will. Then he pulled me up and told me to take my clothes off.
>
> When I unzipped my dress it fell to the ground. I felt something under my feet and I picked it up, and it was a tobacco stick, and I came up and I hit him with it. Then he hit me back in the face. He hit me with his fist. He told me now I had done it, I had hurt him and he was going to kill me. He reached in his pocket and got out his knife and I grabbed his hand, the hand I had free and begged him not to kill me. He told me I had hurt him and I asked him what did he think he had done to me. He pushed me over to the quilt and I was sort of leaning over the bench. At that time he undid my bra and the strap was broken, and then he cut my slip off of me from behind.
>
> I picked up the slip and I wiped my face with it and there was blood all over it. He had intercourse with me repeatedly and I continued begging him to let me go.

The plain meaning of the word "employ" is "to use in some process or effort" or "to make use of." The American Heritage Dictionary of the English Language 428 (1969); Webster's Third New International Dictionary 743 (1964). Viewing the foregoing statements of the victim in the light most favorable to the State, with the benefit of every reasonable inference arising therefrom, we hold that there was an adequate evidentiary basis for the jury to conclude that defendant had employed a deadly weapon by using the pocketknife in at least two ways: (1) to threaten the victim with death, whereby he effectively discouraged any further resistance to his demands, and (2) to remove an article of her underclothing, whereby he expedited the execution of additional

sexual assaults. Such evidence clearly satisfied the requirements of G.S. 14-27.2(a)(1)(a). *See* note 1, *supra.*

[4] Defendant also argues, however, that the State did not demonstrate that his pocketknife was a deadly weapon. A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm. *See State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915 (1956); *State v. Perry,* 266 N.C. 530, 39 S.E. 2d 460 (1946).[2] *Accord,* Black's Law Dictionary 359 (5th ed. 1979); 79 Am. Jur. 2d *Weapons and Firearms* § 1 (1975); 1 A.L.I. Model Penal Code and Commentaries § 210.0(4) (1980). The definition of a deadly weapon clearly encompasses a wide variety of knives. For instance, a hunting knife, a kitchen knife and a steak knife have been denominated deadly weapons *per se. State v. Brady,* 299 N.C. 547, 264 S.E. 2d 66 (1980); *State v. Lednum,* 51 N.C. App. 387, 276 S.E. 2d 920 (1981); *State v. Parker,* 7 N.C. App. 191, 171 S.E. 2d 665 (1970). A pocketknife is also unquestionably capable of causing serious bodily injury or death. *See generally* 79 Am. Jur. 2d *Weapons and Firearms* § 2 (1975); Annot., 100 A.L.R. 3d 287 (1980); *see also* note 2, *supra.* In *State v. Collins,* the Court opined that a pocketknife, having a blade two and a half inches long, was a deadly weapon as a matter of law. 30 N.C. 407, 409, 412 (1848). *Accord, State v. Roper,* 39 N.C. App. 256, 257, 249 S.E. 2d 870, 871 (1978) ("keen bladed pocketknife"). Nevertheless, the evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death. *See State v. Watkins,* 200 N.C. 692, 158 S.E. 393 (1931); *State v. West,* 51 N.C. 505 (1859).

In the instant case, the trial court submitted the issue concerning the "deadly" character of defendant's pocketknife to the

2. No item, no matter how small or commonplace, can be safely disregarded for its capacity to cause serious bodily injury or death when it is wielded with the requisite evil intent and force. *See, e.g., State v. Joyner,* 295 N.C. 55, 243 S.E. 2d 367 (1978) (Pepsi-Cola bottle); *State v. Strickland,* 290 N.C. 169, 225 S.E. 2d 531 (1976) (plastic bag); *State v. Perry,* 226 N.C. 530, 39 S.E. 2d 460 (1946) (brick); *State v. Heffner,* 199 N.C. 778, 155 S.E. 879 (1930) (blackjack); *State v. Smith,* 187 N.C. 469, 121 S.E. 737 (1924) (baseball bat); *State v. Beal,* 170 N.C. 764, 87 S.E. 416 (1915) (rock); *State v. Craton,* 28 N.C. 164 (1845) (pine stub); *State v. Whitaker,* 29 N.C. App. 602, 225 S.E. 2d 129 (1976) (broom handle, nail clippers).

jury. Defendant contends that the evidence was insufficient for the court to do so since the knife itself was not offered into evidence, and the victim failed to describe the length of the knife's blade. We disagree. The absence of such evidence was indeed a factor to be considered by the jury in its evaluation of the overall weight and worth of the State's case on this point. The omission was not, however, fatal as the State presented other evidence which permitted a rational trier of fact to conclude that the pocketknife was a deadly weapon. The victim's uncontroverted testimony revealed that, prior to the kidnapping and rape, defendant had used the pocketknife to open a can of oil. He later used this same knife to cut off the victim's slip. Defendant was a large man, approximately six feet tall and over 250 pounds. We believe that a knife sturdy enough to open a metal oil can and sharp enough to slash a piece of clothing could surely cause death or great bodily harm when wielded by a man of defendant's physical stature. The assignment of error is overruled.

[5] Defendant argues that the trial court's instructions improperly permitted the jury to convict him of first degree rape upon a theory not legally charged in the indictment. Specifically, defendant took exception to the judge's direction that a verdict of guilty of first degree rape would be warranted if, among other things, the jury found that defendant had "employed or displayed a dangerous or deadly weapon" during an act of forcible sexual intercourse. Defendant contends that this instruction misled the jury into believing that he could be convicted upon his *display* of a *dangerous* weapon, a theory different from, and one requiring less proof than, the formal allegation of his *employment* of a *deadly* weapon in the indictment.

It is a cardinal rule of appellate review that the trial court's instructions must be examined contextually as a whole. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965). "[T]he utterance of the judge is to be considered in the light of the circumstances under which it was made." *State v. Carter*, 233 N.C. 581, 583, 65 S.E. 2d 9, 11 (1951). Thus, minor technical errors in an isolated portion of the charge, which could not have affected the outcome of the trial, will not be held prejudicial if the charge as a whole is correct. *State v. Cummings*, 301 N.C. 374, 271 S.E. 2d 277 (1980); *State v. Cousin*, 292 N.C. 461, 233 S.E. 2d 554 (1977).

Here, the judge twice quoted the precise language of the applicable statute, G.S. 14-27.2(a)(1)(a), when he should have used the more limited wording of the indictment. After inaccurately referring to both the employment and display of a dangerous or deadly weapon, the judge additionally instructed the jury as follows:

> A dangerous or deadly weapon is a weapon which is likely to cause death or serious bodily injury. In determining whether a knife is a deadly weapon you should consider the nature of the knife, the manner in which it was used and the size and strength of Ardell Sturdivant as compared to Elizabeth Harvey. So, I charge that if you find from the evidence beyond a reasonable doubt that on or about July the 11th, 1980, Ardell Sturdivant engaged in vaginal intercourse with Elizabeth Harvey . . . and that Elizabeth Harvey did not consent and that it was against her will and that Ardell Sturdivant employed a knife and that this was a dangerous or deadly weapon, it would be your duty to return a verdict of guilty of first degree rape.

First, we note that in the core of his instructions upon this point, *supra*, the judge did not mention the display of a weapon but properly emphasized that the jury would have to find, beyond a reasonable doubt, that defendant had *employed* the knife during the rapes to convict him of the crime in the first degree. In any event, we fail to see how the reference to both an employment and a display of a weapon could have been particularly detrimental to defendant since the State's evidence clearly supported the conclusion that he had employed the knife by displaying it to the victim and threatening to kill her with it. Second, we hold that the reference to a "dangerous or deadly" weapon was not an impermissible variation from the language of the indictment. The terms "dangerous" and "deadly," when used to describe a weapon, are practically synonymous. Black's Law Dictionary 355, 359 (5th ed. 1979). Moreover, any possible illusion, as suggested by defendant, that a dangerous weapon is somehow less harmful than, and different from, a deadly one was plainly dispelled when the judge stated: "A dangerous or deadly weapon is a weapon which is likely to cause death or serious bodily injury." This is the well-accepted definition of a *deadly* weapon in this State. *See State v. Cauley, supra*, 244 N.C. 701, 94 S.E. 2d 915 (1956); *State v. Perry, supra*, 226 N.C. 530, 39 S.E. 2d 460 (1946). In these cir-

cumstances, the mistakes in the charge cannot be deemed so substantial as to create a reasonable probability that the trial result would have otherwise been in defendant's favor; hence, the errors do not warrant a new trial. In sum, the variance between the instructions and the theory alleged in the indictment was not significant or material, and defendant was not wrongfully convicted upon "some abstract theory not supported by the bill of indictment." *See State v. Taylor*, 301 N.C. 164, 170, 270 S.E. 2d 409, 413 (1980); *State v. Dammons*, 293 N.C. 263, 272, 237 S.E. 2d 834, 840 (1977).

[6] Defendant brings forward yet another assignment of error concerning the trial court's instructions on first degree rape. As defendant sees it, a unique problem arose because the State introduced evidence tending to show the commission of several acts of forcible intercourse to support a charge of only one count of first degree rape. His contentions are two-fold: (1) the court erred in not instructing the jury, on its own motion, that it could not consider any evidence of the first act of intercourse in determining his guilt of first degree rape since the victim did not testify that a weapon had been employed during that intitial rape, and (2) the court erred in not instructing the jury that they had to agree unanimously as to the existence of all of the elements of first degree rape with respect to one particular act of forcible vaginal intercourse. We hold that the judge adequately and fairly explained the law arising on the evidence, G.S. 15A-1232, and defendant was not entitled, on this record, to more specific or separate instructions absent a request therefor.

First, we find that, in substance, the trial court gave one of the admonitions which defendant argues were erroneously omitted. The trial judge directed the jury to return a verdict of guilty of first degree rape only if they found beyond a reasonable doubt that defendant had performed an act of forcible, non-consensual vaginal intercourse with the victim and had employed a deadly weapon in its commission. The judge further instructed the jury:

> [I]f you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree rape. If you do not find the defendant guilty of first degree rape, you must determine whether he is guilty of second degree rape.

> Second degree rape differs from first degree rape only that it is not necessary for the State to prove beyond a reasonable doubt that the defendant employed or displayed a dangerous or deadly weapon.

By instructing on the difference between first and second degree rape, the judge effectively prevented the jury from considering evidence of any sexual deed that did not entail the use of a deadly weapon on the first degree rape charge.

Second, we find no authority in this State for the proposition that a trial judge must give *sua sponte* an instruction regarding unanimity of the verdict as to a specific criminal act. Indeed, it is well settled law in this jurisdiction that, in the absence of a request, a judge is not even required to charge the jury in general about the need for an unanimous verdict since the defendant always has the right to have the jury polled. *State v. Ingland*, 278 N.C. 42, 47, 178 S.E. 2d 577, 580 (1971); *State v. Hinton*, 14 N.C. App. 564, 567, 188 S.E. 2d 698, 700, *cert. denied*, 281 N.C. 626, 190 S.E. 2d 469 (1972). Moreover, we are not persuaded that the jury was misled or confused concerning the need for unanimity before they could properly convict this defendant of first degree rape. The judge fully and correctly explained the elements of the crime to the jury. In addition, though he was not required to do so, the judge did instruct the jury "that a verdict is not a verdict until all twelve jurors unanimously agree as to what your decision shall be." Such instructions were patently sufficient to apprise the jury that it must agree on the existence of all of the elements of the greater offense in at least one of the sexual assaults described by the victim. Finally, we note that the verdict returned against defendant specifically stated: "We, the jury, *unanimously* find the defendant, Ardell Sturdivant, Guilty of 1st Degree Rape." (Emphasis added). If defendant had any doubt as to the jury's unanimity, he should have exercised his right to have the jury polled. *State v. Ingland, supra.*

[7] We shall finally consider defendant's remaining contentions concerning the validity of his kidnapping conviction. Defendant first contends that the trial court erred in denying his motion to dismiss the kidnapping charge. We disagree. It is well established that a criminal charge against a defendant is not subject to dismissal unless the State fails to present substantial evidence of

his guilt on every essential element of the particular offense. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981); *State v. Fletcher*, 301 N.C. 870, 272 S.E. 2d 859 (1981). Under G.S. 14-39(a), the essence of any kidnapping offense is the unlawful confinement, restraint or removal of a human being for a certain proscribed purpose. Here, the indictment charged defendant with a violation of G.S. 14-39 upon a single theory: that he kidnapped the victim "by unlawfully restraining her" to facilitate his subsequent commission of first degree rape. The trial court further delimited the permissible basis for a kidnapping conviction by instructing the jury that they must find beyond a reasonable doubt "[t]hat the defendant unlawfully restrained Elizabeth Harvey, that is, restricted Elizabeth Harvey's freedom of movement by restricting her to an automobile in a place or places other than where she wanted to be." Specifically, defendant argues that there was no evidence whatsoever in the record to support submission of the kidnapping charge to the jury upon the hypothesis that he illegally restrained the victim *in her car*. We believe that the State met its burden of presenting substantial evidence of defendant's guilt of the crime upon this theory.

Viewed in the light most favorable to the State, the evidence permitted a rational trier of fact to find that defendant commenced an effective restraint of the victim in her automobile by reentering it, after he had put oil and water in the engine, under the fraudulent pretext of seeking a ride to the home of a crippled friend. This constraint of the victim continued as defendant directed her to turn off the highway onto a dirt road, whereupon he cut off the car engine, made physical advances upon her, refused her repeated requests for him to leave the vehicle and later, while persisting in the pretense of going to the home of a crippled friend, made her drive still further along that deserted road. Restraint of the victim in her automobile did not end until defendant grabbed the keys out of the ignition and pulled her from the car to take her into the tobacco barn.

The State's evidence also permitted the jury to find that defendant's unlawful restraint caused the victim to remain in her car "in a place or places other than where she wanted to be." The victim was driving to her home in South Carolina with her son on a Friday evening. Although engine trouble caused her to make a detour in the direction of Raeford, North Carolina, clearly it was

not her intent to linger in that area after the completion of the required repairs. Nonetheless, when the car was again ready for travel, she agreed to delay her journey for a while longer in order to give defendant a ride to another nearby residence. In light of these circumstances, it is obvious that defendant's chicanery directly induced the victim to remain in her car in a rural, deserted location in this state when she actually wished to be in another place—her home in South Carolina.

A kidnapping can be just as effectively accomplished by fraudulent means as by the use of force, threats or intimidation. *State v. Alston*, 294 N.C. 577, 589, 243 S.E. 2d 354, 362 (1978); *State v. Ingland*, 278 N.C. 42, 47-48, 178 S.E. 2d 577, 581-82 (1971); *see generally* 1 Am. Jur. 2d *Abduction and Kidnapping* §§ 13, 15 (1962); Annot., *Kidnapping by Fraud or False Pretenses*, 95 A.L.R. 2d 450 (1964). The unfortunate victim in the case at bar can, no doubt, attest to this fact.[3] More particularly, in *State v. Fulcher*, our Court noted that the offense of kidnapping, as it is defined in G.S. 14-39, includes an unlawful restraint whereby one person's freedom of movement is restricted due to another's fraud or trickery. 294 N.C. 503, 523, 243 S.E. 2d 338, 351 (1978). This is the precise manner in which the kidnapping was committed here, and we hold that defendant's unlawful restraint of the victim inside her car was a separate, complete act, independent of and apart from his subsequent rape of her in the tobacco barn. *See State v. Silhan*, 297 N.C. 660, 256 S.E. 2d 702 (1979); *State v. Fulcher*, *supra*.

[8] Ten days after oral arguments were concluded in this Court, defendant filed a motion in arrest of judgment and for appropriate relief upon the ground that the kidnapping indictment was fatally defective. Several statutes in our criminal procedure law convince us that this motion is properly before the Court.

3. Indeed, the case reports of this Court are replete with illustrations of kidnapping executed by deception. *See, e.g., State v. Wilson*, 296 N.C. 298, 250 S.E. 2d 621 (1979) (nine-year-old girl fraudulently enticed to enter a vehicle); *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1976), *cert. denied*, 414 U.S. 1160, 94 S.Ct. 920, 39 L.Ed. 2d 112 (1974) (retarded girl admitted defendant into her home after he falsely told her he needed to use the telephone); *State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845 (1971) (young boy followed a man into the woods on the pretense of looking for squirrels); *State v. Gough*, 257 N.C. 348, 126 S.E. 2d 118 (1962) (man falsely represented to a young girl that he wanted her to baby-sit for his two children).

G.S. 15A-1415(b)(2) provides that a motion for appropriate relief, which is based upon the trial court's lack of subject matter jurisdiction, may be asserted by a defendant "any time" after verdict. It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. N.C. Const. Art. I, § 22; *State v. Simpson*, 302 N.C. 613, 276 S.E. 2d 361 (1981); *State v. Crabtree*, 286 N.C. 541, 212 S.E. 2d 103 (1975). Thus, defendant's motion, attacking the sufficiency of an indictment, falls squarely within the proviso of G.S. 15A-1415(b)(2), *supra*, and as such may be made for the first time in the appellate division. G.S. 15A-1418. Moreover, the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division. G.S. 15A-1441, -1442(2)(b), -1446(d)(1) and (4). Consequently, we shall proceed to address defendant's motion upon its merits.

[9] In his motion, defendant argues that the indictment was fatally defective under G.S. 14-39(a) because it failed to allege specifically that the kidnapping was effected *without the victim's consent.* To sustain his position, defendant relies exclusively upon a recent decision of the Court of Appeals, *State v. Froneberger*, 53 N.C. App. 471, 281 S.E. 2d 71 (1981). In *Froneberger*, the Court of Appeals examined the sufficiency of the following kidnapping indictment:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 13 day of July, 1979, in Mecklenburg County, Ronald Tyree Fronberger, did unlawfully, wilfully and feloniously confine, restrain, and remove another person, Ethell Wilson, for the purpose of facilitating the commission of the felony of murder in teh [sic] first degree, adn [sic] said Ethell Wilson was killed as a result of said kidnapping, in violation of G.S. 14-39.

The Court of Appeals concluded that the slight misspelling of defendant's name (absence of "e" as fifth letter) and the absence of an allegation as to the age of the victim did not render the indictment defective. The Court further held, however, that the failure to allege the element of lack of consent in the indictment did constitute fatal error. First, we note that identical indict-

ments were returned against Froneberger's "partners" in the charged kidnapping, and that their convictions have been upheld on appeal. *State v. Norwood*, 303 N.C. 473, 279 S.E. 2d 550 (1981); *State v. Easter*, 51 N.C. App. 190, 275 S.E. 2d 861, *appeal dismissed*, 303 N.C. 183 (1981). Second, we further find that the language of the kidnapping indictment in the instant case is not exactly the same as that used in *Froneberger*. In any event, it suffices to say that we are neither persuaded nor bound by the reasoning of the Court of Appeals,[4] and we decline to hold here that the indictment was insufficient to vest the trial court with jurisdiction to try defendant for kidnapping.

Adequate notice of the nature of a criminal accusation is a necessary corollary to the jurisdictional requirement of an indictment in capital cases. N.C. Const. Art. I, §§ 22-23. This constitutional mandate, however, merely affords a defendant the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense. *See* G.S. 15A-924(a)(5); *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977); *State v. King*, 285 N.C. 305, 204 S.E. 2d 667 (1974). In pertinent part, G.S. 14-39(a) defines the crime of kidnapping as follows: "Any person who shall unlawfully confine, restrain, or remove from one place to another, any person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping. . . ." We believe that this statutory definition of kidnapping focuses on the unlawful confinement, restraint or removal of a human being and that the omission of an *explicit* reference to the victim's lack of consent thereto does not constitute a failure to include an essential element of the offense in the indictment.[5]

This case is clearly governed by the exception set out in *State v. Bryant*, 111 N.C. 693, 694, 16 S.E. 326 (1892):

4. The State petitioned the Court for discretionary review of *Froneberger*, *supra*, on 21 September (1981). This matter is still pending.

5. Prior to 1 July 1975, G.S. 14-39 simply provided that "It shall be unlawful . . . to kidnap or cause to be kidnapped any human being, or to demand a ransom . . . to be paid on account of kidnapping. . . ." Since the elements of the crime were not statutorily delineated, our courts applied the common law definition of kidnapping. Thus, under the former statute, the unlawful taking and carrying away of a person by force against his will constituted kidnapping in this State. *See State v. Ingland*, 278 N.C. 42, 178 S.E. 2d 577 (1971); *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870, *appeal dismissed*, 382 U.S. 22, 86 S.Ct. 227, 15 L.Ed. 2d 16 (1965).

> Though the general rule is, that a proviso contained in the same section of the law . . . in which the defence is defined, must be negatived, yet where the charge itself is of such a nature that the formal statement of it is equivalent in meaning to such negative averment, there is no reason for adhering to the rule, and such a case constitutes an exception to it.

See State v. Epps, 213 N.C. 709, 197 S.E. 580 (1938). By its very nature, the crime of kidnapping cannot be committed if one consents to the act in a legally valid manner. *See* 1 Am. Jur. 2d *Abduction and Kidnapping* § 15 (1962); Bouvier's Law Dictionary 1806 (Rawle rev. 1914). The consent element of G.S. 14-39(a) is, therefore, in reality, an absolute defense to the charge. It was established long ago that an indictment need not negate a defense to the stated crime; rather, it is left to the defendant to show his defenses at trial. *State v. Norman*, 13 N.C. 222 (1828).

More importantly, we are not convinced that defendant's indictment utterly failed to indicate that the kidnapping was accomplished without the victim's consent. The indictment stated:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 11 day of July, 1980, in Hoke County Ardell Sturdivant *unlawfully and wilfully did feloniously kidnap* Elizabeth Sellers Harvey, a person who had attained the age of sixteen (16) years, *by unlawfully restraining her* for the purpose of facilitating the commission of a felony, to wit: rape, in violation of North Carolina General Statutes Section 14-39. (Emphases added.)

The term "kidnap," by itself, continues to have a precise and definite legal meaning under G.S. 14-39(a), to wit, the unlawful seizure of a person against his will. Black's Law Dictionary 781 (5th ed. 1979). *See State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253 (1976); *State v. Penley*, 277 N.C. 704, 178 S.E. 2d 490 (1971); *see also State v. George*, 93 N.C. 567 (1885). In short, common sense dictates that one cannot unlawfully kidnap or unlawfully restrain another with his consent. This being so, we hold that the indictment adequately alleged the essential elements of kidnapping.

In conclusion, we note that the "true and safe rule" for prosecutors in drawing indictments is to follow strictly the precise

wording of the statute because a departure therefrom unnecessarily raises doubt as to the sufficiency of the allegations to vest the trial court with jurisdiction to try the offense.[6] *State v. Carpenter*, 173 N.C. 767, 92 S.E. 373 (1917); *State v. Bryant, supra; State v. George, supra.* Nevertheless, it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime. *See State v. Gregory*, 223 N.C. 415, 27 S.E. 2d 140 (1943). Thus, G.S. 15-153 provides that an indictment shall not be quashed "by reason of any informality or refinement" if it accurately expresses the criminal charge in "plain, intelligible, and explicit" language sufficient to permit the court to render judgment upon conviction. We hold that the instant indictment reasonably notified defendant of the crime for which he was being charged by plainly describing *who did what and when* and by indicating which statute was violated by such conduct. In such circumstances, it would not favor justice to allow defendant to escape merited punishment upon a minor matter of form. *See State v. Parker*, 81 N.C. 531, 532 (1879); *State v. Colbert*, 75 N.C. 368, 373-74 (1876). Defendant's motion for appropriate relief is accordingly denied.

In defendant's trial, we find no error.

No error.

6. A brief and informal survey of the records of twenty-five kidnapping cases appealed to this Court since the enactment of the new kidnapping statute disclosed four other cases where the indictment failed to negate the element of consent. *State v. Norwood*, 303 N.C. 473, 279 S.E. 2d 550 (1981); *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980); *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977). These cases originated in Cumberland, Guilford and Mecklenburg counties.

PAUL OVERTON, JR. v. GOLDSBORO CITY BOARD OF EDUCATION

No. 38

(Filed 3 November 1981)

1. **Schools § 13.2— teacher dismissal—standard for judicial review**

The standards for judicial review set forth in G.S. 150A-51 govern an appeal from a city board of education's dismissal of a career teacher, and the issue presented by the appeal in this case is whether the decision of the board is supported by substantial evidence in view of the whole record, G.S. 150A-51(5).

2. **Schools § 13.2— teacher dismissal for neglect of duty**

Dismissal of a career school teacher for "neglect of duty" under G.S. 115-142(e)(1)(d) cannot be sustained unless it is proven that a reasonable man under those same circumstances would have recognized the duty and would have considered himself obligated to conform.

3. **Schools § 13.2— criminal charges against teacher—failure to teach classes—dismissal for neglect of duty—insufficient evidence**

Plaintiff career teacher's conduct in staying away from school pending resolution of criminal charges against him did not constitute "neglect of duty" within the meaning of G.S. 115-142(e)(1)(d) where the evidence showed that plaintiff was indicted on felony drug charges; plaintiff promptly notified his principal that he was in trouble and would be absent from school; plaintiff remained in close contact with the school superintendent and told the superintendent that he would remain away from the classroom until the matter had been resolved because he felt it would be in the students' best interest; the superintendent never instructed plaintiff to return to school or indicated that his absence could give the board of education cause to dismiss him; the superintendent testified that he agreed that it would be better for plaintiff to remain away from the classroom while the charges against him were pending; plaintiff made a request for leave of absence without pay but the board of education never acted upon such request; and prior to the criminal charges plaintiff's record of performance as a teacher was unblemished for the seventeen years he had been employed by defendant board of education.

ON appeal as a matter of right by defendant from the decision of the Court of Appeals reported at 51 N.C. App. 303, 276 S.E. 2d 458 (1981), one judge dissenting, affirming judgment entered by *Peel, Judge*, at the 28 April 1980 Session of Superior Court, WAYNE County.

By this appeal we consider the adequacy of evidence necessary to establish "neglect of duty," as used in G.S. 115-142(e)(1)(d), as a ground for dismissal of a career public school teacher employed by a city school board.

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., by James C. Fuller, Jr., for plaintiff-appellee.

Taylor, Warren, Kerr & Walker, by Lindsay C. Warren, Jr., and Gordon C. Woodruff, for defendant-appellant.

CARLTON, Justice.

I.

Plaintiff, a career public school teacher with over fifteen years of service in the North Carolina public schools, initiated this action to contest his dismissal by defendant for "neglect of duty." In his complaint he sought reversal of the order of the Goldsboro City Board of Education (hereinafter "Board") and reinstatement to his position as a career teacher. He also prayed for back pay, costs and attorney's fees incurred in bringing this action. The events which led to his dismissal by the Board are as follows:

On 24 April 1979 plaintiff was employed by defendant as a physical education teacher at Middle School South. That morning he learned from a radio news announcement that he had been indicted by a Wayne County grand jury on felony drug charges. After contacting his minister, plaintiff called the school principal, William Charlton, and informed him that he, plaintiff, was in trouble and would not be at work that day and possibly not for the rest of the year. He requested that Charlton retain a teacher to substitute in his classes. Later that morning Charlton relayed plaintiff's message to the Superintendent of the Goldsboro City Schools, William Johnson. During the course of the day Charlton and Johnson learned of the charges against plaintiff.

On 26 April 1979 plaintiff met with Superintendent Johnson to inform him of the charges and to profess his innocence. Johnson reviewed with plaintiff the statutes governing teacher dismissal. Plaintiff told Johnson that he was placing his fate in the hands of the Board and had confidence in so doing. Johnson neither instructed plaintiff to resume his teaching responsibilities nor did he indicate approval of plaintiff's absence. During this meeting plaintiff indicated to Johnson that he thought it would be in the best interest of his students if he did not return to school until his name had been cleared.

On 3 May 1979 plaintiff again met with Superintendent Johnson. At this meeting Johnson informed plaintiff that the Goldsboro City Board of Education had met to discuss plaintiff's case and had requested that plaintiff submit his resignation by noon on 8 May 1979. Although plaintiff asked why his resignation was being requested Johnson told him only that "we felt we did need his resignation." Nothing was said to plaintiff about neglect of duty. Johnson did not instruct him to return to school, nor did he inform plaintiff that dismissal procedures would be initiated if his resignation was not received by noon on 8 May 1979. At either the 3 May meeting or the 26 April meeting plaintiff did request a leave of absence without pay. Although Mr. Johnson never instructed plaintiff to return to or to stay away from school, he did agree with plaintiff that it would be better for plaintiff not to be in the classroom while the charges were pending.

Plaintiff did not submit his resignation but, instead, requested in a letter dated 8 May 1979, addressed to Superintendent Johnson, that he be granted a leave of absence without pay pending the disposition of the drug charges. Johnson received the letter on 9 May 1979.

On 10 May 1979 the school board met and, upon Mr. Johnson's recommendation, voted to suspend plaintiff without pay and to initiate dismissal proceedings. The Board was informed of plaintiff's request for leave of absence without pay.

On 16 May 1979, Mr. Johnson informed plaintiff by letter of the Board's action. This letter was the first notice given to plaintiff that his absence was considered a neglect of duty.

Upon notice of the Board's action, plaintiff requested a hearing before a panel of the Professional Review Committee (hereinafter "Committee") pursuant to his rights under G.S. 115-142(h). That Committee held a hearing on 5 July 1979. The Committee heard evidence on the charges of inadequate performance and neglect of duty as grounds for dismissal. During the hearing the charge of inadequate performance was dropped. The Committee found the facts essentially as noted above and concluded that the charge of neglect of duty "[was] not true and substantiated." The Committee, in its Report, stated: "Mr. Overton made good faith efforts to communicate with his superintendent and

principal and to cooperate with them. He was not told that he should return to the classroom under these circumstances. A reasonable man could assume that his continued absence was approved until he was instructed otherwise."

Despite the conclusion of the Committee that plaintiff had not neglected his duty, Superintendent Johnson pursued the dismissal proceedings and recommended to the Board that plaintiff be dismissed. At plaintiff's request, the Board held a hearing on 10 December 1979 to review the charges against him. Based on the evidence presented at the hearing, the Board found as fact that plaintiff voluntarily had absented himself from school without permission and that he had not requested sick leave or personal leave. Although the Board also found that plaintiff was never instructed to return to his teaching duties, it found that his failure to report to school constituted a neglect of duty and concluded that, because of his contract, the plaintiff should have been aware of his duty to report to school regardless of his personal problems. The Board concluded that the charge of neglect of duty was true and substantiated and that plaintiff should be dismissed. Based on these findings and conclusions, the Board ordered plaintiff's dismissal.

From the order of the Board plaintiff appealed to the Superior Court, Wayne County, pursuant to G.S. 115-142(n) (1978) by filing notice of appeal on 16 January 1980. With his notice plaintiff filed a complaint requesting that the court reverse the Board's order, that he be reinstated as a career teacher with tenure, and that he recover back pay, costs and attorney's fees. The appeal was heard by Judge Peel at the 28 April 1980 Session of Superior Court, Wayne County. After reviewing the Board's order, the transcript of the hearing before the Board and the report of the Professional Review Committee, Judge Peel concluded "that the charges brought by the Superintendent against the petitioner/appellant are not substantiated" and reversed the decision of the Board. No mention was made in Judge Peel's order of plaintiff's request for reinstatement, back pay, costs and attorney's fees. The Board excepted to the order and gave notice of appeal.

On appeal, the Court of Appeals affirmed the order of the Superior Court. After setting out the "whole record" standard of

review for appeals from administrative agencies, the court reviewed the evidence to determine whether the decision of the Board was "[u]nsupported by substantial evidence . . . in view of the entire record as submitted," G.S. § 150A-51(5) (1978). The Court of Appeals first noted the uncontroverted evidence concerning events prior to the dismissal: that prior to April 1979 plaintiff's performance as a teacher had always been rated satisfactory; that plaintiff had maintained close contact with school officials during the period from 24 April to 10 May 1979, when dismissal proceedings were initiated; that no school official instructed plaintiff to return to work; that although it was the normal practice to give an employee an opportunity to correct the problem before seeking dismissal, plaintiff was never so warned. Based on a review of the entire record, Judge Hill concluded that the decision to dismiss plaintiff was not supported by substantial evidence. Judge Webb concurred.

In his dissent, Judge Hedrick argued that Judge Peel had employed the incorrect standard of review and had substituted his judgment for that of the Board. He voted to vacate Judge Peel's order and to remand to the superior court for review under the appropriate standard.

Defendant appeals to this Court from the decision of the Court of Appeals as a matter of right pursuant to G.S. 7A-30(2) (1969).

II.

[1] We first determine the appropriate standard of judicial review. Plaintiff appealed the Board's action to the superior court pursuant to the provisions of G.S. 115-142(n) (1978). That statute, however, provides no standards for review. We find no standards for judicial review for an appeal of a school board decision to the courts set forth in Chapter 115 of our General Statutes. Moreover, we note that G.S. 150A-2(1) expressly excepts county and city boards of education from the coverage of the Administrative Procedure Act (APA), Chapter 150A, N.C. General Statutes. However, this Court held in *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977), that the standards for judicial review set forth in G.S. 150A-51 are applicable to appeals from school boards to the courts. Since no other statute provides guidance for judicial review of school

board decisions and in the interest of uniformity in reviewing administrative board decisions, we reiterate that holding and apply the standards of review set forth in G.S. 150A-51 (1978).[1]

Hence, as stated by the Court of Appeals, the issue presented by this appeal is whether the decision of the Board dismissing plaintiff is unsupported by substantial evidence in view of the whole record, G.S. § 150A-51(5) (1978). Although the language in Judge Peel's order is not lifted verbatim from the statute, we agree with the Court of Appeals that his statement that "the charges . . . are not substantiated" is merely a paraphrase of G.S. 150A-51(5). Therefore, our review is limited to determining whether the superior court and the Court of Appeals correctly decided that the Board's decision was not supported by substantial evidence.

The standard of review set forth in G.S. 150A-51(5) has come to be known as the "whole record" test. In explaining what is involved in "whole record" review under the statute which governed judicial review prior to enactment of the APA, Justice Copeland stated:

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C. L. Rev. 635, 668-74 (1971); Hanft, *Administrative Law*, 45 N.C. L. Rev. 816, 816-19 (1967). The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, Universial Camera Corp., *supra*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the

1. We wish to make it clear that only G.S. 150A-51 is applicable to appeals from decisions of city or county boards of education. Neither this case nor *Thompson* is to be interpreted as holding that any other provision contained in the APA applies to actions of city or county boards of education or appeals therefrom.

> Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. [Citation omitted.]

Thompson v. Wake County Board of Education, 292 N.C. at 410, 233 S.E. 2d at 541. Thus, in deciding this appeal, we will consider all of the evidence, both that which supports the decision of the Board and that which detracts from it to determine whether the finding that plaintiff neglected his duty, the ground on which the dismissal was based, is supported by substantial evidence.

III.

The statute which governs the employment and dismissal of career teachers in our public schools, G.S. § 115-142 (1978 & Supp. 1979), provides that a career teacher may be dismissed or demoted only for certain specified reasons. See G.S. § 115-142(e) (Supp. 1979). In part, this subsection provides: "(1) No career teacher shall be dismissed or demoted or employed on a part-time basis except for: . . . d. neglect of duty . . . ." The term "neglect of duty" is nowhere defined in our statutes nor has this Court endeavored to define it. However, the Court of Appeals indicated in *Thompson v. Wake County Board of Education*, 31 N.C. App. 401, 230 S.E. 2d 164 (1976), *rev'd on other grounds*, 292 N.C. 406, 233 S.E. 2d 538 (1977) (insufficient evidence), that the term encompasses failure to maintain classroom order.

Our review of cases from our sister states reveals that the term "neglect of duty" is uniformly accorded a common sense definition: failure to perform some duty imposed by contract or law. *See, e.g., State ex rel. Hardie v. Coleman*, 115 Fla. 119, 155 So. 129 (1934); *State ex rel. v. Ward*, 163 Tenn. 265, 43 S.W. 2d 217 (1931); *State ex rel. Knabb. v. Frater*, 198 Wash. 675, 89 P. 2d 1046 (1939). In *Ward*, the Tennessee Supreme Court stated, "The terms 'malfeasance' and 'neglect of duty' are comprehensive terms and include any wrongful conduct that affects, interrupts or interferes with the performance of official duty." 163 Tenn. at 266, 43 S.W. 2d at 219. The Florida courts have also adopted a functional definition of the term: "Neglect of duty has reference

to the neglect or failure on the part of a public official to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law." *State ex rel. Hardie v. Coleman*, 155 So. at 132. Although the term is susceptible to definition, it is, as a California appellate court said, "an abstraction until viewed in light of the facts surrounding a particular case," *Gubser v. Department of Employment*, 271 Cal. App. 2d 240, 242, 76 Cal. Rptr. 577, 579 (1969). With a general definition of the term in mind, we now examine the facts of this particular case to determine whether plaintiff neglected his duty by failing to report to school.

It requires no citation of authority to state that one of the basic duties of a public school teacher, or any employee, is to appear for work. Under the terms of his contract with the defendant Board, plaintiff agreed to teach through the end of the 1978-79 school year and, thus, had a duty to present himself for work. Clearly, failure to report for work may constitute "neglect of duty."

[2] The Board argues in essence that defendant's failure to appear for work for reasons other than illness without the express permission of the Superintendent constitutes, *ipso facto*, a neglect of duty within the meaning of the statute. We disagree. Regardless of the circumstances to which "neglect of duty" is sought to be applied, we think that dismissal under the statute on this ground alone cannot be sustained unless it is proven that a reasonable man under those same circumstances would have recognized the duty and would have considered himself obligated to conform.

The evidence before the Board, on most relevant points, was not in conflict. All parties agree that plaintiff promptly notified his principal, Mr. Charlton, that he was in trouble and would be absent from school and that he remained in close contact with Superintendent Johnson, meeting with him on 26 April and on 3 May. At both of these meetings plaintiff told Superintendent Johnson that he would remain away from the classroom until the matter had been resolved because he felt it would be in the students' best interest. Superintendent Johnson never instructed plaintiff to return to school or indicated that his absence could give the Board cause to dismiss him. Indeed, Mr. Johnson

testified before the Board that he agreed that it would be better for plaintiff to remain away from the classroom while the charges against him were pending. And, at either the 26 April or 3 May meeting, plaintiff discussed a leave of absence without pay. His request was not granted. At the 3 May meeting, Superintendent Johnson informed plaintiff that the Board had requested his resignation. No reason for the request was given and neglect of duty wasn't mentioned. In a letter dated 8 May 1979 addressed to Superintendent Johnson, plaintiff formally requested a leave of absence. This request, although submitted to the Board, was never acted upon by it, and on 10 May 1979 it adopted a resolution suspending plaintiff without pay on the ground of neglect of duty. Plaintiff was notified of the resolution by letter dated 16 May; this was plaintiff's first notice that his absence was considered a neglect of duty. Prior to the criminal charges plaintiff's record of performance as a teacher was unblemished for the seventeen years he had been employed by the Board. Superintendent Johnson explained that plaintiff's indeterminate length of absence created a problem in finding substitutes although a substitute was procured by the school for all the school days prior to plaintiff's suspension.

[3] Taking into account the evidence which supports the Board's action and that which detracts from it, we find that the Board's conclusion that plaintiff neglected his duty by absenting himself from his job as a school teacher while criminal charges were pending against him is unsupported by substantial evidence in view of the entire record as submitted and, for that reason, we agree with Judge Peel's order reversing the Board's decision. Indeed, we find that all of the evidence before the Board supports the conclusion that plaintiff acted reasonably in choosing to stay away from the classroom and that his voluntary continued absence was the most prudent course of action. We agree fully with the finding of the Professional Review Committee that "[a] reasonable man could assume that his continued absence was approved until he was instructed otherwise." As we stated in *Thompson*, "[w]hile the panel report is not determinative, it is entitled to some weight in a review of the entire record." 292 N.C. at 414, 233 S.E. 2d at 543. We hold that plaintiff's conduct in staying away from school pending resolution of the criminal charges against him did not constitute a neglect of duty within the meaning of G.S. 115-142(e)(1).

This result does not conflict with the cases cited to us by the Board. In *Miller v. Noe*, 432 S.W. 2d 818 (Ky. App. 1968), plaintiff took an indeterminate voluntary leave of absence to work for the American Federation of Teachers without the consent of the school board. Upon his return to the teaching profession he was denied a job and sued to regain his teaching position. The trial court denied his claim and, on appeal, the Court of Appeals of Kentucky affirmed, holding that "an act of resignation occurred when the teacher took an indeterminate voluntary leave of absence without the consent of the Board." *Id.* at 818. Important to the holding of this case, however, was the express denial of the plaintiff's request for a leave one month prior to the date on which he stopped teaching.

This factor was likewise present in *Fernald v. City of Ellsworth Superintending School Committee*, 342 A. 2d 704 (Me. 1975). There, plaintiff left school after her request for a leave had been denied and she was dismissed. Her dismissal for taking an unauthorized leave was upheld on the ground that her services were unprofitable to the school board.

Similarly, the plaintiff in *Evard v. Board of Education of City of Bakersfield*, 64 Cal. App. 2d 745, 149 P. 2d 413 (1944), was dismissed for taking an indeterminate leave of absence after the local school board had denied her request. The court of appeals upheld her dismissal on the ground of unprofessional conduct. The court stressed that plaintiff knew that her absence was unauthorized and that plaintiff could not reasonably have believed that her absence would be forgiven.

Other cases cited by the defendant Board are of like import. In all of these cases, regardless of the stated ground for dismissal, the courts emphasized that the plaintiff had taken the leave with full knowledge that the local board had disapproved the request. In this case, plaintiff's request for a leave was never acted on; the only response was a request for his resignation. Moreover, the Superintendent seemed to agree with plaintiff that his course of action was the proper one under the circumstances.

We do not intend to imply that neglect of duty based on unauthorized leave can never take place in the absence of a prior denial of a request for leave. There may be circumstances under which a reasonable person would know that his actions would be

disapproved, and such actions may constitute neglect of duty. Here, we decide only that the question must be decided on a case-by-case basis with the guidance of the general principles noted above.

Finally, we agree with Judge Hedrick that it is not the function of a court to substitute its judgment for that of an administrative agency when reasonably conflicting views are presented. However, under G.S. 150A-51(5) the evidence in support of the Board's decision must be *substantial.* "The 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Rogers,* 297 N.C. 48, 65, 253 S.E. 2d 912, 922 (1979); *see Commissioner of Insurance v. N.C. Rate Bureau,* 300 N.C. 381, 430, 269 S.E. 2d 547, 578 (1980). Here, for the reasons stated above, we must conclude that the Board's decision is not supported by substantial evidence and therefore must be reversed.

Plaintiff's complaint requested relief in the form of reinstatement with tenure, back pay, costs and attorney's fees. Judge Peel merely reversed the Board's decision. The question of appropriate relief was not addressed and therefore is not before us. On remand, the Board will proceed as provided by law. We express no opinion on plaintiff's entitlement to reinstatement with tenure, costs and attorney's fees; however, by his request for a leave of absence pending ultimate resolution of the criminal charges, which has not occurred as of this writing, plaintiff has waived any right to collect back wages.

V.

We note our awareness that, for all practical purposes, this decision may appear moot. If plaintiff's criminal convictions are ultimately affirmed, the Board may dismiss him on that ground. G.S. 115-142(e)(1)g. Moreover, as noted above, plaintiff will not be entitled to back wages in any event.

We are also fully aware of the difficult situation confronting the school board and that our Legislature has not provided school boards a workable method for dealing with these problems. We are not inadvertent to the circumstances surrounding plaintiff's dismissal. This Board had the commendable intention of ensuring

that no person involved in violation of drug laws would be allowed to teach the children of Goldsboro. Such an intention can only be applauded. Granted, the decision of the three courts which have now reviewed the board's action are based on what the general public perceives as a "technicality." Nevertheless, it is the function of the courts to enforce the requirements of the law. This is so not just for the benefit of this plaintiff, but for others who may appear more deserving.

In summary, we conclude that the order of the Board dismissing plaintiff for neglect of duty must be vacated because the Board's findings and conclusions are unsupported by substantial evidence in view of the entire record as submitted, G.S. § 150A-51(5), and plaintiff's rights have been prejudiced thereby. Therefore, the decision of the Court of Appeals affirming the reversal of the Board's order by the Superior Court, Wayne County, is

Affirmed.

STATE OF NORTH CAROLINA v. ANTHONY DWAYNE JONES

No. 31

(Filed 3 November 1981)

1. **Searches and Seizures § 12— temporary detention—reasonable suspicion of criminal activity—seizure within the ambit of Fourth Amendment**

The totality of circumstances afforded an officer reasonable grounds to believe criminal activity was afoot, and he therefore did not violate defendant's constitutional right by temporarily detaining defendant as a suspect where (1) the officer observed an occupied vehicle parked in the travel lane of a public road at 11:45 p.m. with its lights off and motor running, (2) the officer noticed defendant running from a closed business toward the car, and (3) defendant opened the car door and placed something on the back seat.

2. **Searches and Seizures § 33— shotgun in "plain view"—seizure proper**

Since an officer had the authority to detain defendant temporarily, he violated no constitutional right in seizing a sawed-off shotgun, which constituted contraband under G.S. 14-288.8(c)(3), which protruded from a brown paper bag in the back seat of a vehicle and was in plain view from a vantage point the officer had legally obtained.

3. Rape § 6.1— failure to instruct on second degree rape proper

The trial court was not required to submit second degree rape and second degree sexual offense, even though defendant's witness testified he had defendant's shotgun while defendant was with the victim, as there was no evidence defendant used any force other than the shotgun and if the jury found defendant did not have the shotgun, it would have to find him not guilty on grounds the victim consented. G.S. 14-27.2(a)(1)a, G.S. 14-27.3(a)(1), G.S. 14-27.4(a)(1)a, and G.S. 14-27.5(a)(1).

4. Criminal Law § 26.5; Kidnapping § 1— rape and kidnapping—no double jeopardy

There is no violation of the double jeopardy clause in considering rape as part of the crime of kidnapping and as a crime in itself.

DEFENDANT appeals from judgments of *Hobgood (Robert H.)*, *J.*, 1 December 1980 Criminal Session, CUMBERLAND Superior Court.

Defendant was charged in a three-count bill of indictment with committing the following offenses on 31 May 1980 in Cumberland County: (1) the first degree rape of Ava G. Whittaker in violation of G.S. 14-27.2, (2) a first degree sexual offense with Ava G. Whittaker, to wit, oral sex, in violation of G.S. 14-27.4, and (3) the kidnapping of Ava G. Whittaker by unlawfully removing her from one place to antoher for the purpose of facilitating the commission of the felony of rape, she being sixteen years of age or older, and being sexually assaulted during the kidnapping in violation of G.S. 14-39.

The State's evidence tends to show that Ava Whittaker was a member of the United States Army stationed at Fort Bragg and living in the home of Mr. and Mrs. Freddie Terry. On Saturday, 31 May 1980, she returned from a visit with friends, arrived at the Terry residence about 10:45 p.m., entered and locked the door. All the windows were open since it was a hot night. She started closing them and heard a noise coming from a small bedroom in which the young son of the Terrys usually slept. The Terrys were not at home at the time. Becoming apprehensive, she picked up her car keys, left the house and locked herself in her car parked nearby. In five to ten minutes a man tapped on the car window, displayed a sawed-off shotgun with two barrels and demanded that she open the door, which she did out of fright. The man entered her car, forced her to perform fellatio upon him, then raped her in the car and thereafter forced her to accompany

him on foot into a nearby field where he forced her to undress and raped her again. She testified the man had the gun with him at all times. He finally released her and she telephoned for help from a nearby trailer.

At approximately 11:45 p.m. that same night, Sergeant J. W. Welch, patrol commander for the Spring Lake Police Department, observed an unoccupied Toyota hatchback stopped in the westbound lane of travel on Odell Road near Highway 87 with its lights off and the motor running. Sergeant Welch passed the vehicle and was attempting to make a U-turn to the left to come up behind it when he saw an individual in the parking lot of a nearby Quick-Stop walking at a fast pace toward the Toyota carrying a brown paper bag in his hand. Officer Welch used his public address set on the patrol car and advised the individual that he wanted to talk to him. The man quickened his pace, moved to the driver's side of the Toyota, opened the door, folded the driver's seat forward and moved the upper part of his body into the back seat area of the car. Officer Welch exited his patrol car, approached the Toyota and ordered the man to step back from the vehicle with his hands in plain view. When the man came backing out of the vehicle with his hands in plain sight, he did not have the paper bag. The officer shined his flashlight inside the Toyota and observed that the back seat had been pulled forward and the brown paper bag had been shoved down between the seat and the back portion. Sticking out of the paper bag and out of the seat, in plain view, was the butt of a sawed-off shotgun or some similar type weapon. Officer Welch retrieved the item and determined that it was a double-barreled sawed-off shotgun. The person involved was the defendant Anthony D. Jones.

The officer placed defendant under arrest for possession of a weapon of mass destruction. After frisking defendant, Officer Welch asked for his registration card to the Toyota in order to fill out the storage report and was advised by defendant that it was in the glove box of the vehicle and that he would have to get it from there. While doing so, Officer Welch noted in the front seat one twelve-gauge Federal shotgun shell.

After taking defendant to the police station in the patrol car, Officer Welch returned to a house on Highway 87 directly beside the Quick-Stop and talked to numerous people there, including

Ava Whittaker. She told the officer that she had been raped and that it had just occurred. She described her assailant as a black male, approximately 5 feet 9 inches tall, weighing 165 pounds. She said he had a sawed-off double-barreled shotgun in a brown paper bag.

Defendant did not testify before the jury. However, he offered John Danny Sparks, nineteen years old, as a witness. Sparks testified that he lived in the town of Hudson near Hickory, N.C. On 31 May 1980 he met defendant Anthony Jones at a washerette on Highway 87 near Fort Bragg around 10 o'clock at night. Anthony Jones was washing some sheets. They struck up a conversation. Jones' car was parked next to the house in front of the laundromat. Defendant had a sawed-off double-barreled shotgun, and while they talked about it being an unlawful weapon to own and discussed disassembling it, "that girl out there kept coming in from the house to her car and she didn't look bad no way and we sort of kept our minds on her a little bit." Sparks later learned her name was Whittaker. When defendant took the gun out of the brown paper bag and then put it back inside the bag, the butt end was sticking out. Finally, after Ms. Whittaker had come out of the house four or five times, she walked to her car parked nearby, looked at them, and then walked back to the house. Her car was parked about fifteen feet away. Finally, she came over the defendant's car and said: "Ain't nobody home. I am lonely, you want to come over and keep me company." She was talking to defendant Jones and was on his side of the car. Jones put the shotgun back in the paper bag, handed it to Sparks, went to the girl's car and entered it.

Sparks further testified that he threw the shotgun into the back seat of Jones' car, went back into the laundromat, got the clothing belonging to him and to defendant Jones, placed his clothing and defendant's sheets in a box and went to the girl's car to tell Jones what he had done. On arrival, he discovered the girl was performing fellatio on Jones so he threw the clothes in the Jones car and left, taking his own pants and shirt and putting them in his own car. Sparks went to a service station up the road, got a drink, waited "about eleven minutes" and then returned to see if defendant and the girl had finished. When his car lights struck the car they were in, both jumped up and Sparks figured they were still busy and just "left and went back to Hudson,"

some 200 miles away. He left home the next day and returned to Georgia where he was stationed.

The next time he saw Anthony Jones was many months later after he had finished his training in Georgia, been transferred to "jump school," got out of jump school and was stationed at Fort Bragg. At that time defendant told him the girl involved had charged him with rape.

Defendant offered various members of the military establishment, all of whom testified to his good character.

Defendant was convicted on all three counts contained in the bill of indictment. He was given a life sentence for the rape, a life sentence for the first degree sexual offense, and twenty-five years for the kidnapping, all sentences to run concurrently. Defendant appealed and we allowed his motion to bypass the Court of Appeals in the kidnapping case to the end that initial appellate review in each case be had in the Supreme Court.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

James R. Parish, Assistant Public Defender, for defendant appellant.

HUSKINS, Justice.

Defendant's first three assignments of error are based on the search of his car and the introduction into evidence of a shotgun seized during that search. These assignments will be considered together.

Defendant contends the shotgun was inadmissible on grounds it was seized in violation of the Fourth Amendment to the United States Constitution. The Fourth Amendment, as one of the original eight substantive amendments forming the Bill of Rights, does not limit any power or prohibit any action of the State of North Carolina, or any of its agents. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833). The assignments of error more properly pose an alleged violation of the due process clause of the Fourteenth Amendment, which does prohibit states from participating in searches and seizures which violate the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

[1] The initial question is whether the Fourth Amendment, as incorporated by the due process clause of the Fourteenth Amendment, applies to the actions of Sergeant Welch in instructing defendant to halt and step back from the Toyota with his hands in plain view. Defendant was not free to leave when Sergeant Welch directed him to stop. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16, 20 L.Ed. 2d 889, 903, 88 S.Ct. 1868, 1877 (1968). We hold the actions of Sergeant Welch constituted a seizure within the ambit of the Fourth Amendment.

The Fourth Amendment requires seizures to be reasonable. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 45 L.Ed. 2d 607, 614, 95 S.Ct. 2574, 2578 (1975). The reasonableness of seizures less intrusive than traditional arrests depends on a balance between the public interest and the individual's right to personal security. *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 54 L.Ed. 2d 331, 336, 98 S.Ct. 330, 332 (1977). Brief detention for questioning need not be based on probable cause to believe an individual is involved in criminal activity—the standard for a traditional arrest. Instead, the detention may be grounded on "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L.Ed. 2d 357, 362, 99 S.Ct. 2637, 2641 (1979).

Sergeant Welch's initial stopping of the defendant satisfied this constitutional requisite. His action was based on several factors. He observed an unoccupied vehicle parked in the travel lane of a public road at 11:45 p.m. with its lights off and motor running. While turning to investigate, he noticed a man running from a closed business toward the car. The man opened the car door and placed something on the back seat. These objective facts support a reasonable suspicion that the individual was involved in criminal activity. Where the totality of circumstances affords an officer reasonable grounds to believe criminal activity is afoot, he may temporarily detain a suspect. *State v. Buie*, 297 N.C. 159, 162, 254 S.E. 2d 26, 28, *cert. denied*, 444 U.S. 971, 62 L.Ed. 2d 386, 100 S.Ct. 464 (1979); *State v. Streeter*, 283 N.C. 203, 210, 195 S.E. 2d 502, 507 (1973). See *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973), for detention of suspects based on grounds similar to those in the case *sub judice*. Therefore, Sergeant Welch did not violate

defendant's constitutional rights by instructing him to halt and step away from his car.

Since our analysis is based on the initial detention of defendant and whether there was a reasonable suspicion he was involved in criminal activity, we find it unnecessary to determine whether Sergeant Welch had probable cause to arrest him. We therefore have no occasion to consider whether Sergeant Welch searched the interior of defendant's vehicle incident to a lawful arrest within the scope of the recent decision of *New York v. Belton*, --- U.S. --- , 69 L.Ed. 2d 768, 101 S.Ct. 2860 (1981).

[2] After Sergeant Welch approached defendant's car, he shined his flashlight into the back seat. He observed the sawed-off butt of a shotgun protruding from a brown paper bag wedged between the seat cushions. Possession of such a weapon is unlawful. G.S. 14-288.8(c)(3). The shotgun thus constituted contraband, which may be seized by an officer who has observed it in plain view from a vantage point he has legally obtained. *Harris v. United States*, 390 U.S. 234, 236, 19 L.Ed. 2d 1067, 1069, 88 S.Ct. 992, 993 (1968); *State v. Smith*, 289 N.C. 143, 150, 221 S.E. 2d 247, 252 (1976). Since Sergeant Welch had the authority to detain defendant temporarily, he violated no constitutional rights in seizing an illegal weapon he observed upon approaching defendant.

The trial court's conclusions of law were thus supported by the evidence, and the court did not err in denying defendant's motion to suppress the shotgun.

Defendant abandoned his fourth and fifth assignments of error.

[3] Defendant's sixth and seventh assignments are based on the failure of the trial court to submit second degree rape and second degree sexual offense as permissible verdicts. These issues will be consolidated for discussion.

The elements of first degree rape as applicable to this case are as follows: (1) vaginal intercourse, (2) against the will and without the consent of the victim, (3) using force sufficient to overcome any resistance of the victim, (4) effected through the employment or display of a dangerous or deadly weapon. G.S. 14-27.2(a)(1)a. Second degree rape includes the first three of these elements, but there is no requirement of use of a dangerous or

deadly weapon. G.S. 14-27.3(a)(1). The elements of first degree sexual offense are (1) a sexual act, (2) against the will and without the consent of the victim, (3) using force sufficient to overcome any resistance of the victim, (4) effected through the employment or display of a dangerous or deadly weapon. G.S. 14-27.4(a)(1)a. Second degree sexual offense includes the first three of these elements, but there is no requirement of use of a dangerous or deadly weapon. G.S. 14-27.5(a)(1).

Defendant contends that since his witness John Danny Sparks testified that he had defendant's shotgun while defendant was with Ms. Whittaker, the court should have given an instruction on second degree rape and second degree sexual offense. This argument is based on *State v. Drumgold*, 297 N.C. 267, 254 S.E. 2d 531 (1979). Defendant's reliance on *Drumgold* is misplaced.

In *Drumgold*, we granted a new trial because the trial court had erroneously failed to instruct the jury regarding second degree rape. Drumgold had presented evidence that he did not have a gun on the day in question. This contradicted the evidence of the State's witness that he used a pistol to overcome her resistance. We ruled that although a "trial court need not submit lesser degrees of a crime to the jury 'when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime,*' " the lesser included offense should have been submitted because there was conflicting evidence on an essential element of the crime charged. *Id.* at 271, 254 S.E. 2d at 533.

An implicit underlying factor in the decision in *Drumgold* was that the lesser included offense was supported by the evidence. The defendant had "threatened to kill" the victim, and "she had what appeared to be an abrasion on the left side of her face." *Id.* at 271-72, 254 S.E 2d at 533. From this evidence the jury could have inferred the victim submitted to Drumgold because of fear or duress. Submission to sexual intercourse because of fear, duress or force other than the display or employment of a dangerous or deadly weapon is second degree rape. G.S. 14-27.3(a)(1).

The rule that no instruction on lesser included offenses is required unless the lesser offense is supported by evidence has long been the law in North Carolina. "The trial court is required to

submit lesser included degrees of the crime charged in the indictment when and only when there is evidence of guilt of the lesser degrees." *State v. Simpson*, 299 N.C. 377, 381, 261 S.E. 2d 661, 663 (1980); *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Smith*, 201 N.C. 494, 160 S.E. 577 (1931). The presence of such evidence is the determinative factor. 299 N.C. at 381, 261 S.E. 2d at 663; *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954).

The principle articulated in *Drumgold* is subject to this long-standing rule. Where there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense *supported by any version of the evidence.* If the lesser included offense is not supported by the evidence, it should not be submitted, regardless of conflicting evidence.

To illustrate, suppose both the State's and defendant's evidence in a first degree rape prosecution shows defendant had a deadly weapon. Defendant's sole defense is that the victim consented. Even though there is conflicting evidence as to an essential element of the crime charged, *i.e.*, consent, the court should not give an instruction on second degree rape. No evidence indicates the defendant used any force other than a deadly weapon to overcome resistance of the victim. *See State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980).

The result is no different here. Although evidence conflicts on the issue of the presence of the shotgun, there is no evidence defendant used any force other than the shotgun. "I willingly had oral sex with Mr. Jones in the car knowing that he had a weapon, yes." If the jury found defendant did not have the shotgun, it would have to find him not guilty on grounds the victim consented. There is no evidence of force such as that shown by the abrasions and threats in *Drumgold.* 297 N.C. at 271-72, 254 S.E. 2d at 533.

The proposition that the jury could believe all, part or none of the evidence is of no avail to the appellant here. "[T]he jury need not accept all or none of either the state's or the defendant's evidence. It may believe only part of the evidence on either or both sides." *State v. Faircloth*, 297 N.C. 388, 398, 255 S.E. 2d 366, 372 (1979) (Exum, J., dissenting). No matter how much of either side's evidence the jury believed, it could not arrive at a conclu-

sion that defendant raped the victim using force other than the shotgun. Such a result is neither founded in the evidence nor logically inferable from the evidence. No combination of the evidence offered by both sides allows such a determination. A jury finding that defendant raped the victim using force other than the shotgun could only be reached by conjecture, speculation or surmise. Hence the trial judge was not required to submit lesser included offenses.

[4] Defendant's eighth and final assignment of error is that the convictions of rape and kidnapping merged and he could not be punished for both under the double jeopardy clause of the Fifth Amendment, made applicable to the states by the due process clause of the Fourteenth Amendment. Defendant's contention has no merit. This very question was answered in *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978). G.S. 14-39 creates only a single offense of kidnapping, and the absence of a sexual assault is a mitigating rather than aggravating factor and results in a lesser rather than more severe sentence. *Id.* at 669, 249 S.E. 2d at 719. Therefore, there is no violation of the double jeopardy clause in considering rape as part of the crime of kidnapping and as a crime in itself.

Our review of the record impels the conclusion that defendant has had a fair trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

GILBERT SHUGAR v. H. L. GUILL

No. 44

(Filed 3 November 1981)

1. Damages § 12.1— assault and battery—pleading punitive damages

In a civil action in which plaintiff alleged assault and battery, his complaint was sufficient to state a cause of action for punitive damages under G.S. 1A-1 as defendant could take notice and be apprised of "the events and transactions which produce the claim to enable [him] to understand the nature of it and the basis for it" even though all the aggravating circumstances were not specifically pleaded.

2. Damages § 17.7— punitive damages—evidence insufficient to go to jury

The evidence presented on the issue of punitive damages in plaintiff's action for assault and battery was not sufficient to permit the jury reasonably to infer that defendant's actions were activated by personal ill will toward plaintiff or that his acts were aggravated by oppression, insult, rudeness, or a wanton reckless disregard of plaintiff's rights. To the contrary, the evidence showed that two adults acting as adolescents engaged in an affray which was precipitated by plaintiff's "baiting" of defendant and plaintiff's invitation that he be ejected from defendant's premises.

Justice CARLTON did not participate in the decision of this case.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals which vacated that portion of the judgment entered by *Bruce, J.*, at the 8 February 1981 Session of EDGECOMBE Superior Court awarding plaintiff punitive damages.

The portion of the Court of Appeals' decision reversing and remanding the issue of compensatory damages for a new trial is not before this Court since there was no appeal from this phase of the case.

Plaintiff instituted this civil action on 5 January 1979 seeking damages for injuries allegedly caused by an assault and battery committed by defendant. At trial defendant duly moved to dismiss plaintiff's claim for punitive damages on the ground that plaintiff had failed properly to plead or prove such claim. The trial judge denied these motions and submitted to the jury the issues of liability, punitive damages, and compensatory damages.

Plaintiff's evidence tended to show that on 19 October 1978 around 9:25 a.m. he entered the defendant's restaurant in Tarboro known as "Cotton's Grill" for the purpose of joining several regular customers for coffee. After serving himself a cup of coffee, he joined the group. Plaintiff moved toward the table where the men sat without paying for his cup of coffee. Defendant was seated at the table, and as plaintiff took a seat at the table, he said to defendant, "This cup of coffee is on the house." Plaintiff then told defendant to "charge it against the formica that you owe me for."

Plaintiff's remarks were in reference to a dispute between himself and defendant regarding a piece of formica that a contractor had removed from a job at plaintiff's place of business with

his permission to use it in the completion of a job at defendant's restaurant in March, 1978. Plaintiff had billed defendant twice for the formica, but the $6.25 bill remained unpaid at the time of the October 1978 incident. Defendant had refused to pay for the formica and had in turn sent plaintiff a bill for what defendant claimed was lost time for a painter who had been conversing with plaintiff while he was working on a job for defendant. Plaintiff had not honored defendant's request to reimburse him for the painter's lost time although defendant had offered to pay plaintiff for the formica after plaintiff had paid defendant for the claimed lost time.

Following plaintiff's comment regarding the charging of the coffee against the formica cost, defendant commented on plaintiff's cheapness and demanded that plaintiff leave the restaurant immediately. Plaintiff responded by saying, "Make me." Defendant then picked plaintiff up in a "bear hug" and started toward the door. Plaintiff managed to free himself and blows were exchanged. Plaintiff was struck about the eyes twice, and defendant's glasses were broken when he was hit in the face during the scuffle. A bystander attempted to intervene, and plaintiff, apparently thinking the melee over, dropped his hands to his side at which point defendant struck plaintiff squarely in the face breaking his nose and causing it to bleed profusely.

Plaintiff lost consciousness momentarily after being struck in the nose. Thereafter, he continued to struggle while he was moved to a chair and a wet compress was applied to his nose. Plaintiff ceased struggling when he heard defendant say, "Gilbert, I am trying to help you." The entire incident lasted less than sixty seconds. Later that day, plaintiff visited a Tarboro physician who referred him to a specialist in Greenville.

Plaintiff's nose was particularly sensitive owing to a deviated septum, a condition from which he had suffered as a child and for which he had undergone four operations.

Plaintiff's nose was treated by straightening, packing, and bandaging. The medical treatment involved was quite painful, and plaintiff experienced a partial loss of breathing capacity as a result of the blow to the nose. Plaintiff's medical expenses totalled $234.

The jury answered the issue of liability in plaintiff's favor and awarded him $2,000 in compensatory damages and $2,500 in punitive damages.

Fields, Cooper and Henderson, by Milton P. Fields, for plaintiff-appellant.

Bridgers, Horton and Simmons, by Edward B. Simmons for defendant-appellee.

BRANCH, Chief Justice.

[1] We first consider whether plaintiff's complaint stated a cause of action for punitive damages.

The rationale permitting recovery of punitive damages is that such damages may be awarded in addition to compensatory damages to punish a defendant for his wrongful acts and to deter others from committing similar acts. A civil action may not be maintained solely for the purpose of collecting punitive damages but may only be awarded when a cause of action otherwise exists in which at least nominal damages are recoverable by the plaintiff. *Worthy v. Knight,* 210 N.C. 498, 187 S.E. 771 (1936).

It is well established in this jurisdiction that punitive damages may be recovered for an assault and battery but are allowable *only* when the assault and battery is accompanied by an element of aggravation such as malice, or oppression, or gross and wilful wrong, or a wanton and reckless disregard of plaintiff's rights. *Oestreicher v. American Nat. Stores, Inc.,* 290 N.C. 118, 225 S.E. 2d 797 (1976); *Van Leuven v. Motor Lines,* 261 N.C. 539, 135 S.E. 2d 640 (1964); *Allred v. Graves,* 261 N.C. 31, 134 S.E. 2d 186 (1964); *Trogden v. Terry,* 172 N.C. 540, 90 S.E. 583 (1916). *See also* 123 A.L.R. 1115 and 16 A.L.R. 771; 6A C.J.S. Assault & Battery § 33 (1975).

The complaint reads as follows:

> The plaintiff, complaining of the defendant, alleges and says as follows:
>
> 1. Plaintiff and defendant are both citizens and residents of Edgecombe County, North Carolina.
>
> 2. That on or about the 19th day of October, 1978, the defendant, without just cause, did intentionally,

willfully and maliciously assault and batter the plaintiff, inflicting upon him serious and permanent personal injuries thereby causing him to suffer both in body and in mind and that he did aggravate a preexisting injury which has caused the plaintiff additional mental anguish, and suffering.

3. Plaintiff has incurred medical bills in an amount not yet determined and he is informed and believes and so alleges that additional expenses will be forthcoming in the future.

WHEREFORE, the plaintiff prays the Court that he have and recover of the defendant the amount of $25,000 as actual damages and the amount of $50,000 as punitive damages, together with the costs of this action.

Prior to the adoption of the Rules of Civil Procedure on 1 January 1970, our decisions required that a plaintiff plead *facts* showing aggravating circumstances which would justify an award of punitive damages if supported by the evidence. *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968); *Allred v. Graves, supra.*

In *Clemmons v. Insurance Co., supra*, this Court held that it was not sufficient to state a cause of action for punitive damages to allege that the defendant's conduct was "willful, wanton and gross" and further set forth the then prevailing pleading rule that:

> While it seems that punitive damages need not be specifically pleaded by that name in the complaint, it is necessary that the facts justifying a recovery of such damages be pleaded.

Id., 274 N.C. at 424, 163 S.E. 2d at 767.

Indeed, *Cook v. Lanier*, 267 N.C. 166, 172, 147 S.E. 2d 910, 915-16 (1966), stated that plaintiff's complaint *must* allege facts or elements showing the aggravating circumstances which would justify the award of punitive damages.

Unquestionably, under our decisions prior to the adoption of the 1970 Rules of Civil Procedure, plaintiff's pleadings in this case could not have withstood defendant's motions to dismiss.

"By enactment of G.S. 1A-1, the legislature adopted the 'notice theory of pleading.'" *Roberts v. Memorial Park*, 281 N.C. 48, 56, 187 S.E. 2d 721, 725 (1972).

In our first case which considered the "notice pleading" theory of the new Rules of Civil Procedure, Justice Sharp (later Chief Justice) wrote:

> A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

Sutton v. Duke, 277 N.C. 94, 104, 176 S.E. 2d 161, 167 (1970). *Accord: Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979); *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971).

In instant case, the Court of Appeals held that the complaint did not state a claim for punitive damages. In reaching this result, the Court of Appeals first reviewed cases decided prior to the adoption in 1970 of the Rules of Civil Procedure, *Clemmons v. Insurance Co., supra; Cook v. Lanier, supra; Lutz Ind. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955), and relying on the cases of *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976), and *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979), concluded that this Court intended to follow the general rules laid down in cases involving punitive damages which predated the 1970 Rules of Civil Procedure. We do not agree. *Newton* and *Stanback* are distinguishable from the case before us in that both of those cases dealt with the pleading of sufficient facts to warrant punitive damages when related to tortious conduct involved in a *breach of contract.*

Newton involved the tort of fraud as it related to a breach of contract action involving failure to pay insurance policy proceeds, while *Stanback* rested upon the intentional infliction of emotional distress as related to breach of a separation agreement contract.

Since punitive damages may not be awarded in North Carolina for breach of contract, it was imperative in both *Newton* and *Stanback* that the pleading set forth with specificity the allegations and facts of the tortious conduct which would justify

the awarding of punitive damages. In such cases, even "notice pleading" requires that the complaint be more precise and the facts and allegations be sufficiently pleaded so as to prevent confusion and surprise to the defendant and preclude the recovery of punitive damages for breach of contract where there is no tortious conduct.

Here under the "notice pleading" theory there was sufficient information in the complaint from which defendant could take notice and be apprised of "the events and transactions which produce the claim to enable [him] to understand the nature of it and the basis for it." *Sutton v. Duke*, 277 N.C. at 104, 176 S.E. 2d at 167. Defendant was not "ambushed" at trial nor was he presented with an issue for which he was not prepared. He knew what happened on 19 October 1978 and was therefore cognizant of all the aggravating circumstances which might have been presented at trial.

We therefore hold that plaintiff's complaint was sufficient to state a claim for punitive damages.

[2] We turn now to the question of whether there was sufficient evidence to carry the issue of punitive damages to the jury.

In our consideration of this question, we deem it necessary to restate and examine the rule that in cases involving assault and battery, punitive damages are recoverable only when the assault and battery is accompanied by an element of aggravation such as malice or the other aggravating circumstances.

Some jurisdictions permit the recovery of punitive damages on the theory of *implied* or *imputed* malice when a person intentionally does an act which naturally tends to be injurious. These jurisdictions thus infer the malice necessary to support recovery of punitive damages from *any* assault and battery. *Barker v. James*, 15 Ariz. App. 83, 486 P. 2d 195 (1971); *Robbs v. Missouri Pac. Ry. Co.*, 210 Mo. App. 429, 242 S.W. 155 (1922); *Custer v. Kroeger*, 209 Mo. App. 450, 240 S.W. 241 (1922); *Mecham v. Foley*, 120 Utah 416, 235 P. 2d 497 (1951). We do not adhere to this rule. To justify the awarding of punitive damages in North Carolina, there must be a showing of *actual* or *express* malice, that is, a showing of a sense of personal ill will toward the plaintiff which activated or incited a defendant to commit the alleged assault and

battery. *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). *See also Clemmons v. Insurance Co.*, 274 N.C. at 424, 163 S.E. 2d at 767.

In jury trials the usual rules governing motions for a directed verdict apply when there is such a motion as to a claim for punitive damages on the grounds of insufficiency of evidence, and the trial judge must determine as a matter of law whether the evidence when considered in the light most favorable to the plaintiff is sufficient to carry the issue of punitive damages to the jury. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979); *Ward v. Smith*, 223 N.C. 141, 25 S.E. 2d 463 (1943). Application of this rule is difficult under the particular facts of the case *sub judice*, and we therefore find it helpful to review the *types* of cases in which punitive damages have been allowed. Punitive damages were recovered in cases where a clergyman while peacefully walking down a street was attacked by the defendant and severely injured, *Tucker v. Green*, 27 Kan. 355 (1882); where the plaintiff while eating in a hotel dining room was compelled to sign a retraction by a show of violence, accompanied with offensive and threatening language, *Trogden v. Terry, supra;* where defendant assaulted a weak and old person with a stick loaded with lead for the reason that defendant *thought* plaintiff was a trespasser, *Causee v. Anders*, 20 N.C. 388 (1839); where a twelve year old boy was assaulted in public in the presence of others without justification or excuse, *Hollins v. Gorham*, 23 Ky. L. Rep. 2185, 66 S.W. 823 (1902). We note that all of these cases contain a thread of unprovoked humiliating assaults, assaults on children, assaults on weaker persons, or assaults where a deadly weapon was callously used. Such is not the case before us.

The case of *Riepe v. Green*, 65 S.W. 2d 667 (Mo. App. 1933), is most instructive toward decision because of its strong factual similarity to the case before us. There plaintiff brought a civil action against defendant seeking compensatory and punitive damages. The evidence of the plaintiff disclosed that there had been some difficulty between plaintiff and defendant and that plaintiff "had no good feeling toward him (defendant) for over a year." *Id.*, 65 S.W. 2d at 668. On the day that the incident complained of occurred, defendant was talking to some men on the street when plaintiff called him and asked "have you found any more victims?" Plaintiff then drove his wagon across the sidewalk

so that defendant could not move. After some further conversation, plaintiff told defendant that he did not want any dealings with him because of his refusal to pay for some cow pasture. Plaintiff testified that he might have called defendant an "S.O.B." and a damned crook. Thereafter, a fight ensued which resulted in plaintiff's alleged injuries. The jury answered issues awarding plaintiff compensatory and punitive damages, and defendant appealed. In reversing and remanding, the Kansas City Court of Appeals reasoned:

> The general rule, as to punitive damages, is to the effect that the question is one for the jury and not for the court. This general rule is predicated upon the presumption that wantonness, recklessness, oppression, or express malice be shown by some fact or circumstance in evidence from which one of these elements may be inferred. (Citation omitted.)
>
> * * *
>
> We fail to find any evidence in the record before us that justifies the submission of the issue of punitive damages. In so far as words and conduct could provoke such a state of mind as above, the plaintiff is shown to be the aggressor. One who drives a wagon across the pathway of another with the intent expressed by plaintiff furnishes a poor subject for smart money. While foul words and epithets do not justify assault, yet such words and epithets mitigate, and, in the absence of any showing that defendant was actuated by willfull, wanton, and malicious state of mind, it was error to submit the issue of punitive damages.

Id., 65 S.W. 2d at 669.

Applying the above-stated principles of law to the facts presented by this appeal, we conclude that the evidence presented was not sufficient to permit the jury reasonably to infer that defendant's actions were activated by personal ill will toward plaintiff or that his acts were aggravated by oppression, insult, rudeness, or a wanton and reckless disregard of plaintiff's rights. To the contrary, the evidence shows that two adults acting as adolescents engaged in an affray which was precipitated by plaintiff's "baiting" of defendant and plaintiff's invitation that he be ejected from defendant's premises. Thus, the trial court erred

by denying defendant's motion to dismiss on the ground that there was not sufficient evidence to carry the issue of punitive damages to the jury. We affirm the Court of Appeals' action in vacating for the reasons set forth herein.

There will be a new trial on the issue of compensatory damages since there was no appeal from the Court of Appeals' decision on that phase of the case.

Modified and affirmed.

Justice CARLTON did not participate in the decision of this case.

RUSSELL NORMAN v. RICK BANASIK, D/B/A THE MOTOR WORKS AND OHIO CASUALTY INSURANCE COMPANY

No. 19

(Filed 3 November 1981)

Insurance § 142— action on burglary policy—sufficiency of evidence to show physical damage—summary judgment improper

Evidence that tools were missing from an automobile repair shop; that the front door, which had been locked the night before, was closed but unlocked; that a bolt was missing from an L-shaped steel plate that held the rear sliding door in place; that, at this location, mortar dust had been "swept" aside; and that there was no evidence of forced entry or access from any other door or window was sufficient for the loss to come within the provision of an insurance policy requiring theft by actual force and violence as evidenced by physical damage to the interior of the premises at the place of the exit. Therefore, summary judgment for the insurance company was improper as the "felonious exit" which the jury must find may consist of merely the exit of a thief's hand in pushing some of the stolen items through the rear door.

APPEAL by defendant Banasik as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 51 N.C. App. 197, 275 S.E. 2d 542 (1981), affirming the judgment of *Keiger, D.J.*, entered 17 January 1980 in the District Court, FORSYTH County, directing a verdict in favor of defendant Ohio Casualty Insurance Company.

Plaintiff instituted this action against his employer, Banasik, and his employer's insurer, Ohio Casualty, to recover for

the loss of his mechanic's tools apparently stolen from the employer's place of business during the night or early morning hours of 1-2 December 1978. Banasik brought a cross-claim against the insurer for the value of all the tools, parts and equipment found to be missing on the morning of 2 December 1978, including those of the plaintiff. The case came to trial at the 7 January 1980 Session of District Court, Forsyth County. At the close of the plaintiff's evidence, defendant Banasik's motion for directed verdict against the plaintiff on the issue of negligence was granted. At the close of defendant Banasik's evidence, defendant Ohio Casualty's motion for directed verdict against both the original plaintiff Norman and the defendant/cross-claimant Banasik was granted on the ground that the evidence was insufficient to show a "burglary" as defined in the insurance policy and only Banasik appealed. The plaintiff did not appeal from either of the verdicts directed against him and the only matter before this Court is Banasik's appeal from the verdict directed against him.

The Court of Appeals affirmed the trial court's ruling, with Judge Hedrick dissenting, and the propriety of that ruling is now the issue before this Court.

William B. Gibson, for defendant-appellant Banasik.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by W. Thompson Comerford, Jr. and William A. Brafford for defendant-appellee, Ohio Casualty Insurance Company.

MEYER, Justice.

The evidence at trial tended to show that Rick Banasik owned and operated an automobile repair shop known as The Motor Works located in an old brick building with a concrete floor on Northwest Boulevard in Winston-Salem. His brother Robert worked as a mechanic there, and when Robert reported to work on Saturday morning, 2 December 1978, he discovered the front door to the building closed but unlocked, several items out of place and several tool boxes opened. Robert called the police and his brother to report a probable burglary. A police officer and Rick Banasik arrived shortly thereafter and began investigating for clues as to how the thief or thieves might have entered the building. They failed to discover initially any signs of forced entry and the police officer left the scene. In continuing his investiga-

tion, Rick Banasik discovered an area on the concrete floor where the mortar dust had been "swept" aside. At that location a steel plate anchored to the floor at the bottom of the left side of the rear door held the door against the rear wall on the interior of the building. He also noticed that one of the bolts was missing from this L-shaped steel plate and was lying several feet away underneath a car. He recalled the police officer to the scene and showed him his discoveries.

The rear door is a large wooden sliding door, and this L-shaped steel plate, along with a similar one on the right side, held in place by two lag bolts on each plate which were screwed into receptables in the concrete floor, serves to prevent the door from being pushed inward. These plates hold the sliding door within its proper path between the plates and the rear wall. The door is opened and closed by sliding it from side to side along the wall. When the steel plates are in their proper location, there is a clearance of a few inches between the door and the wall, so that a person on the outside of the building could put his hand through the clearance between the door and the wall and, with the use of a tool, remove the bolt from the plate. However, with the bolt missing, the steel plate on the left side could swivel so that the door could be pushed inward between twelve and eighteen inches, creating an opening large enough to allow a person to crawl through, and through which the missing items could be removed.

The testimony indicated that the front door had been locked and the bolt and plate on the left side of the rear door were in their normal positions the night before. The front door could be locked or unlocked from the outside only with a key and from the inside only by turning a brass hasp. Keys to the front door were in the possession of Banasik, his brother Robert, and two secretaries. The rear door was secured by a chain and lock and could only be unlocked from the inside. There was no evidence of forced entry or exit at any other door or any window. The front of the building faced a lighted street and the rear faced an unlighted parking lot away from the street.

Banasik was insured against burglary by Ohio Casualty under a policy which defined burglary as:

> [t]he felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by

> actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry, or (2) from within a showcase or show window outside the premises by a person making felonious entry into such showcase or show window by actual force and violence, of which force and violence there are visible marks thereon, or (3) *from within the premises by a person making felonious exit therefrom by actual force and violence as evidenced by* visible marks made by tools, explosives, electricity or chemicals upon, or *physical damage to, the interior of the premises at the place of such exit.* (Emphasis added).

The company denied Banasik's claim for recovery under the policy for the items taken, contending then as it does now before this Court, that there was no burglary within the definition of the policy.

The appellant contends that both the trial court and the Court of Appeals erred in concluding that the evidence at trial was insufficient to permit the jury to find that a burglary as defined by the policy of insurance had in fact occurred. We agree.

Ohio Casualty argues that we should affirm the rulings of the lower courts because (1) Banasik's evidence is insufficient to show an entry or exit at the rear door as a more reasonable inference than other theories not covered under the policy, and (2) regardless of where entry or exit may have occurred, a missing bolt does not constitute "visible marks" or "physical damage" within the meaning of the policy.

To support its first contention, Ohio Casualty argues that Banasik has failed to carry the burden of showing that a "burglary" is the more reasonable inference from the evidence, that Banasik has merely offered evidence tending to show that a burglary *could have* occurred, but no substantial evidence tending to show that a burglary *did* occur. The insurance company argues that even if this Court agrees with the appellant that the removal of the bolt constitutes "visible marks . . . or physical damage," it is more likely, or at least equally likely, that any purported entry or exit occurred through the front door of the building which was found unlocked the next morning.

First, we note that it is not uncommon for insurance companies to include in their burglary policies provisions requiring visible marks or physical damage as evidence of felonious entry or exit. The rule requiring construction in favor of the insured does not apply to such provisions because they are not ambiguous. *Clemmons v. Insurance Co.*, 2 N.C. App. 479, 163 S.E. 2d 425 (1968); 44 Am. Jur. 2d *Insurance* § 1401 (1969); *Annot.*, 99 A.L.R. 2d 129 (1965).

We also note that in order to establish a burglary within the wording of the policy, appellant must prove that the thief or thieves at some point used this rear opening as an exit because the only possible visible mark or physical damage existing in this case is on the interior of the premises. Under the definition of "burglary" set out in the policy, if Banasik were proceeding under the theory of entry at this rear door, he would have to show visible marks upon or physical damage to the exterior of the premises. The question on the insurance company's motion for a directed verdict becomes then whether there was sufficient evidence to justify a conclusion by the jury that it is more reasonable to infer that the rear door was used that night to make a felonious exit. *See Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971). In answering this question, the Court must view the evidence in the light most favorable to the non-movant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor. *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978), *citing Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973); *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977), *citing Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974) *and Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971). The court's granting of Ohio Casualty's motion for directed verdict was proper only if it appears that Banasik failed to show a right to recover upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. at 670, 231 S.E. 2d at 680; *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). We feel that in light of the fact that an opening was created at the rear door large enough through which a person could crawl and through which the stolen items could be taken and that this opening faces an unlighted parking lot away from

the street, whereas the front door faces the lighted street, the jury would clearly have been justified in inferring that the thief or thieves used the rear door as an exit.

We add that the jury does not have to find that the thief or thieves exited themselves through this door. Just as the "entry" involved in burglary is not confined to the intrusion of the whole body but may consist of the insertion of any part of the body or any instrument with which it is intended to commit a felony, the "felonious exit" which the jury must find occurred at the rear door may consist of merely the exit of a thief's hand in pushing some of the stolen items through the door. *See People v. Pettinger*, 94 Cal. App. 297, 271 P. 132 (1928); *People v. Roldan*, 100 Ill. App. 2d 81, 241 N.E. 2d 591 (1968); 13 Am. Jur. 2d *Burglary* § 10 (1964); W. Lafave & A. Scott, Jr., Handbook on Criminal Law, ch. 8, § 96 at 710-11 (1972); R. Perkins, Criminal Law, ch. 3 at 198-99 (2d ed. 1969).

To support its contention that the missing bolt does not constitute "visible marks" or "physical damage" within the policy of insurance, the insurance company attempts to analogize the facts here to the facts in several other cases. We find each of those cases distinguishable. For example, in *Clemmons v. Insurance Co.*, 2 N.C. App. 479, 163 S.E. 2d 425 (1968), the plaintiff was insured against burglary under a policy containing the same definition of burglary as that in the policy in the case *sub judice*. He was the operator of a combination service station and grocery store. His new building was constructed of concrete block and had metal frame windows. The bottom one-third of the rear window was stationary and the top two-thirds was hinged to swing outward and upward from the bottom. A latch attached to the bottom of the top section fitted over the metal frame across the top of the bottom section to secure the top from opening. Lifting the latch upward to clear the top of the stationary metal frame of the bottom section allowed the window to be opened by pushing outward on the bottom of the top two-thirds section. The latch could not be lifted from the outside of the building but was easily accessible from the inside.

These metal frames and the latch itself were painted dark green. From the time he moved into the new building in August 1966 until the time it was robbed in March 1967, the plaintiff had

never opened the rear window. He had never unlatched the window nor authorized anyone else to unlatch it. However, at times he had left the store building unattended with persons inside while he serviced automobiles on the outside.

When the plaintiff opened his store on the morning of 17 March 1967, he discovered money and merchandise missing. The top section of the metal frame window was open and merchandise was scattered on the floor just inside the window. While the police investigators found no evidence of forcible entry to the building from the outside, the green paint on the inside of the metal along the stationary top of the lower one-third of the window was scratched off just underneath the area where the window latch fitted over it.

At trial, the plaintiff's theory was that someone unlatched the window from the inside of the building while the store was open for business and came back later to gain entry and exit through the unlatched window. The trial judge, sitting without a jury, rendered judgment for the plaintiff, and the defendant appealed arguing that the plaintiff failed to prove a loss coming within the terms of the policy. As here, the issue on appeal was whether the plaintiff's evidence considered in the light most favorable to him was sufficient to support a finding that his loss was covered by the insurance contract, *i.e.*, that there was physical damage to the interior of the premises at the place of exit. The Court of Appeals found no fault with the plaintiff's assertion that someone obreptitiously unlatched the window while the store was open for business and came back to burglarize his store after it had closed, but refused to find that the mark made by the unlatching of the window came within the definition of "physical damage" because that mark was the natural mark which would be made by lifting the latch of the window in the normal manner in which it was designed to be unlatched. Herein lies the difference between the facts in the *Clemmons* case and the facts before us. Rick Banasik discovered a bolt lying several feet away from its place in the L-shaped metal plate, causing the plate to swivel on the remaining bolt and allowing the door to be pulled or pushed inward. This is not the normal manner of opening this door; the normal manner was to slide the door to the side. Had the missing bolt been in its normal place, the door could not have been pulled or pushed inward. Opening this door in the normal

manner of sliding it to the side would not have caused the bolted plate security system any damage. Wrenching the bolt out of the floor did. The normal position of the door was perpendicular to the floor. With the bolt missing, the door could be pushed inward and upward, away from the position it retained in normal use. The bolt had to be replaced in order for the door to function properly in its normal manner. Clearly the removal of the bolt constitutes physical damage to the interior of the premises within the meaning of the policy. Whether a felonious exit occurred at the site of this physical damage is for the jury to determine.

We feel that the facts here are more closely analogous to those in *Ross v. Travelers Indemnity Company,* 325 A. 2d 768 (Me. 1974), where the owner of a clothing store was insured against burglary under a policy defining burglary in essentially the same terms as the policy here. The rear door of the building there opened inward from an alley into a furnace room. It was protected against inward pressure by two wooden bars of the size of "two-by-fours." Metal brackets affixed to the wall on each side of this door held the two bars in place. Two spikes driven into each of the two-by-fours so that they would fall on either side of the metal brackets prevented them from being moved horizontally. The spikes would not prevent the two bars from being lifted vertically from the brackets.

Following the discovery of the burglary in this case, the two bars were found lying on the storeroom floor, as were two spikes which had been removed from one of them by some sort of tool. The Supreme Judicial Court of Maine found that:

> [s]ince the two bars with imbedded spikes constitute an integral part of the security system designed to protect the structure from a felonious entry, they must be viewed as a part of the total interior portion of the insured premises. (Citation omitted.)
>
> The removal of these spikes from the bar constituted physical damage to the interior of the premises since these bars constituted a part of the premises as did the two spikes. Furthermore, the holes left in the bar by the removal of the spikes constituted visible marks obviously made by a tool of the force and violence involved.

325 A. 2d at 770. *See also Kretschmer's House of App. v. United States F. & G. Co.*, 410 S.W. 2d 617 (Ky. 1966), 22 A.L.R. 3d 1302 (1968).

Just as the extraction of the spikes in *Ross* damaged the security system by which intruders were denied entry at the rear door, the extraction of the bolt damaged the security system in the case before us.

For the reasons herein stated, the decision of the Court of Appeals affirming a directed verdict in favor of the defendant Ohio Casualty Insurance Company is reversed. The case is remanded to that court for further remand to District Court, Forsyth County for further proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. THOMAS WALTER WRIGHT

No. 39

(Filed 3 November 1981)

1. Burglary and Unlawful Breakings § 7— first degree burglary—intent to rape—instruction on non-felonious breaking and entering not required

In this prosecution for first degree burglary and rape, testimony by the victim that, upon entering her bedroom, defendant immediately asked her, "Where is Johnny?" did not tend to show that defendant did not initially intend to commit the felony of rape when he illegally entered the victim's home and require the court to submit the lesser included offense of non-felonious breaking and entering since (1) when defendant's overall conduct throughout the continuous series of criminal events is considered, his question to the victim can be deemed as nothing more than a means to make certain that the victim was alone and (2) an individual having only innocent intentions would not break into another's home in the middle of the night and break through a locked bedroom door, while carrying an opened knife, just to find out where someone else might be.

2. Rape § 6.1— first degree rape—failure to submit lesser included offenses

The trial court in a first degree rape case did not err in failing to submit the lesser included offenses of attempted rape and assault with a deadly weapon where the victim's testimony raised a conflict only as to how defendant initially accomplished penetration and the evidence plainly established penetration.

3. Criminal Law § 102.1— arguing facts of other cases to jury—objections sustained—instruction not necessary

The district attorney's reference in his jury argument to the facts of a decided case for the purpose of explaining the law regarding the element of force in rape cases, if improper, was at most a minor transgression which was adequately cured by the trial court's immediate sustention of an objection thereto, and the trial court was not required to instruct the jury *sua sponte* to disregard such argument.

ON appeal as a matter of right from judgments of *Battle, Judge*, entered at the 5 January 1981 Criminal Session, GUILFORD Superior Court. Defendant received concurrent life sentences upon his convictions of first degree burglary and first degree rape.

Defendant was charged in indictments, proper in form, for the first degree rape of Belinda Womble in her home on 23 September 1980 and the commission of a first degree burglary connected therewith. Defendant entered pleas of not guilty to both offenses.

The State's evidence, in chief, consisted of the testimony of the victim, Belinda Womble. Several neighbors and investigating police officers substantiated and corroborated major portions of her testimony. Defendant offered no evidence in his behalf. The jury found defendant guilty as charged.

Since defendant makes no contention concerning the sufficiency of the evidence to sustain his convictions for first degree burglary and first degree rape, only those facts, which become relevant to defendant's specific assignments of error, shall be disclosed by inclusion in the opinion below.

Attorney General Rufus L. Edmisten, by Associate Attorney Lisa Shepard, for the State.

Public Defender, Wallace C. Harrelson, and Assistant Public Defender, Hugh Davis North, III, for the defendant.

COPELAND, Justice.

At the outset, we note that defendant has abandoned assignments of error 1, 2, 3, 4, 8 and 9 by failing to advance any argument to support them in his brief. Rule 28(a), North Carolina Rules of Appellate Procedure. By the assignments of error prop-

erly preserved for our review, defendant raises two basic questions: (1) whether the trial court should have instructed the jury about certain lesser included offenses, as requested, and (2) whether the trial court should have instructed the jury *sua sponte* to disregard the district attorney's reference to the facts of a decided case in his closing argument. A careful examination of this record, and the law applicable thereto, compels us to conclude that defendant's contentions, in both regards, are void of merit.

It is, of course, clear that a judge must declare and explain the law arising on all of the evidence, G.S. 15A-1232, and that this duty necessarily requires the judge to charge upon a lesser included offense, even absent a special request therefor, whenever there is *some* evidence to support it. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Little*, 51 N.C. App. 64, 275 S.E. 2d 249 (1981). The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense. *State v. Gadsden*, 300 N.C. 345, 266 S.E. 2d 665 (1980); *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). Here, defendant argues that there was at least some evidence to support submission of the following lesser included offenses: non-felonious breaking and entering, upon the first degree burglary charge, and attempted rape and assault with a deadly weapon, upon the first degree rape charge. To the contrary, we find that *all* of the pertinent evidence is susceptible to but one reasonable interpretation, to wit, that defendant, if he was guilty of anything at all, was guilty of the higher degree crimes only.

[1] The victim testified that, upon entering her bedroom, defendant immediately asked her, "Where is Johnny?" Defendant relies upon this single fact as evidence tending to show that he did not possess the requisite felonious intent when he broke into and entered the dwelling. It is, of course, true that, to make out a case of burglary in the first degree, the State had to show that defendant broke into and entered an occupied dwelling or sleeping apartment in the nighttime with the intent to commit a felony therein. *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973). Defendant contends that his inquiry about "Johnny" was at least some evidence

that he did not initially intend to commit the felony of rape when he illegally entered the victim's home; rather, he was merely trying to find an acquaintance. If this evidence truly had any tendency to negate the existence of defendant's felonious intent, it would have unquestionably required the judge to submit the lesser crime of non-felonious breaking and entering, G.S. 14-54(b), in addition to the indicted charge of first degree burglary, G.S. 14-51. *See also State v. Cooper*, 288 N.C. 496, 219 S.E. 2d 45 (1975). We are not, however, persuaded that defendant's opening query about "Johnny's" whereabouts, standing alone, had any such proclivity whatsoever. The State's uncontradicted evidence showed the following.

Ms. Womble was aroused from her sleep in the early morning hours of 23 September 1980 by someone "knocking and bamming" on the front door of her apartment. Her husband was at work. She did not get up to see who was at the door. A few minutes later, she heard someone pulling at the screen to her bedroom window. She asked, "Who is it?" and saw an individual run away. That man was wearing light-colored pants and shirt. [When police officers later apprehended defendant in Ms. Womble's apartment, he was wearing khaki pants and a white striped shirt.] Ms. Womble got up, shut the window and barred it. After her return to bed, she rolled over and glanced through the other bedroom into the kitchen. She saw a man's hand by the refrigerator. She began screaming, jumped up and locked her bedroom door. The man pushed the door open and stood there swinging an opened hawkbill knife back and forth. He asked her, "Where is Johnny?" Thereupon, Ms. Womble immediately recognized the intruder as Thomas Walter Wright, the defendant, a man who had been to her apartment *once* before, some two months earlier, in the company of Johnny Richardson. She told defendant that Johnny did not live there. He then asked, "What are we going to do?" Ms. Womble asked him what he wanted, and he replied, "You know what I want." Defendant put the knife against her throat and ordered her to take off her clothes. After she undressed, he pushed her onto the bed and pulled his pants down. As he continued to hold the knife against her head, defendant got on top of her and had sexual intercourse with her.

In light of these facts, it would indeed stretch one's imagination to the breaking point to say that defendant's question about

"Johnny" was some indication, however slight, that his entry into the victim's home was not precipitated by a felonious intent. First, considering defendant's overall conduct throughout this continuous series of criminal events, his question, "Where is Johnny?" can be deemed as nothing more than a means to make certain that the victim was alone and that his evil design would not be thwarted, or interrupted, by unexpected interference. Second, it is evident that an individual, having only innocent intentions, does not break into another's home in the middle of the night and break through a locked bedroom door, while carrying an opened knife, just to find out where someone else might be. In sum, the State's evidence, if believed, compelled a *single* rational conclusion: that defendant unlawfully entered an occupied dwelling in the nighttime with only one thing on his mind—to rape this woman. Thus, it was not error on this record for the trial court to reject defendant's requested instructions on non-felonious breaking and entering.

[2] Defendant also believes that the trial court should have instructed the jury about attempted first degree rape and assault with a deadly weapon. In this, too, he is mistaken. Instructions on the lesser included offenses of first degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration. *See State v. Hall*, 293 N.C. 559, 238 S.E. 2d 473 (1977); *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976). Such is not the case here, and defendant's argument in this regard simply misses the mark.

In pertinent part, the victim testified on direct examination, as follows, about what happened after defendant pushed her onto the bed:

> After he said, "I'm not going to keep on laying here," he kept on saying what we were going to do, and, "I'm not going to keep on laying here," and he said, "You know what I want you to do," so I reached down and I inserted his penis into my vagina.
>
> . . . .
>
> After I inserted his penis into my vagina, he started to having sex with me. I couldn't think of no way to get him off. I didn't know how to get him up. Yes, he was moving, in a

round ways position. He was just moving this part of his body, right here, around his hips.

On cross-examination, the victim again stated:

> We were lying on the bed and he said, "I'm not going to keep lying here." At that time he almost asked me to put his penis in my vagina—he had a knife in the top of my head and was asking me what we going to do, and "I'm not going to keep lying here." At that time, it wasn't a thing to it—that I thought he wanted to put his penis in, I knew what he wanted me to do. So, I put his penis into my vagina because he told me he'd find me before the police found me if I turned him in.

This evidence plainly established the accomplishment of penetration and performance of the sex act. Nonetheless, defendant contends that the victim contradicted this testimony upon further cross-examination:

> Q. Didn't you make this statement to Detective Brady, he then tried to put his penis inside my vagina but couldn't get it in?
>
> A. Yes, I did, *but he did get inside me.*
>
> Q. Then you did tell Mr. Brady that he could not get his penis in your vagina, didn't you?
>
> A. Yes, I did.
>
> Q. So that is correct, isn't it, you told Mr. Brady that?
>
> A. Yes, but I said *he put it in himself.* He kept right on trying and he would not get up.
>
> I said that I did it, that I put it in, but he did not get up. By he did not get up, I mean he would not get up until he got himself up to the point where he wanted to be and that's when I asked him right after *he penetrated inside of me and he started having sex with me,* I did not move. I just laid there, and I asked him did he want something to eat. I made him mad when I asked him that. In other words, *we were having sex* and I said something about eating in the middle of it and that made him mad.
>
> (Emphases added.)

It suffices to say that, at most, this testimony raised a question or conflict about *how* defendant's penis *initially* entered the victim's vagina. It had absolutely no tendency to negate the occurrence of penetration itself. Indeed, we find that the State presented overwhelming and uncontradicted evidence on this point. This being so, defendant has failed to show the existence of any evidence in this record to support submission of *attempted* rape and assault with a deadly weapon to the jury as possible alternative verdicts. Defendant was either guilty of first degree rape, or not guilty. The assignment of error is overruled.

[3] Defendant finally argues that certain remarks of the district attorney, in his closing argument to the jury, require a new trial. We disagree. Although counsel must respect certain well delineated boundaries thereto, wide latitude is permitted in jury argument. However, only the law and facts *in evidence*, as well as all reasonable inferences arising therefrom, may be properly argued to the jury. *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). Indeed, fair play prohibits counsel from travelling outside the trial record and propounding extraneous facts to the jury. *See State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761 (1972). In the instant case, defendant contends that the district attorney did just that by attempting to argue as follows:

> While we're talking about it, I want to say to you, first of all, that force can be the threatened use of force such as holding a knife to the victim's throat to procure her submission.
>
> The Supreme Court in 1967 did address that and said that evidence tending to show that four defendants had the sixteen year old victim alone at night in an automobile driven by them—
>
> MR. HARRELSON: I object.
>
> THE COURT: Objection sustained as to that.

Only this excerpt was printed in the record for our review.

We preceive that the facts of *other* cases would ordinarily be inappropriate topics for jury argument. *State v. Spence*, 271 N.C.

23, 155 S.E. 2d 802 (1967), *vacated on other grounds*, 392 U.S. 649, 88 S.Ct. 2290, 20 L.Ed. 2d 1350 (1968); *State v. Board*, 37 N.C. App. 581, 246 S.E. 2d 581 (1978), *rev'd on other grounds*, 296 N.C. 652, 252 S.E. 2d 803 (1979); *State v. Royal*, 7 N.C. App. 559, 172 S.E. 2d 901 (1970). *See generally*, 75 Am. Jur. 2d *Trial* § 279 (1974). Nevertheless, we need not specifically decide here whether the district attorney should have been allowed to refer to the facts of another case for the apparent purpose of explaining the law regarding the element of force in rape cases. The district attorney was interrupted in mid-sentence by defendant's objection and did not complete the analogy. Since the trial judge promptly sustained defendant's objection, defendant's only cause for complaint now is that the trial court did not, on its own motion, give some sort of curative instruction on the matter. We hold that the judge was not obligated to do so in the absence of a request and that the district attorney's incomplete remark, about the 1967 case, if it was improper at all, was at most a "minor transgression" which was adequately cured by the judge's immediate sustention of defendant's objection thereto. *See State v. Monk*, 286 N.C. 509, 516, 212 S.E. 2d 125, 131 (1975). A new trial is warranted only where the judge has failed to correct a gross or extreme impropriety in jury argument. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). Consequently, this assignment of error must be overruled.

Our review of the record discloses no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. GEORGE McCALL RICK

No. 46

(Filed 3 November 1981)

Criminal Law § 34.4— evidence of other offenses—admissible

In a prosecution for first degree rape in which defendant threatened the prosecuting witness with a kitchen knife and raped her after he arrived at her house bleeding and seeking transportation, evidence that defendant accosted and choked a woman in a parking lot approximately four hours prior to the

crime charged and evidence that he robbed, choked and forced another woman to remove her clothes and took her knife and car approximately one-half hour later was properly admitted and relevant as a part of the chain of circumstances leading up to the matter on trial and to show a common plan or scheme to commit the subsequent crime.

DEFENDANT appeals from decision of the Court of Appeals reported in 51 N.C. App. 383, 276 S.E. 2d 768 (1981), upholding judgment of *Lewis, J.*, entered at the 16 June 1980 Session of Lincoln Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree rape of Brenda Lee Allen on 11 March 1980 in Lincoln County.

Mrs. Susan Diane Cogdill testified that shortly after 5 p.m. on 11 March 1980 defendant accosted her in the parking lot of the Belmont Armory as she sat in her automobile. Defendant attempted to force his way into the car by choking her. She resisted his attack and told her little girl to go for help. Mrs. Cogdill began screaming and defendant, apparently frightened, abandoned the struggle and fled into the nearby woods.

Mrs. Carrie Jenkins testified that on 11 March 1980 between 5 and 5:30 p.m. she had just returned home from the grocery store. Shortly thereafter, defendant walked into her house. He didn't knock but just walked in and inquired if Mrs. Jenkins was alone. She replied in the affirmative and defendant said he was going to rob her. She said she had no money whereupon defendant took her by the shoulders, raised her out of the chair, walked her backward into a bedroom and shoved her down on the bed. He told Mrs. Jenkins to pull off her clothing, and when she sat up to unbutton her blouse he slapped her across the face with the back of his hand and broke her glasses. Defendant then ripped her blouse and tore it off her body with the exception of the cuffs. He asked her for her car keys and she told him they were on the table. When he returned to the bedroom, he had a knife and used it to cut her bra in two. He then cut down the side of her other clothes so that she was entirely nude except the blouse cuffs still on her arms. Defendant then cut one of her blankets and used the pieces to tie her hands and legs together. He then went outside and attempted to start the car but failed because he didn't know which key to use. He returned to the house, choked Mrs. Jenkins, forced her to show him which key started the car, then left. She

opened the drapes and saw defendant drive her car away at about 6 p.m. The assault and theft was reported and officers called her about 9:30 that night and said her car had been found wrecked in Lincoln County.

Brenda Lee Allen, aged eighteen, testified that on and prior to 11 March 1980 she did not know defendant personally but had known his wife Tina because they had attended Central High School in Lincolnton together. Around 9 p.m. on that date, defendant telephoned her that Tina wanted to talk with her—it was important. She told him to tell Tina to come to her house because she did not know where Tina lived. Shortly thereafter, Brenda's stepfather answered a knock on the door and admitted the defendant George Rick. His wife Tina was not there. Rick had blood on his hands and wanted to use the phone to call Tina to come and get him. He made a phone call and told "whoever it was" to meet him at Winn-Dixie which was about a quarter mile up the road from Brenda's home.

After the phone call, defendant said, "Could I talk to you?" Brenda agreed and went outside thinking they would just sit on the steps and talk, but defendant continued walking and Brenda walked beside him. She returned to get her coat because it was getting cold. They walked back up the driveway above the trailers in the park, whereupon defendant exhibited a knife "which looked like a steak knife," suddenly threw her on the ground and put the knife to her throat. He told her to take her pants off or he would kill her. She pulled the knife away from her face and defendant started choking her with his hands. He choked her so much she "couldn't say a word." Finally, he said: "Now take your pants off before I kill you." In the struggle, he had lost the knife—"It went flying in the air somewhere and I was scared he would find it again." Brenda thereupon removed her pants and defendant had sexual intercourse with her by force and against her will.

After the rape was completed, defendant got up and said he needed to call Tina to come and get him. They walked back down the roadway of the trailer park and used a neighbor's phone to call defendant's wife who eventually picked him up and took him away. Brenda then called the sheriff's department and reported the rape. When the deputies arrived, she said she had been raped by George Rick. She went with Officer Beam to the area where

the rape occurred, and they found the knife in the bushes. Brenda's car keys, which she had lost, were also found in the area where the rape occurred. Both items were offered in evidence. Brenda testified that when she found herself on the ground, "George Rick had the knife in his left hand and had his left hand around my neck. When we started wrestling, he lost the knife." She denied she had ever had intercourse with defendant prior to this occasion but admitted sexual relations with four other men, naming them.

Defendant, twenty-nine years of age, testified in his own behalf. He said that on 11 March 1980, he had known Brenda Allen for three or four months, had partied with her and they had smoked pot and drank beer together. He said he had had sexual relations with her on two occasions prior to 11 March 1980, and on one of those occasions she gave him pictures of herself. When we arrived at her home on 11 March 1980, he was in pain, having cut his fingers and "busted" his nose in a car wreck and was bleeding badly. He used Brenda's phone and asked his mother if she and his sister would come to get him, telling them to meet him at a convenience store near Brenda Allen's home. He made that call around 8:30 p.m. After hanging up, he told Brenda he needed to talk to her and asked her if she would walk up the road with him. She agreed and they left the trailer. He told her about the car wreck and she inquired about Tina. He told her he wasn't sure and believed Tina may have left him. During all that time he had a knife out and was using it to cut skin off his fingers which had been injured in the wreck. She asked him to put the knife away, and he "pitched the knife away." She then asked him to sit down and talk and he agreed. She said she thought she was pregnant and named two different men who might be the father. They eventually started kissing and caressing each other, moved back behind some bushes and had sexual intercourse "to which she voluntarily consented."

Defendant further testified that when they were walking back to Brenda's trailer, he told her he would not be able to see her any more because his wife was pregnant and was suspicous that he was seeing someone else. He informed her he intended to tell his wife about Brenda before she found out from someone else. Brenda thereupon told him "that if I told my wife that I had been seeing her that she would fix it to where I would lose my

wife. When Brenda told me that I slapped her." Defendant said that on the occasion in question he was wearing a black vinyl jacket, a black T-shirt, a pair of Wrangler pants, and a cowboy hat. His wife came in about fifteen minutes and he left with her.

Defendant admitted on cross-examination that he was picked up in Charlotte that night at his sister's apartment after the alleged rape; that he had used marijuana; that in July 1971 he was represented by a lawyer and pled guilty to the rape of his sister-in-law; that in 1975 he pled guilty to larceny of a tape player, assault on a female, and reckless driving. He denied that he choked Mrs. Susan Cogdill at the Belmont Armory on 11 March 1980 but admitted he went to the home of Mrs. Carrie Jenkins on that date, threw her down on the bed, cut her clothing off, tied her up, and stole her car. He denied that he choked her and stated he had been drinking earlier that morning.

The jury convicted defendant of second degree rape and he was sentenced to a prison term of not less than twenty nor more than twenty-five years. The Court of Appeals found no error with Webb, J., dissenting. Defendant appealed to the Supreme Court as of right pursuant to G.S. 7A-30(2), assigning errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Richard L. Griffin, Assistant Attorney General, for the State.

T. M. Shuford, Jr., attorney for defendant appellant.

HUSKINS, Justice.

Did the trial court err in admitting the testimony of Mrs. Cogdill and Mrs. Jenkins? Answer to the question posed disposes of this appeal.

Defendant contends the challenged testimony was evidence of distinct, independent and separate offenses, and thus incompetent in the trial of this case, citing *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). The State contends the testimony of Mrs. Cogdill and Mrs. Jenkins was competent, relying upon the exceptions to the rule contained in *State v. McClain*, supra, and citing in support of its position *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516, *cert. denied*, 414 U.S. 1042, 38 L.Ed. 2d 334, 94 S.Ct. 546 (1973); *State v.*

McClain, 282 N.C. 357, 193 S.E. 2d 108 (1972). These conflicting contentions will now be examined in light of the authorities relied upon by the respective parties.

In a prosecution for a particular crime, it is the general rule that the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense. Even so, various exceptions to this general rule are as well recognized as the rule itself. See *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), where the rule and the exceptions are discussed and documented. The sixth exception listed in *McClain* reads as follows:

> 6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. [Citations omitted.] Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.

Stansbury expresses the rule as follows:

> Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.

1 Stansbury's North Carolina Evidence, § 91 (Brandis rev. 1973). Thus, proof of commission of other offenses may be competent to show the state of mind, 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. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973). *Accord, State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971).

Defendant's contention that these two earlier assaults were so dissimilar to the attack on Miss Allen as to fail to provide evidence of a common scheme or plan is not without some merit. Neither Mrs. Cogdill nor Mrs. Jenkins was raped. These two assaults took place in a different county from the rape of Miss Allen, and they occurred four hours beforehand. Defendant emphasizes that after cutting Mrs. Jenkins' clothes off and tying her on her bed, he left without raping her. Whether such conduct had "sexual overtones" is, for the present, left to experts in the field of deviant psychology. The attack against Mrs. Cogdill may or may not have been sexual in nature. Her resistance enabled her to escape before defendant's intentions could be manifested.

A defendant's conduct need not be identical to his actions in the crime charged to constitute evidence of a scheme or plan to commit that offense. Sometimes, however, the similarities are striking. *See State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. McClain*, 282 N.C. 337, 193 S.E. 2d 108 (1972). Here, all crimes committed against Mrs. Cogdill, Mrs. Jenkins and Miss Allen took place within a four-hour period, involved an assault on a lone woman, and were accomplished or attempted by choking the victim into submission. Whether the requisite degree of relevancy exists in this case would be a close question were it not for other pertinent facts.

This case is similar to *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). Defendant therein was convicted of felony murder pursuant to the robbery of a grocery store. We upheld the admission of Jenerett's statement in which he confessed to a series of actions logistically and chronologically paralleling those in the case *sub judice*. He admitted entering one store on the morning in question with the intention of robbing it. He failed to carry out his plan because there was a customer present who knew his accomplice. He then entered a second store to rob it, yet changed his mind because "the lady who ran that store looked so pitiful." Jenerett was tried for a felony murder which occurred during his robbery of a third store at 1:30 p.m. that same day. We held this evidence "competent to show defendant's intent to commit a robbery and as a part of the chain of circumstances leading up to the matter on trial. It was also competent to properly develop the evidence in the case at bar." *Id.* at 89, 187 S.E. 2d at 740. So it is

here. The evidence will not be excluded merely because it also shows the commission of other crimes.

Moreover, Mrs. Jenkins' testimony is admissible on more specific grounds. Defendant stole Mrs. Jenkins' car to drive to Miss Allen's house. He also took Mrs. Jenkins' "kitchen knife" and used such a knife to attack Miss Allen. When a defendant uses a stolen instrumentality to carry out a crime, evidence of its theft is admissible to show a plan or scheme to commit the subsequent crime. *State v. Stinson*, 263 N.C. 283, 139 S.E. 2d 558 (1965); *State v. Dail*, 191 N.C. 231, 233, 131 S.E. 573, 574 (1926).

The testimony of Mrs. Jenkins further explains the sequence of events or "chain of circumstances" leading up to defendant's appearance at Miss Allen's home. On his way to Miss Allen's house, defendant wrecked the stolen car. When he arrived at her door, he was bleeding from injuries sustained in this very accident. Since Miss Allen had testified to defendant's injuries, Mrs. Jenkins' testimony is admissible to explain how he arrived, bleeding, on Miss Allen's doorstep.

When Mrs. Jenkins' testimony is admitted, the inclusion of Mrs. Cogdill's testimony is of little consequence and does not constitute prejudicial error.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. JESSE HAMILTON McCOY

No. 34

(Filed 3 November 1981)

Criminal Law §§ 143.13, 146.4— suspended sentence—motion for appropriate relief—right to appointed counsel at trial—suspended sentence not yet invoked—premature appeal

Where defendant was convicted under G.S. 49-2 of willful refusal to support his illegitimate child and received a sentence of imprisonment suspended on the condition that he pay child support, defendant was arrested upon a warrant charging that he had failed to comply with the order for support, and

defendant thereafter filed a motion for appropriate relief on the ground that his constitutional right to appointed counsel at his trial had been denied, the trial court's denial of his motion for appropriate relief is not yet ripe for appellate review where the trial court has not determined whether defendant willfully failed to comply with the court's judgment and has not invoked the suspended sentence. If it is determined that defendant is in contempt as a result of which the suspended sentence is invoked, defendant may appeal as of right to the Court of Appeals to review that decision, and the court's ruling on his motion for appropriate relief is subject to review as part of that appeal. G.S. 15A-1422(c)(1).

ON certiorari to review the order of *Read, District Judge*, presiding at a Regular Session of the District Court of DURHAM County on 15 September 1980, said order having been entered on 12 November 1980.

The following numbered paragraphs reflect in chronological order the matters contained in the record before us in this case:

1. On 17 March 1978 defendant was arrested on a warrant charging him with the willful neglect and refusal to provide adequate support for Michael Bobbitt, his illegitimate child born to Cynthia Bobbitt on 9 November 1977, the warrant alleging that the refusal and neglect to provide adequate support for the child continued after due notice and demand made upon him on 24 February 1978 by the Department of Social Services, in violation of G.S. 49-2.

2. On 30 March 1978 defendant pled not guilty in district court before Judge J. M. Read, Jr., who found defendant guilty, found as a fact that defendant was the father of the child named in the warrant, ordered that defendant be imprisoned in jail in Durham County for four months, sentence suspended for three years on condition that defendant pay the costs, pay the sum of $20.00 per week to the clerk of superior court "for use and benefit of Department of Human Resources," first payment due 3 April 1978.

3. On 14 August 1980 defendant was arrested upon a warrant charging that he had failed to comply with the order for support "in that the sum of $2360.00 has become due, the defendant has paid the sum of $450.00 and is in arrears in the amount of $1910.00 as of the 30th day of June, 1980."

4. On 8 September 1980 defendant filed a motion for appropriate relief pursuant to G.S. 15A-1415 which reads in pertinent part as follows:

1. The Defendant is a 21 year old male and currently employed part-time as a plumber's helper in Durham, North Carolina.

2. On or about March 15, 1978, the Defendant was arrested on a warrant and charged with bastardy in that the Defendant did neglect and refuse to provide adequate support and maintain one Michael Bobbitt, his alleged illegitimate child born to Cynthia Bobbitt, on November 9, 1977, after due notice and demand have been made upon him by the Durham County Department of Social Services, in violation of N.C.G.S. Sec. 49-2.

3. The Defendant, Jessie McCoy, is informed and believes and upon such information and belief alleges that the said Cynthia Bobbitt has had sexual relations with a number of persons at or about the time that the warrant claims he fathered the said Michael Bobbitt, and further claims that the said Cynthia Bobbitt is the mother of three children, all of whom have been fathered by different persons.

4. On March 30, 1978, the Defendant, Jessie McCoy, appeared before the Honorable J. Milton Read, Jr., in Durham County District Court on the charges in the above-mentioned warrant. The Defendant was not advised at said Court hearing of his right to the assistance of counsel, nor was the Defendant at said time able to privately retain counsel to defend him in the action brought by the State of North Carolina. The Defendant pled not guilty to the charge and was found guilty, with the Court further finding as a fact that the Defendant was the father of the child named in the warrant.

5. The Defendant was sentenced to a term of imprisonment in the jail of Durham County for four months, suspended on the condition that he pay the costs of Court and $20.00 per week to the Clerk of Superior Court.

6. The Defendant Jessie McCoy, being unrepresented by counsel, was unable as an indigent layman at his trial in 1978 to properly raise and present to the trial Court good and sufficient defenses to the charges for which he now stands convicted.

7. Subsequent to his trial in 1978, Defendant has paid certain sums to the Clerk of Superior Court in accordance with the Judgment that was entered, however, the Defendant is in substantial arrears, said arrears being in excess of $2,000.00. The Defendant is currently employed as a part-time plumber, and makes approximately $38.00 per week. As a result of the Defendant's current employment, the terms of said suspension constitute an impossible burden and disability to the Defendant and that he currently does not earn sufficient money in his job, nor does he have any other resources, from which he can make the payments required on a continuing basis in order to avoid imprisonment.

WHEREFORE, Defendant prays the Court that this pleading be treated as a Motion for an Affidavit in Support of an Order for Appropriate Relief pursuant to N.C.G.S. Sec. 15A-1417 seeking a new trial on all of the charges on the following grounds:

1. Pursuant to the provisions of N.C.G.S. Sec. 15A-1415(b)(3) the conviction of the Defendant was obtained in violation of the Constitution of the United States in that the Defendant was not advised of his right to have counsel appointed to represent him on said charges, there being a likelihood that a sentence of imprisonment would be imposed, and in fact the sentence of imprisonment for four months, suspended on certain conditions, was in fact imposed in the said case, and that the Defendant was in fact an indigent and was unable to retain private counsel to assist him in his defense, all in violation of the Sixth Amendment to the Constitution of the United States; and

2. Pursuant to the provisions of N.C.G.S. Sec. 15A-1415(6), evidence is now available that was unavailable at the time Defendant was tried and convicted for the reason that Defendant at said time did not have an adequate understanding of the nature of the proceedings or the type of

evidence that he should present, as he was unrepresented by counsel.

Defendant prays that his Motion for Appropriate Relief be set for a hearing by the Honorable Judge presiding notwithstanding that ten (10) days since the entry of Judgment had elapsed in that the grounds asserted by the Defendant for the Motion for Appropriate Relief provide that same may be made at any time after entry of Judgment.

This the 8th day of September, 1980.

5. Judge Read heard defendant's motion for appropriate relief on 15 September 1980 at a Regular Session of the District Court in Durham County and on 12 November 1980 entered the following order:

This cause coming on to be heard and being heard before the undersigned presiding Judge J. Milton Read, Jr., at a regular session of Durham County District Criminal Court on the 15th day of September, 1980, and it appearing to the Court that the Defendant, by and through his attorney, has filed a verified Motion for Appropriate Relief pursuant to G.S. Sec. 15A-1415 wherein the Defendant seeks a new trial on charges of bastardy. G.S. Sec. 49-2, and the Defendant appearing in Court and being represented by Eugene F. Dauchert, Jr., and the State appearing in Court, and being represented by Assistant District Attorney Cecily P. Smith, and the Court having examined the file in this case, and having heard arguments of counsel in support of and in opposition to the Motion for Appropriate Relief, does make the following findings of fact:

1. Defendant was charged in a warrant issued the 15th day of March, 1978 with bastardy in that the Defendant did neglect and refuse to provide adequate support and maintain one Michael Bobbitt, an illegitimate child born to Cynthia Bobbitt on November 9, 1977, after due notice and demand had been made upon him by the Durham County Department of Social Services, in violation of G.S. Sec. 49-2.

2. On March 30, 1978, the Defendant, Jessie Hamilton McCoy, appeared before the Honorable J. Milton Read, Jr., in Durham County District Criminal Court on the charges in the

above warrant. Defendant was not advised at said Court hearing that he had a right to the assistance of counsel, and that the State would appoint an attorney to represent him. The Court at no time appointed an attorney or sought to obtain from the Defendant a waiver of his right to have an attorney appointed. Defendant has filed a verified Motion alleging that he was unable to privately retain counsel at the time of his trial on March 30, 1978. At the time of his trial on March 28, 1978, the Court made no attempt to ascertain whether or not the Defendant was indigent, and whether or not the Defendant had sufficent financial resources to be able to privately retain counsel to assist him in the defense of the action brought against him. That, however, the Defendant was charged with an offense (bastardy) in which active imprisonment, or a fine of $500.00 or more was not likely to be adjudged at the time of trial. That the customary practice of the court was to impose only a suspended sentence upon payment of child support for this offense as opposed to an active sentence.

3. The Defendant pled not guilty to the charge and after a trial was found guilty of bastardy with the Court further finding as a fact that the Defendant is the father of the child named in the warrant.

4. The following Judgment was entered:

> 'It is ordered that the Defendant: be imprisoned in the jail of Durham County for 4 months. With Defendant's consent, sentence is suspended for 3 years on condition(s); that he: (1) pay costs; (2) pay the sum of $20.00 per week to the Clerk of Superior Court for the use and benefit of Department of Human Resources. First payment due April 3, 1978.'

5. The Defendant at no time executed a written waiver of any right to the appointment of counsel, nor is there any such written waiver in the Court file.

6. That on July 25, 1980, the Defendant was ordered before the court for failure to pay child support as ordered herein and an attorney was appointed to represent him on August 18, 1980, because he was indigent and imprisonment

had become likely if the evidence showed the Defendant had wilfully or intentionally failed to obey the terms of the suspended sentence herein.

Based on the foregoing findings of fact, the Court makes the following conclusions of law:

1. The trial Court had no duty to inform the Defendant that he had a right to retain counsel or to have counsel appointed for him in the event that he was indigent, nor did the trial Court have any duty to make a determination as to whether or not the Defendant was indigent at the time of his trial, nor was the trial Court under any duty to obtain a knowing and intelligent waiver of any rights the Defendant had to the appointment of counsel in that it was not the practice of the Court or likely that the defendant would be imprisoned or fined in excess of $500.00 at the time of this trial if he was convicted at this trial, but that a suspended sentence upon payment of child support and cost would follow as opposed to an active sentence as contemplated by G.S. 7A-451(1).

2. The Judgment imposed by the trial Court after the Defendant's trial on March 30, 1978, does not constitute a sentence of imprisonment, but is in fact a suspended sentence as opposed to an active sentence and the Defendant was not entitled to have counsel appointed to represent him because the Defendant has never been imprisoned for bastardy, the offense with which he was charged and tried on March 30, 1978.

3. The Defendant is not entitled to a new trial on the grounds that evidence is available which was unknown or unavailable to the Defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant, because the only ground that Defendant has alleged for relief under this section is that he was unable to adequately prepare a defense, because Defendant was not entitled to the assistance of counsel on the charges brought against him.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Defendant's Motion be denied.

This the 12 day of Nov., 1980.

6. On 12 November 1980, in open court, defendant gave notice of appeal pursuant to G.S. 15A-1422. No appeal was perfected.

7. On 26 January 1981 defendant petitioned the Court of Appeals for certiorari to review Judge Read's ruling and that petition was denied on 24 February 1981.

8. Thereafter, defendant petitioned this Court for certiorari to review the order of Judge Read, and we allowed the petition on 5 May 1981.

Rufus L. Edmisten, Attorney General, by James W. Lea, III, Associate Attorney, for the State.

Eugene F. Dauchert, Jr., attorney for defendant appellant.

HUSKINS, Justice.

Does an indigent defendant in an action under G.S. 49-2, who receives a sentence of imprisonment suspended on condition that he pay child support, have a constitutional right to appointed counsel? We decline to answer the question posed because it is not properly before us.

Being the father of an illegitimate child is no crime. The only prosecution authorized by Chapter 49 of the General Statutes is grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child—the paternity itself is no crime. *State v. Green*, 277 N.C. 188, 176 S.E. 2d 756 (1970). The question of paternity, although a preliminary requisite to conviction, is merely incidental to the prosecution for nonsupport. *State v. Robinson*, 236 N.C. 408, 72 S.E. 2d 857 (1952); *State v. Ellis*, 262 N.C. 446, 137 S.E. 2d 840 (1964). The father of an illegitimate child may be convicted of failure to support such child when, and only when, it is established beyond a reasonable doubt that such failure was willful, that is, without just cause, excuse or justification. The willfulness of the failure to support is an essential ingredient of the offense, must be charged in the warrant or bill of indictment and proven beyond a reasonable doubt. *State v. Robinson*, 245 N.C. 10, 95 S.E. 2d 126 (1956). Willfulness is not

presumed from a failure to support. *State v. Cook*, 207 N.C. 261, 176 S.E. 757 (1934).

The ruling of Judge Read on defendant's motion for appropriate relief is not yet ripe for appellate review because the trial court has not determined whether defendant has willfully failed to comply with the 30 March 1978 judgment and has not invoked the four-month suspended sentence. If defendant has not willfully failed to comply with said judgment, that ends the matter. Defendant may not be imprisoned or otherwise punished because he has not been found in contempt. If it be determined that he is in contempt as a result of which the suspended sentence is invoked, defendant may appeal as of right to the Court of Appeals to review that decision, and Judge Read's ruling on his motion for appropriate relief is subject to review as part of that appeal. G.S. 15A-1422(c)(1).

The case is remanded to the trial court for trial of the issue whether defendant has willfully failed to comply with the conditions upon which the four-month prison sentence was suspended and whether the suspended sentence should be invoked.

For the reasons stated, we conclude that certiorari was improvidently granted. The writ is vacated and the case remanded for further proceedings consistent with this opinion.

Remanded.

BONE INTERNATIONAL, INC. v. JOHN C. BROOKS

No. 53

(*Filed 3 November 1981*)

1. Rules of Civil Procedure § 56.2— summary judgment—burden of proof

A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. G.S. 1A-1, Rule 56(c).

2. Corporations § 1— repairs to corporation's trucks—conducting business as individual—genuine issue of material fact

Plaintiff's forecast of evidence was sufficient to allow it to proceed to trial on the theory that defendant was conducting his business as an individual rather than as a corporation and was therefore personally liable to plaintiff for repairs to trucks which had been transferred by defendant to a corporation where plaintiff's evidence on motion for summary judgment tended to show that defendant agreed to pay the amount sought in the complaint and at no time during dealings with plaintiff's president contended that he did not personally owe the bills; defendant wrote two letters to plaintiff's president wherein he failed to suggest that the bill should have been addressed to the corporation and one which stated that he expected plaintiff to remit to him any surplus arising from the sale of a truck; plaintiff had never been informed that any of defendant's trucks had been conveyed to a corporation; all business transacted with defendant was transacted in the same manner as all prior business; and letters from defendant to plaintiff were on plain white paper and were signed by defendant individually and not as an agent of the corporation.

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, 51 N.C. App. 183, 275 S.E. 2d 556 (1981), affirming the entry of summary judgment for defendant by *Harrell, Judge*, at the 16 April 1980 Session of District Court, NASH County.

Fields, Cooper & Henderson, by Milton P. Fields, for plaintiff-appellant.

Henson, Fuerst & Willey, P.A., by Thomas W. King, for defendant-appellee.

CARLTON, Justice.

I.

Plaintiff filed a complaint seeking to recover for labor and parts furnished in repairing defendant's vehicles. The complaint alleged that the work was done pursuant to an express contract and on an "open account" basis. Plaintiff alleged that under the terms of the open account agreement defendant agreed to pay plaintiff the invoice price for the labor and materials furnished. Plaintiff further alleged that it had furnished labor and materials in the amount of $4,141.84 and had billed defendant for that amount and that defendant refused to pay. Plaintiff prayed that it recover the sum of $4,141.84 plus interest and costs.

Defendant answered, denying the material allegations of the complaint and alleging that the repair work for which plaintiff had not been paid was improperly done. He also moved in his answer to dismiss plaintiff's complaint on the ground that he was an employee of John C. Brooks, Inc., and at all times functioned as an employee of the corporation and not in his individual capacity. Defendant further alleged that the repairs in question were performed on trucks owned by the corporation and that he, defendant, is not a proper party to this action.

Both parties moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, and each presented affidavits and exhibits.

Defendant submitted an affidavit from his attorney who averred that defendant incorporated his business on or about 7 September 1976 and that the necessary papers attesting to the incorporation were filed as provided by law. He further averred that he and defendant proceeded to notify all persons doing business with defendant that the business formerly conducted as a sole proprietorship was now a corporation; that titles to motor vehicles were changed to reflect the corporate name; that a letter was sent to International Harvester Credit Corporation requesting information concerning the transfer of titles to the vehicles to the corporate name; that a reply letter was received by the attorney indicating that the transfers were being made and that a copy of the letter was being sent to an employee of plaintiff; and that numerous assets had been transferred to the corporation.

Defendant submitted exhibits indicating that the transfer of titles was made and that he subsequently had signs painted on the trucks indicating the corporate name. Defendant further averred that, since the incorporation, numerous business dealings were conducted with plaintiff for repairs of defendant's vehicles. The repair bills were paid with checks drawn on the account of John C. Brooks, Inc., and signed by John C. Brooks subsequent to the time of incorporation. The checks were submitted as exhibits. One of them was allegedly completed in the handwriting of the plaintiff's president. Defendant further averred that he at no time indicated to plaintiff's president or any agent, employee or director of plaintiff that he was anything but an employee and agent of the corporation.

In an affidavit, plaintiff's president averred that he had several discussions with defendant concerning the subject matter of this litigation, that defendant had agreed to pay the amount set forth in the complaint and that defendant at no time during the discussions had contended that he did not personally owe the bill. After these discussions, defendant wrote two letters in reply to inquiries from plaintiff's president in an individual capacity. The letters were written on plain white paper and were signed "John C. Brooks." In the letters, defendant raised no question as to proper notification of the bill nor did he indicate that the bill should have been made out to a corporation. One of the letters acknowledged that defendant had been receiving the bills and contained the statement that he was expecting plaintiff to remit to him any remaining amount arising from the sale of a truck. Plaintiff's chief bookkeeper averred that he had examined the account of the defendant with plaintiff and that at no time had defendant advised the plaintiff by letter or otherwise that the trucks involved in the lawsuit had been conveyed to a corporation. He further averred that all business transacted with or for the defendant was transacted in the same manner as all prior business.

Based on the pleadings, affidavits and exhibits, Judge Harrell directed entry of summary judgment for defendant on the ground that "there is no genuine issue as to any material facts."

Plaintiff appealed to the Court of Appeals and that court, in a unanimous decision, affirmed the trial court. We granted plaintiff's petition for discretionary review on 2 June 1981.

II.

The sole question on this appeal is whether the trial court erred in allowing summary judgment for defendant.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

An issue is genuine if it "may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518,

186 S.E. 2d 897, 901 (1972). An issue is material if, as alleged, facts "would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Id.* More succinctly, a fact is material if it would constitute or would irrevocably establish any material element of a claim or a defense. *See* Louis, *A Survey of Decisions Under the New North Carolina Rules of Civil Procedure*, 50 N.C.L. Rev. 729, 736 (1972).

[1] A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Generally this means that on "undisputed aspects of the opposing evidential forecast," where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. 2 McIntosh, *North Carolina Practice and Procedure* § 1660.5, at 73 (2d ed. Supp. 1970). If the moving party meets this burden, the nonmoving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. at 470, 251 S.E. 2d at 421-22; *Zimmerman v. Hogg & Allen*, 286 N.C. at 29, 209 S.E. 2d at 798. If the moving party fails to meet his burden, summary judgment is improper regardless of whether the opponent responds. 2 McIntosh, *supra*. The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial. *Id.* Thus, if there is any question as to the credibility of an affiant in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. at 470, 251 S.E. 2d at 422.

In order to satisfy this burden defendant, as the moving party here, must initially (1) prove that an essential element of plaintiff's claim is nonexistent or (2) show that a forecast of the plaintiff's evidence indicates it will be unable to prove facts giving rise at trial to all essential elements of its claim.

[2] In holding that summary judgment for defendant was proper, we think that the Court of Appeals misconstrued the gravamen of

plaintiff's action. That court discussed extensively two opinions of this Court which dealt with the liability of an individual defendant vis-à-vis the liability of his corporation. *Howell v. Smith*, 258 N.C. 150, 128 S.E. 2d 144 (1962), and *Howell v. Smith*, 261 N.C. 256, 134 S.E. 2d 381 (1964). Those decisions dealt with the liability of agents for undisclosed principals. In the second *Howell* decision, Chief Justice Sharp stated, "Ordinarily the agent who made the original purchase is not liable if the third party continues to deliver goods after acquiring knowledge of the principal's identity unless he has agreed to be personally liable." *Id.* at 260, 134 S.E. 2d at 385. The Court of Appeals concluded that plaintiff here was attempting to hold defendant liable as an agent for an undisclosed principal. The Court of Appeals stated, "Plaintiff is of course wise in seeking to characterize defendant as an agent for an undisclosed principal. Were defendant acting for a disclosed principal, plaintiff would have no case." 51 N.C. App. at 187, 275 S.E. 2d at 559. That court went on to hold that the invoices from plaintiff to defendant for services rendered in 1976 and 1977 bearing the corporate name established, as a matter of law, knowledge on the part of the agent of the plaintiff who filled out the invoice that defendant's trucking business was being carried on as a corporation and that defendant had authority to act for the corporation. Judge Clark concluded, "The knowledge of plaintiff's agent must be imputed to plaintiff." *Id.*

Reliance on the *Howell* decisions and the numerous principles of agency discussed in those decisions was, we think, misplaced. It is clear from the plaintiff's complaint, pleadings, affidavits and exhibits that plaintiff was not attempting to hold defendant liable on an agency theory. It is clear that plaintiff's complaint sought to hold defendant liable as an individual because plaintiff had continued to do business with him as an individual as it always had and because it had had no reason to believe that defendant was attempting to do business as a corporation.

In this light, therefore, the crucial question in determining whether summary judgment for defendant was proper is whether defendant established that a forecast of plaintiff's evidence indicated that plaintiff would not be able to prove facts giving rise to the claim that defendant was acting in an individual and not a corporate capacity. Plaintiff's evidence, as forecasted by his pleadings, affidavits and exhibits, clearly established a genuine

and material issue of fact as to whether defendant was acting in an individual or corporate capacity.

Plaintiff's president's affidavit tends to show that defendant agreed to pay the amount sought in the complaint and at no time during dealings with plaintiff's president contended that he did not personally owe the bill. Moreover, defendant wrote two letters to plaintiff's president wherein he failed to suggest that the bill should have been addressed to the corporation and one which stated that he expected plaintiff to remit to him any surplus arising from the sale of a truck. Also contained in one of plaintiff's affidavits was an allegation that plaintiff had never been informed that any of defendant's trucks had been conveyed to a corporation and that all business transacted with defendant was transacted in the same manner as all prior business. The letters from defendant to plaintiff were on plain white paper and were signed by defendant individually and not as an agent of the corporation.

Clearly, a genuine issue as to a material fact, whether defendant had properly notified plaintiff that his business was incorporated such that he was not personally liable for its debts, arose from this forecast of plaintiff's evidence. Whether defendant held himself out to do business individually with plaintiff or with the protection of the corporate veil is an issue for the jury. Plaintiff's forecast of evidence is clearly sufficient to allow it to proceed to trial on the theory that defendant was conducting his business as an individual and was therefore personally liable for the debt in question.

For the reasons stated, the decision of the Court of Appeals is reversed and this cause is remanded to that court with instructions to remand to the District Court, Nash County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WILLIE RAY ARTIS

No. 63

(Filed 3 November 1981)

Criminal Law § 75.6— failure to repeat Miranda warnings—sufficiency for second confession

Defendant's second statement was properly admitted into evidence where the evidence tended to show that defendant was apprehended near his wife's burning residence and taken to the police station for questioning; that he admitted a hit-and-run offense shortly after being advised of his *Miranda* rights but denied any act of arson; that the officer who took defendant's statement went to defendant's wife's residence and detected the odor of gasoline; that the officer returned to the station approximately three hours after defendant's first statement and said the fire was started by gasoline and that he detected the odor of gasoline on defendant's hands; and that defendant then gave the second statement admitting arson without being again advised of his *Miranda* rights. Factors supporting the trial court's conclusion that both statements were voluntarily made with full knowledge of his constitutional rights include the facts that: (1) there was only three hours time between the warnings and a second statement, (2) the second statement was given at the same place as the first, (3) the second statement was given to the same officer, and (4) the second statement was not inconsistent with the first statement.

BEFORE *Tillery, Judge,* at the 2 March 1981 Session of Superior Court, LENOIR County. Defendant was convicted of arson and appeals as a matter of right from the sentence of life imprisonment.

Attorney General Rufus L. Edmisten, by Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for the State.

Fred W. Harrison for the defendant.

CARLTON, Justice.

Defendant confessed to the crime with which he was charged in a statement to law enforcement authorities approximately three hours after a statement to the same officers in which he denied committing the crime. He was given his *Miranda* warnings prior to his first statement, but they were not repeated prior to the second statement. The sole assignment of error presented by this appeal is whether the trial court erred in admitting the second statement, in which defendant confessed to arson, into

evidence over his objection. Defendant contends that the admission of his purported confession was error because the *Miranda* warnings were not repeated prior to his second statement. At trial, defendant denied that he made the second statement.

I.

Defendant was tried on an indictment, proper in form, alleging that he feloniously set fire to and burned the dwelling house inhabited by his wife, Melba Jean Williams Artis, and others on 2 January 1981. Evidence for the State tended to show that defendant went to the home of his estranged wife at 608 North East Street in Kinston on the night of 1 January 1981. He brought some Christmas presents for his two sons and stayed about thirty minutes. While he was there, defendant and his wife began arguing and he pulled a knife and threatened her. She fled to an adjacent apartment and asked a neighbor to call the police. Defendant left his wife's residence, and, in doing so, struck and damaged her automobile. His wife reported the hit-and-run accident to the police and she and the children thereafter retired for the evening. Mrs. Artis awoke around 4:00 a.m. the following morning and realized that the house was on fire. She awakened the other occupants and they escaped without injury.

Later that morning, defendant was apprehended near his wife's burning residence and was taken to the police station in Kinston for questioning. A police officer advised him of his *Miranda* rights and defendant signed a waiver of his rights at approximately 6:35 a.m. on 2 January 1981. At that time defendant gave the officers a statement detailing his activities that evening, including an admission that he hit his wife's car, but he did not admit any act of arson. According to defendant, the reason he was near his wife's home at the time of the fire was that he was returning to tell her that he had hit her car. When he got near the house, he saw the fire engines. A policeman stopped him and he was arrested for the hit-and-run. His statement was completed at approximately 7:35 a.m.

Officer Heath, the officer who took defendant's statement, then left defendant at the police station in the custody of other officers and returned to the scene of the fire for further investigation. He detected an odor of gasoline in the soil underneath the house, obtained soil samples for analysis by the state laboratory,

and, after further investigation, returned to the police station. Officer Heath advised defendant that the fire had been set with gasoline and that he detected an odor of gasoline on the defendant's hands. This was approximately three hours following the defendant's first statement, and he was not again advised of his *Miranda* rights. Defendant then gave a second statement to Officer Heath. The second statement recounted some of the details included in the first and included an admission that he had set the fire by placing a rag in the top of a gasoline-filled plastic jug, lighting the rag, and throwing the jug underneath the house.

The State also presented evidence that the fire had been started underneath the house by igniting gasoline contained in a plastic jug.

Defendant himself took the stand and explained his activities that evening and early morning. His testimony essentially corroborated the version of events contained in his first statement. He denied setting the fire and also denied that he had made a second statement to the police officers.

The jury convicted defendant of arson, and he was sentenced to life imprisonment. He appeals to this Court as a matter of right.

II.

Defendant strenuously contends that the trial court erred in admitting the second statement because he was not informed of his *Miranda* rights immediately prior to making that statement and because the original warnings had been diluted by the passage of time and the techniques employed by the police officers in obtaining the second statement. Officer Heath testified that one police officer told another in defendant's presence that he should "wrap this matter up" and get on with a murder case. This technique was frequently used by the Kinston police to elicit statements from defendants.

Upon objection of defendant to testimony concerning the second statement, the trial court conducted a voir dire. On voir dire, Officer Heath testified that upon his return from the scene of the fire, he informed defendant that the fire had been deliberately set with gasoline and that he smelled gasoline on defendant's hands. At that point, according to Officer Heath, defendant said he wish-

ed to make an additional statement. Although defendant overheard another officer say that they should wrap this matter up and move on to more important business, at no time was he asked to make another statement. Defendant testified on voir dire that he had initially waived his rights and understood that he did not have to make a statement and that no one had done anything to cause him to believe that those rights no longer applied. He also testified that Lieutenant Green and Heath had told him that if he wanted to see his kids, he should go ahead and tell the truth. However, defendant denied that he had made a second statement although he admitted that the signature on the purported confession was his.

Based on this testimony, the trial judge found that defendant had been fully advised of his constitutional rights and that he had voluntarily waived them, that no threats, promises or duress were employed to obtain the second statement, nor was defendant under the influence of any intoxicants. The court concluded that both statements were voluntarily made by defendant with full knowledge of his constitutional rights.

This Court has considered on numerous occasions whether *Miranda* warnings must be repeated at subsequent interrogations when they have been properly given and waived at the initial one. In *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death sentence vacated*, 428 U.S. 904 (1976), Chief Justice Sharp, citing the cases and authorities from other jurisdictions, enunciated the rule now well established in this jurisdiction:

> [A]lthough *Miranda* warnings, once given, are not to be accorded "unlimited efficacy or perpetuity," where no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required. [Citations omitted.] However, the need for a second warning is to be determined by the "totality of the circumstances" in each case. [Citation omitted.] "[T]he ultimate question is: Did the defendant, with full knowledge of his legal rights, knowingly and intentionally relinquish them?"

Id. at 433-34, 219 S.E. 2d at 212 (quoting *Miller v. United States*, 396 F. 2d 492, 496 (8th Cir. 1968), *cert. denied*, 393 U.S. 1031 (1969)).

McZorn recognized that the following factors should be considered in determining whether the initial warnings have become so stale and remote that there is a substantial possibility the individual was unaware of his constitutional rights at the time of the subsequent interrogations: (1) the length of time between the giving of the first warning and the subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statements differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect.

Defendant here contends that the initial warnings had been diluted by the passage of an inordinate amount of time and the use of a ruse to elicit a confession. We cannot agree. First of all, we are unwilling to establish the rule that the passage of three hours after the *Miranda* warnings have been given is sufficient, by itself, to require that they be repeated. The amount of time between the giving of of the warnings and the making of the challenged statement is only one factor among many to be considered. Nor do we think that the statement that the police should move on to more important matters, even in combination with the passage of time, is enough to show that the initial warnings had been so diluted that there existed at the time of the second statement a substantial probability that defendant was unaware of his rights. *See State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979); *State v. Garrison*, 294 N.C. 270, 240 S.E. 2d 377 (1978); *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977); *State v. Cole*, 293 N.C. 328, 237 S.E. 2d 814 (1977). Additionally, assuming that such a statement is sufficient to amount to an interrogation, the other factors making up the totality of the circumstances support a conclusion that the confession was freely and voluntarily made. The subsequent statement was given at the same place as the first, was made to the same officer and was not inconsistent with the first statement. His second statement merely was an extention of the first and admitted the crime. There was no evidence presented at the voir dire which would support the inference that defendant was so intellectually deficient or emotionally unstable that he had forgotten or was unware of his constitutional rights.

The assignment of error presented by defendant is overruled for the reasons stated above. In the trial below, we find

No error.

STATE OF NORTH CAROLINA v. CHAUNCEY ROSCOE VAUGHAN

No. 81

(Filed 3 November 1981)

ON certiorari to review decision of the Court of Appeals reported in 51 N.C. App. 408, 276 S.E. 2d 518 (1981), vacating judgment of *Hobgood (Robert H.), J.*, entered 1 July 1980 in FRANKLIN Superior Court.

The record discloses the following chronology of events:

1. The alleged robbery occurred on 14 May 1978.

2. On 23 April 1979, the Grand Jury of Franklin County returned a true bill of indictment against defendant. A copy of the bill was served on defendant on 16 May 1979, and he was arrested on that date.

3. Defendant was first brought to trial on 14 January 1980. Between that date and the date of his arrest, four regularly scheduled criminal sessions of Superior Court were held in Franklin County. Defendant's case was calendared for the August 1979 session but not reached. The case was not calendared for the September or October 1979 sessions of court. It was calendared for December 1979, but that session of court was canceled for reasons undisclosed.

4. On 3 December 1979, defendant filed a pro se written motion for a speedy trial or for dismissal of the charges against him. The record fails to show any action taken on that motion. The trial was finally held for the first time on 14 January 1980 and resulted in a mistrial.

5. Defendant was again brought to trial on 21 April 1980. Prior to trial, the court considered defendant's 3 December 1979 motion and denied it. This second trial also resulted in a mistrial,

and on 23 April 1980 defendant called the court's attention to his written motion for a speedy trial and orally renewed said motion, requesting the judge to set his case peremptorily for trial at the next criminal session of Franklin Superior Court, which would have been the following Monday, *i.e.*, the second week of a two-week session beginning 21 April 1980. The trial court took no action on this motion, and on 30 May 1980 defendant filed a second written motion seeking to have the charges against him dismissed on the ground that he had been denied a speedy trial.

6. On 30 June 1980, defendant was brought to trial for the third time. Prior to trial, the presiding judge denied defendant's speedy trial motion dated 30 May 1980 and made findings of fact and conclusions of law to the effect that defendant had not been denied a speedy trial because the limited number of court sessions scheduled for Franklin County placed the county under G.S. 15A-702 for purposes of the Speedy Trial Act and G.S. 15A-701 did not apply. Defendant was thereupon tried before a jury, convicted of armed robbery, and sentenced to a lengthy prison term. He appealed to the Court of Appeals.

7. In the Court of Appeals defendant contended, among other things, that the trial court erred in denying his motion to dismiss for lack of a speedy trial. The Court of Appeals so held, reversed the trial court, vacated the judgment and remanded the case to Franklin Superior Court to be dismissed for failure to comply with the Speedy Trial Act. That court further directed the trial court to consider the factors set out in G.S. 15A-703 in determining whether the dismissal should be with or without prejudice. On 9 July 1981, we granted the State's petition for certiorari and supersedeas.

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State appellant.

Aubrey S. Tomlinson, Jr., for defendant appellee.

PER CURIAM.

After reviewing the record and briefs and hearing oral arguments, we conclude that the petition for further review was improvidently granted. Our order allowing certiorari is therefore

vacated. *See* G.S. 15A-701, -702, -703. The decision of the Court of Appeals remains undisturbed and in full force and effect.

Certiorari improvidently allowed.

STATE OF NORTH CAROLINA v. RICKY MANFORD CHERRY

No. 37

(Filed 3 November 1981)

ON the State's petition for discretionary review, pursuant to G.S. 7A-31, of the decision of the Court of Appeals, (*Judge Harry C. Martin*, with *Judges Clark* and *Arnold* concurring), reported at 51 N.C. App. 118, 275 S.E. 2d 266 (1981), ordering a new trial for defendant upon the judgment of conviction entered by *Brown, Judge*, at the 21 July 1980 Criminal Session of Superior Court, MARTIN County.

Attorney General Rufus L. Edmisten, by Associate Attorney Lisa Shepherd, for the State.

Gaylord, Singleton & McNally, by L. W. Gaylord, Jr. and Vernon G. Snyder, III, and Gurganus & Bowen, by Edgar J. Gurganus, for the defendant.

PER CURIAM.

Defendant was indicted for first degree murder. He was convicted of involuntary manslaughter. In brief, the evidence tended to show that, on 4 January 1980, defendant had been drinking intoxicants with David Edmondson during most of the day. Later that evening, defendant, with Edmondson and two other companions, drove to Bobby Wynne's trailer to get some "hash." A loaded rifle, with the hammer forward, was on the floor of the car beside defendant. Upon arrival at Wynne's residence, defendant parked the car parallel to the trailer. Edmondson got out and went inside. Later, defendant, who was still waiting in the car, said "I'll fix him," picked up the rifle and pointed it at the trailer. The gun discharged. The bullet passed through the wall of the trailer and killed Bobby Wynne.

The Court of Appeals held that the evidence authorized submission of the charge of involuntary manslaughter to the jury and that the trial court did not commit prejudicial error regarding its instructions upon this crime. Nevertheless, the Court of Appeals did find reversible error in the trial judge's instructions on accidental death or misadventure and granted defendant a new trial. We granted the State's petition for discretionary review upon this latter point on 5 May 1981.

In sum, the Court of Appeals held that the instructions improperly permitted the jury to negate the defense of accidental killing without first finding that defendant had been *criminally* or *culpably* negligent in the handling of a weapon. In so holding, the Court of Appeals relied on three decisions of this Court: *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, *cert. denied*, 368 U.S. 851, 82 S.Ct. 85, 7 L.Ed. 2d 49 (1961); *State v. Kluckhohn*, 243 N.C. 306, 90 S.E. 2d 768 (1956); *State v. Early*, 232 N.C. 717, 62 S.E. 2d 84 (1950).

After a thorough and careful examination of the record and briefs, and the authorities cited therein, and giving due consideration to the oral arguments presented on this question, we conclude that the petition for further review was improvidently granted. The order granting discretionary review is hereby vacated. The decision of the Court of Appeals granting defendant a new trial, for error in the instructions on accidental killing, shall remain undisturbed and in full force and effect.

Discretionary review improvidentally allowed.

AMERICAN FOODS, INC. v. GOODSON FARMS, INCORPORATED, AND J. MICHAEL GOODSON

No. 52

(Filed 3 November 1981)

APPEAL from decision of the Court of Appeals affirming judgment in favor of plaintiff entered by *Llewellyn, J.*, in PENDER Superior Court. The Court of Appeals opinion, 50 N.C. App. 591, 275 S.E. 2d 184 (1981), is by *Judge Hill* with *Judge Arnold* concur-

ring. *Judge Wells* dissented from that part of the majority opinion affirming summary judgment in plaintiff's favor on defendants' counterclaim.

Pursuant to G.S. 7A-30(2), defendants appealed from the portion of the majority opinion affected by the dissent. Defendants petitioned this court for discretionary review of the remainder of the Court of Appeals decision but that petition was denied on 2 June 1981.

Poisson, Barnhill & Britt, by L. J. Poisson, Jr., for defendant-appellants.

Murchison, Fox & Newton, by William R. Shell, for plaintiff-appellee.

PER CURIAM.

The only question presented to this court is whether the Court of Appeals erred in affirming the judgment of the trial court dismissing defendants' counterclaim. After carefully reviewing the opinion of the Court of Appeals and the briefs and authorities on this question, we conclude that the result reached by the Court of Appeals, its reasoning and the legal principles enunciated by it, are correct. Consequently, we adopt the majority opinion as our own and the decision is

Affirmed.

BERNICE M. JONES, ADMINISTRATRIX OF THE ESTATE OF BEVERLY A. JONES, DECEASED v. THOMAS GLENN ALLRED, RICHARD ALLEN HUBBARD, AND TONI C. KINSEY

No. 51

(Filed 3 November 1981)

APPEAL pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals which reversed the entry of a directed verdict for defendants at the close of all the evidence by *Judge Lupton* at the 7 April 1980 Session of RANDOLPH Superior Court. The opinion of the Court of Appeals, reported at 52 N.C.

App. 38, 278 S.E. 2d 521 (1981), is by *Judge Wells* with *Judge Vaughn* concurring. *Judge Clark* dissented.

Boyan and Nix, by Clarence C. Boyan and Kathleen E. Nix, Attorneys for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by Stephen P. Millikin and Jeri L. Whitfield, Attorneys for defendant appellants.

PER CURIAM.

The facts are fully and accurately set out in the Court of Appeals' opinion. For the reasons given in that opinion the decision of the Court of Appeals is

Affirmed.

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

COMBS v. PETERS

No. 35 PC.

Case below: 53 N.C. App. 630.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 November 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 November 1981.

CRANFORD v. HELMS

No. 9 PC.

Case below: 53 N.C. App. 337.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 November 1981.

DORSEY v. DORSEY

No. 55 PC.

No. 149 (Fall Term).

Case below: 53 N.C. App. 622.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 November 1981.

EDWARDS v. NORTHWESTERN BANK

No. 31 PC.

Case below: 53 N.C. App. 492.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 November 1981.

EMPLOYMENT SECURITY COMMISSION v. LACHMAN

No. 36 PC.

No. 146 (Fall Term).

Case below: 52 N.C. App. 368.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 3 November 1981.

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

FALLS v. FALLS

No. 338 PC.

Case below: 52 N.C. App. 203.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1981.

GILLESPIE v. DEWITT

No. 13 PC.

Case below: 53 N.C. App. 252.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1981.

GLENN v. GLENN

No. 8 PC.

Case below: 53 N.C. App. 515.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1981.

HOUSING, INC. v. WEAVER

No. 326 PC.

Case below: 52 N.C. App. 662.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 November 1981.

HUMPHRIES v. CONE MILLS CORP.

No. 287 PC.

Case below: 52 N.C. App. 612.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 November 1981.

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

IN RE CALHOUN

No. 1 PC.

Case below: 53 N.C. App. 371.

Petition by caveator for discretionary review under G.S. 7A-31 denied 3 November 1981.

IN RE WOMACK

No. 342 PC.

Case below: 53 N.C. App. 221.

Petition by caveator for discretionary review under G.S. 7A-31 denied 3 November 1981.

McPHERSON v. ELLIS

No. 38 PC.

No. 147 (Fall Term).

Case below: 53 N.C. App. 476.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 November 1981.

MEDFORD v. MOODY

No. 20 PC.

Case below: 53 N.C. App. 371.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 November 1981.

MORRIS v. MORRIS

No. 19 PC.

Case below: 52 N.C. App. 734.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1981. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 3 November 1981.

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

PRESTON v. THOMPSON

No. 345 PC.

Case below: 53 N.C. App. 290.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 November 1981. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 3 November 1981.

SHEPHERD, INC. v. KIM, INC.

No. 319 PC.

Case below: 52 N.C. App. 700.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1981.

SKINNER v. TURNER

No. 3 PC.

Case below: 53 N.C. App. 630.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1981.

STATE v. FRONEBERGER

No. 32 PC.

Case below: 53 N.C. App. 471.

Petition by Attorney General for discretionary review is allowed for the limited purpose of entering this order 3 November 1981. Opinion of Court of Appeals filed in this cause is hereby vacated and case is remanded to Court of Appeals for consideration of all assignments of error brought forward in defendant's brief filed with that court.

STATE v. GATEN

No. 41 PC.

Case below: 28 N.C. App. 273.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 3 November 1981.

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

STATE v. THORNTON

No. 39 PC.

Case below: 53 N.C. App. 630.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1981.

TAEFI v. STEVENS

No. 54 PC.

No. 148 (Fall Term).

Case below: 53 N.C. App. 579.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 November 1981.

ZIGLAR v. DU PONT CO.

No. 353 PC.

Case below: 53 N.C. App. 147.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1981.

STATE OF NORTH CAROLINA v. LARRY DARNELL WILLIAMS

No. 4

(Filed 1 December 1981)

1. Criminal Law § 15.1— change of venue—pretrial publicity—denial of motion not error

After an examination of articles appearing in area newspapers, the Court could not find that the trial judge abused his discretion when the judge denied defendant's pretrial motion for a change of venue and ruled that defendant had not met the burden of establishing "so great a prejudice . . . that he [could] not obtain a fair and impartial trial." G.S. 15A-957.

2. Constitutional Law §§ 18, 32— indirect attempt to impose "gag" order—denial proper

Defendant's First and Fourth Amendment rights were not violated by the denial of his pretrial motion to prohibit all attorneys, their assistants, investigators, and employees, the Cabarrus County Superior Court Clerk, the County Sheriff, the County Jailer, police officials and other law enforcement officers and employees, and all witnesses associated with the case from commenting on it to any newspaper, radio, or television reporters, agents, or employees within Cabarrus County during the course of the proceedings as (1) there was no showing that at the time the matter was before the trial judge there existed any intense or pervasive pretrial publicity which was adverse to defendant and the impact of such publicity would at best have been merely speculative, and (2) there was no *in personam* jurisdiction sought, and a group such as defendant sought to restrain cannot as a matter of practicality be restrained from discussing pending cases with others. U.S. Const., Amend. VI, XIV; N.C. Const., Art. I, §§ 19, 23, 24.

3. Criminal Law § 101.2— pretrial published statement of judge—no prejudicial error

The use of the words "gas chamber" by the trial judge in an article published about 30 days prior to trial did not result in prejudicial error warranting a new trial.

4. Constitutional Law § 31— denial of additional court-appointed assistance at trial—proper

The trial court did not err in denying defendant's motion for additional counsel, a research assistant, a statistician, and a jury selection expert as the record disclosed nothing which showed there was a reasonable likelihood that the appointments requested by defendant's motions would have materially assisted defendant in the preparation or presentation of his defense or that without such assistance it is probable that defendant did not receive a fair trial. G.S. 7A-450(b); G.S. 7A-454.

5. Constitutional Law § 45— no right to act as co-counsel with court-appointed attorney

The trial court did not err in denying defendant's motion to allow him to act as co-counsel with his court-appointed attorneys. A criminal defendant cannot represent himself and, at the same time, accept the services of court-appointed counsel.

6. Criminal Law § 91.1— motion for continuance until trial on other charges

The trial judge did not abuse his discretion in failing to allow a continuance of defendant's trial until the disposal of charges brought against him concerning a killing and robbery which occurred shortly before the robbery and murder for which he was tried.

7. Indictment and Warrant § 14— motion to quash indictment—coerced confession—insufficient ground

A motion to quash an indictment lies where a defect appears on the face of the indictment; therefore, the trial court did not err in denying defendant's motion to quash the indictments and dismiss the charges against him on the ground that the indictments were based upon a coerced confession by a witness which implicated defendants.

8. Criminal Law § 77.3— testimony of defendant's girlfriend—coerced—properly admitted

In a first degree murder and armed robbery trial, the court did not err in admitting the testimony of defendant's girlfriend which resulted from a plea bargain arrangement and which implicated defendant even though there was evidence that her original statements to police had been coerced. Evidence of any police coercion in obtaining her statement went to the credibility of the testimony, which was a jury question.

9. Criminal Law §§ 77, 88— refusal of witness to testify at voir dire—cross-examination at trial—right of confrontation not violated

Defendant was in no position to complain that he was denied his constitutional right to confront a witness who testified against him where a codefendant, at the time of a pretrial voir dire, exercised her Fifth Amendment guarantee against self-incrimination and refused to testify concerning alleged inculpatory statements made by her to police officers, but at trial, as the charges had been dropped against her, she testified and defense counsel extensively cross-examined her.

10. Constitutional Law § 80— constitutionality of death penalty—no impermissible expansion of Court's jurisdiction

The death penalty statute is not unconstitutional on the ground that it constitutes cruel and unusual punishment violating the Eighth and Fourteenth Amendments of the United States Constitution, nor does the statute impermissibly extend the Court's jurisdiction without a constitutional amendment in violation of Article IV, Section 12, of the North Carolina Constitution as G.S. 15A-2000(d) vests automatic review in the Supreme Court of North Carolina and provides standards and guidelines for review of the death sentence by the Supreme Court.

11. Indictment and Warrant § 13.1— denial of motion for bill of particulars proper

The trial court correctly denied defendant's motion for a bill of particulars pursuant to G.S. 15A-925 as it requested some matters which were capable of being ascertained by viewing the murder scene and were therefore discoverable under G.S. 15A-901, *et seq.*, and it requested other information which was beyond the scope of G.S. 15A-925(c) as it requested "matters of evidence."

12. Constitutional Law § 28; Judges § 1— no prejudice in rotating judges

Our system of superior court judge rotation under Article IV, Section 11, of the North Carolina Constitution is constitutionally valid, and defendant failed to demonstrate error or show prejudice in the denial of his motion for one judge to retain jurisdiction of his case throughout its pendency both during the pretrial stage and at trial.

13. Constitutional Law § 31— refusal to release defendant to seek alibi witnesses

There was no abuse in discretion in the trial court's refusal to release defendant, who was charged with first degree murder and armed robbery, from custody in order that he might seek alibi witnesses.

14. Criminal Law § 158— failure to include in record order denying pretrial motions

The Court is bound by the record before it, and in the absence of anything in the record to indicate otherwise, must assume that the trial judge ruled properly on matters before him. Therefore, the Court could not properly review the denial of defendant's trial motions where there was (1) no order by the trial court denying the motions, (2) no record of the proceedings in which the motions were said to have been denied, (3) nothing before the Court to indicate the grounds presented for granting these motions, and (4) nothing before the Court indicating upon which ground the motions were denied.

15. Jury § 6— district attorney's ties with prospective jurors—proper subject for voir dire

The court did not err in denying defendant's motion to require the district attorney and his staff to disclose personal, business, social, church, and civic ties with the prospective jurors as the proper way to inquire into such matters is on the jury voir dire.

16. Criminal Law § 87.1— leading questions—no abuse of discretion

The defendant failed to show abuse of discretion on the part of the trial judge where he allowed numerous leading questions by the district attorney as (1) they suggested no facts which were not obviously a part of the witness's prior testimony, (2) in the remaining questions which elicited an answer, defense counsel failed to properly object or preserve his exceptions by a motion to strike, and (3) there was nothing in the content of the challenged questions or answers which added strength to the State's case.

17. Criminal Law § 90— clarification of witness's testimony—no impeachment of own witness

Asking the State's witness "were you saying that you were uncertain that he was the man that walked in the store with the gun?" was not improper as

the purpose of this question was not to discredit the witness's testimony but merely to clarify the fact that her doubts were directed not to defendant's involvement in the shooting but to the question of whether defendant was the one who actually pulled the trigger.

18. Criminal Law § 135.4— sentencing phase—no requirement to indicate aggravating circumstances in indictment

The indictment against defendant met the due process requirements of the United States Constitution, met the requirements of the North Carolina Constitution, and properly activated the provisions of G.S. 15A-2000 *et seq.*, where it complied with the short form indictment authorized by G.S. 15-144. An indictment need not allege one or more aggravating circumstances to support a judgment imposing a death penalty. G.S. 15A-2000(a)(1), (b), (e) and (f).

19. Criminal Law §§ 34.5, 34.6— evidence of prior crime—admissible to show intent and identity

In a prosecution for murder and armed robbery, the trial judge did not err in admitting evidence of a murder and armed robbery that occurred hours prior to the murder and robbery in question as the evidence of the earlier crime tended to show intent and identity.

20. Criminal Law § 135.4— sentencing phase—submission of an aggravating circumstance improper

In a prosecution for murder and armed robbery, the trial court erred in submitting the aggravating circumstance that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody," G.S. 15A-2000(e)(4), as there was not sufficient evidence from which a jury could reasonably infer such a motivating factor in the killing. The error was prejudicial as the jury answered issues submitted on three aggravating circumstances against defendant and one or more of seven mitigating circumstances in his favor, and it was reasonably possible that the submission of the erroneous issue may have tipped the balance in favor of the death sentence.

APPEAL by defendant from *Seay, J.*, 4 February 1980 Session of CABARRUS Superior Court.

Defendant was charged in bills of indictment, proper in form, with the first-degree murder and armed robbery of Susan Verle Pierce. At the guilt determination phase of the trial, the State offered evidence tending to show that Susan Verle Pierce was working as a clerk at the Seven-Eleven convenience store operated by the Southland Corporation on North Church Street in Concord, North Carolina on the 11:00 p.m., 2 June 1979, to 7:00 a.m., 3 June 1979, shift. She was seen alive at 6:00 a.m. on 3 June 1979 by a customer who returned to the store a short time later and found her lying on the floor with a wound at the base of her neck. Police, medical personnel, and officials of the Southland Cor-

poration were summoned to the scene where it was ascertained that Mrs. Pierce was dead and that $67.27 was missing from the store's cash register. It was later determined that Mrs. Pierce's death was caused by a shotgun blast to her neck and that the shotgun was fired from three to nine feet away. Southland Corporation and its management personnel offered a $5,000 reward for information leading to the conviction of Mrs. Pierce's killer.

Linda Massey, defendant's girlfriend, testified that in the late morning of Saturday, 2 June 1979, she began to smoke marijuana and drink beer, wine, and vodka. Later on that day, she exchanged her Pinto automobile with Robert Brown so that she, defendant, and her fourteen-year-old nephew, Darryl Brawley, could ride around in Brown's Oldsmobile. The three of them left the witness's apartment in Charlotte in the early afternoon, and after stopping at a couple of taverns and an acquaintance's apartment, they picked up a man who throughout her testimony the witness referred to as the "dude." They continued to drink and smoke marijuana as they rode around. On the way to and in Gastonia, they stopped at several service stations and convenience stores, and upon returning to the automobile at each store the witness would report whether it was crowded or not. At one station they stopped at in Gastonia, defendant and the "dude" entered the station and the witness, who had remained in the automobile on this occasion, heard a sound like a backfire. After leaving this station, the witness assumed a position in the back seat and the man she identified as the "dude" began driving. She was "high" on alcohol and marijuana and dozed intermittently as they proceeded to Concord. In Concord they stopped at another store, and defendant and the unidentified "dude" went into the store. Shortly thereafter, defendant returned to the automobile and carried what appeared to the witness to be a shotgun into the store. She then heard a noise that sounded like an automobile crashing into a building and observed the female attendant in the store grab her chest near her left shoulder. Defendant then returned to the automobile, and they proceeded to the witness's apartment in Charlotte.

The witness testified on cross-examination that when she was first taken to jail in Gastonia, she was told by the police that her children would be taken away from her and that she would be the first woman in the country to die in the gas chamber unless she

agreed with what they said and cooperated with them. The witness admitted that she had given five different stories about the happenings on 2 and 3 June 1979 for the reasons that she was scared and she did not want defendant to be involved because she loved him. She stated that as a result of plea bargain charges against her were reduced from first-degree murder and armed robbery to accessory after the fact of these crimes.

Darryl Brawley, after plea bargaining for a reduction of the charges against him from first-degree murder and armed robbery to accessory after the fact to these crimes, testified to facts which were essentially the same as those testified to by the witness Massey. In addition, he identified the third man in the automobile as "Danny Brown" and pointed him out in the courtroom as co-defendant Riley Edward Devore. He further stated that after picking up "Danny Brown," defendant put a shotgun shell in the shotgun and said, "Let's go to Concord or Gastonia and make some money." He testified that he saw defendant and "Danny Brown" run into a service station booth, tackle the attendant, remove money from the cash register, and heard the gun go off while it was pointed at the attendant. He did not testify as to the events surrounding the killing of Mrs. Pierce and the robbery of the Seven-Eleven convenience store. Other testimony indicated that he had previously told police officers investigating the killing of Mrs. Pierce that defendant had shot a woman in the chest with a .20 gauge sawed-off shotgun.

The State also offered the testimony of Evelyn Kindley, who testified that at about 6:10 a.m. on 3 June 1979 she passed the Seven-Eleven store on North Church Street in Concord and saw a black male aged sixteen to twenty-five years old sitting on the passenger seat of an automobile in the store's parking lot with his feet on the ground. He was slumped forward as if he were tying his shoes or fumbling with his legs. She also observed that the attendant in the store was standing behind the counter and appeared to be looking at something in the back of the store.

There was evidence which tended to show that one of defendant's fingerprints was found on the inside of the rear passenger side window of Robert Brown's Oldsmobile.

Defendant testified that on Saturday, 2 June 1979, after visiting with his mother in Charlotte, North Carolina, he went to

his sister's house in Charlotte where he remained until night. His sister then carried him to his wife's house in Charlotte where he spent the night with his wife and his three sons. He remained there until the afternoon of Sunday, 3 June 1979. He stated that he did not see the witness Linda Massey until the afternoon of Sunday, 3 June 1979. Defendant's sister, his wife, and his wife's sister offered testimony which tended to corroborate defendant's testimony regarding his whereabouts on Saturday, 2 June 1979, and Sunday morning, 3 June 1979.

On rebuttal the State offered the testimony of Detective Douglas Rivelle of the Gastonia Police Department who stated that defendant told him and other police officers that on the night of 2 June 1979 and the morning of 3 June 1979 he was with Linda Massey and a fourteen-year-old boy smoking marijuana and drinking wine.

The jury returned a verdict of guilty of first-degree murder on the theory of felony murder and a verdict of guilty of robbery with a firearm. The conviction for armed robbery was arrested since it was the underlying felony upon which the felony murder conviction was based. Co-defendant Riley Edward Devore was found not guilty on all charges.

Pursuant to the provisions of G.S. 15A-2000(a)(1), the court proceeded to conduct the sentencing phase to determine whether defendant should be sentenced to death or life imprisonment. The State again presented evidence concerning the robbery and killing of the service station attendant in Gastonia. Defendant offered evidence of his good behavior while incarcerated in Cabarrus County Jail, and a stipulation was entered showing that defendant's intelligence quotient was sixty-nine.

At the conclusion of the evidence on the sentencing proceeding, the trial court instructed the jury on the sentencing phase. Three aggravating circumstances were submitted to the jury: (1) whether the murder was committed for the purpose of avoiding or preventing lawful arrest; (2) whether the murder was committed for pecuniary gain; and (3) whether the murder was part of a course of conduct in which Larry Darnell Williams engaged and did that course of conduct include the commission by the defendant of other crimes of violence against other persons? Seven mitigating circumstances were submitted to the jury:

(1) Larry Darnell Williams has no significant history of prior criminal activity.

(2) That Larry Williams was gainfully employed when the murder occurred.

(3) That Larry Williams voluntarily admitted himself to Open House in Charlotte for rehabilitation for drug problems in October 1975 and January and February of 1976.

(4) That Larry Williams has an intelligence quotient (IQ) of 69.

(5) That Larry Williams was of good conduct while in the Cabarrus County jail.

(6) That Larry Williams conducted himself in a normal business manner with Attorney Karl Adkins in a personal injury case.

(7) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury found beyond a reasonable doubt each of the aggravating circumstances submitted. The jury also found that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. After finding one or more of the seven mitigating circumstances, although it did not designate which ones were found, the jury found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. The jury then recommended that the death penalty be imposed, and the court entered judgment imposing the death penalty for the crime of first-degree felony murder. Defendant appealed of right to this Court from the judgment imposed.

Rufus L. Edmisten, Attorney General, by Thomas F. Moffitt, Assistant Attorney General, for the State.

Webster S. Medlin and Steve L. Medlin for defendant appellant.

BRANCH, Chief Justice.

Defendant's brief brings forward forty-seven assignments of error with little semblance of continuity. We have therefore

elected to consider the assignments of error under the general headings of pretrial motions, guilt phase of the trial, and sentencing phase of the trial.

I. PRETRIAL MOTIONS

[1] Defendant first assigns as error the denial of his pretrial motions for change of venue or in the alternative for a special venire due to the publicity his case had received prior to trial.

The record includes as exhibits articles which appeared in newspapers in the Cabarrus County area. Defendant asserts these articles were "reasonably likely" to prejudice potential jurors. *See Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed. 2d 600, 86 S.Ct. 1507 (1966). Examination of these articles discloses that they are factual, non-inflammatory, accurate reports. Defendant's motion was addressed to the sound discretion of the trial judge. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050, *reh. denied*, 448 U.S. 918, 65 L.Ed. 2d 1181, 101 S.Ct. 41 (1980). We cannot say, after a thorough examination of these exhibits, that the trial judge abused his discretion when he ruled that defendant had not met the burden of establishing "so great a prejudice . . . that he [could] not obtain a fair and impartial trial." G.S. 15A-957. *See State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Barfield, supra; State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated, sub nom, Carter v. North Carolina*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976).

[2] Defendant also assigns as error the denial of his motion to control pretrial publicity. By this motion, defendant sought to prohibit all attorneys, their assistants, investigators, and employees, the Cabarrus County Superior Court Clerk, the County Sheriff, the County Jailer, police officials and other law enforcement officers and employees, and all witnesses associated with the case from commenting on it to any newspaper, radio, or television reporters, agents, or employees within Cabarrus County during the course of the proceedings.

The motion was filed on 11 September 1979 and was heard by Judge Collier on 14 November 1979. His order denying the motion was entered on 27 November 1979.

The first and fourteenth amendments to the United States Constitution and Article I, Section 14, of the North Carolina Constitution guarantee freedom of speech and freedom of the press.

These constitutions are equally clear in their guarantee that every criminal defendant shall receive a fair trial. U.S. CONST., Amend. VI, XIV; N.C. CONST., art. I, §§ 19, 23, 24. The framers of our federal and state constitutions gave no priorities to these fundamental guarantees but left to the courts the delicate task of balancing the defendant's constitutionally guaranted right to a fair trial against the constitutional guarantees of freedom of speech and freedom of the press. *New York Times Co. v. United States*, 403 U.S. 713, 29 L.Ed. 2d 822, 91 S.Ct. 2140 (1971).

The United States Supreme Court considered a question of prior restraint in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 49 L.Ed. 2d 683, 96 S.Ct. 2791 (1976). In ruling that the order restraining publication of news was too vague and too broad to survive the scrutiny given to restraints on first amendment rights, the Court noted that even pervasive, adverse publicity does not inevitably lead to an unfair trial and that any prior restraint on expression comes to the courts with a heavy presumption against its constitutional validity. Thus one seeking to impose a "gag" rule carries a heavy burden of showing justification for the imposition of such a rule.

Here the motion did not directly seek to restrain the news media but sought to restrain a large group of unnamed public officials and lawyers from commenting on the case to the agents or employees of the news media. Even so, it was an attempt to indirectly impose a prior restraint upon the news media and to impose a "gag" order upon assorted people in violation of the state and federal constitutional guarantees. Seventeen of the nineteen news articles submitted in support of defendant's motion were printed shortly after the killing occurred in June, 1979, over four months before the hearing before Judge Collier. Thus, there was no showing that at the time the matter was before Judge Collier there existed any intense or pervasive pretrial publicity which was adverse to defendant. Had he allowed the motion to control the pretrial publicity, his conclusion as to the impact of such publicity would at best have been merely speculative. Further, the very nature of the relief that defendant sought brings into clear focus the impossibility of enforcing such a pretrial order. There was no *in personam* jurisdiction sought, and a group such as defendant sought to restrain cannot as a matter of practicality be restrained from discussing pending cases with others. We therefore hold that Judge Collier correctly denied defendant's motion. Our holding is strongly supported by the fact that at trial

defendant apparently did not pursue his "publicity tainted" argument during jury voir dire since the record gives no indication whether any juror was stricken because of prejudice allegedly caused by pretrial publicity.

[3] By his next assignment of error defendant contends that a quotation in *The Charlotte Observer* attributed to the trial judge resulted in prejudicial error warranting a new trial.

The 8 January 1980 edition of *The Charlotte Observer* quoted Judge Seay as saying:

> "There is not a lot of sweetness and light when you are talking about someone going to the gas chamber," Seay said. "This is an extremely adversary proceeding."

Defendant takes the position that the use of the words "gas chamber" in the article published about thirty days before the trial resulted in prejudicial error. He also seems to contend that the statement indicated a lack of impartiality on the part of the trial judge. We do not agree. The more reasonable interpretation of the statement is that Judge Seay was merely indicating the obvious fact that a case involving the death penalty is one that will be hotly contested. Neither can we find anything in the quoted statement which indicates that he was partial to either the State or defendant. Further, the record does not indicate that any juror was even aware of the statement attributed to the judge or that the defendant was forced to accept a juror who had knowledge of the quoted remark.

Defendant has failed to show any possible prejudice resulting from the remark attributed to Judge Seay.

[4] Assignments of error 2, 6, 23, and 26 will be considered collectively since they relate to court-appointed assistance at trial. It is defendant's position that the trial judge erred by denying his motions for additional counsel, a research assistant, a statistician, and a jury selection expert. In support of his position, he relies upon the provisions of G.S. 7A-450(b) and 7A-454 which in pertinent part provide:

> G.S. 7A-450(b). Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation.

G.S. 7A-454. The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State.

This Court has considered similar motions on several occasions. In *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976), the indigent defendant moved that a private investigator be appointed. We there expressed our opinion concerning the appointment of "experts" for indigent defendants in this language:

> [O]ur statutes and the better reasoned decisions place the question of whether an expert should be appointed at State expense to assist an indigent defendant within the sound discretion of the trial judge. We adopt that rule. However, we feel that the appointment of an investigator as an expert witness is a matter *sui generis*. There is no criminal case in which defense counsel would not welcome an investigator to comb the countryside for favorable evidence. Thus, such appointment should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. Mere hope or suspicion that such evidence is available will not suffice. For a trial judge to proceed otherwise would be to impede the progress of the courts and to saddle the State with needless expense.

Id. at 82, 229 S.E. 2d at 567-68.

Thereafter we were faced with a motion for the appointment of a serologist and a private investigator for an indigent defendant in *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977). We there held:

> There are, then, no constitutional or legal requirements that private investigators or expert assistance *always* be made available simply for the asking. (Citation omitted.) Our statutes, G.S. 7A-450(b) and 7A-454, as interpreted in *Tatum* and *Montgomery* require that this kind of assistance be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. Neither the state nor the federal constitution requires more.

292 N.C. at 278, 233 S.E. 2d at 911. *See also, State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980).

We considered a motion for the appointment of associate counsel in *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979), and there stated:

> Defendant contends that the trial judge erred in denying his motion for appointment of associate counsel. Defendant cites no authority in support of this contention but states that additional counsel should have been appointed. As in the case of providing private investigators or other expert assistance to indigent defendants, we think the appointment of additional counsel is a matter within the discretion of the trial judge and required only upon a showing by a defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. (Citations omitted.)

Id. at 362-63, 259 S.E. 2d at 758. *See also, State v. Easterling, supra; State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976).

In addition to the statutory authority above cited, defendant relies strongly upon the "reasonable likelihood" standard which was adopted in the foregoing opinions. He contends that he has shown that the allowance of additional assistance requested by his motions would have materially assisted in the preparation and presentation of his case and that without such assistance he was denied a fair trial.

Defendant has presented no evidence to show that the jury selection process was challenged or that the services of a statistician would have resulted in the selection of a more favorable jury. Neither do we find any indication that a jury selection expert would have enabled defendant's counsel to conduct a better voir dire of the jury panel. Our review of the record indicates that defendant's two court-appointed counsel aggressively and vigorously represented defendant at trial and conscientiously pursued his case on appeal.

In summary, the record discloses nothing which shows that there is a reasonable likelihood that the appointments requested by defendant's motions would have materially assisted defendant in the preparation or presentation of his defense or that without such assistance it is probable that defendant did not receive a fair trial.

These assignments of error are overruled.

[5] Defendant contends that the trial court erred in denying his motion to allow him to act as co-counsel with his court-appointed attorneys. This contention is without merit.

Although a criminal defendant cannot be required to accept the services of court-appointed counsel, *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972); *State v. Morgan*, 272 N.C. 97, 157 S.E. 2d 606 (1967), we have previously said that a criminal defendant cannot represent himself and, at the same time, accept the services of court-appointed counsel. *State v. House*, 295 N.C. 189, 244 S.E. 2d 654 (1978), answered this very question as follows:

> It is well settled that a defendant in a criminal action has a right to represent himself at the trial and cannot be required to accept the services of court-appointed counsel. (Citations omitted.) It is, however, equally well settled that "[a] party has the right to appear *in propria persona* or by counsel, but this right is alternative," so that "one has no right to appear both by himself and by counsel." (Citations omitted.) Thus, while the defendant elected to retain the services of the court-appointed counsel, the court did not err in holding that the interrogation of prospective jurors and of witnesses must be done through his counsel.

Id. at 204, 244 S.E. 2d at 662.

The Court's decision in *House* clearly answers the question posed by this assignment of error adversely to defendant's contention.

Several of defendant's remaining assignments of error relate to the denial of other pretrial motions.

[6] The first of these is addressed to the trial court's failure to allow a continuance of the trial until the disposal of the charges brought against him in the Gastonia killing and robbery. He contends that in order to preserve the chronological continuity of events the Gastonia matter should have been heard before the Cabarrus County charges were tried. Failure to dispose of the charges in chronological order, he argues, prejudiced his case in the eyes of the jury through the introduction of evidence regarding the Gastonia events in the trial of the Cabarrus County matter.

It is well settled in this State that a motion for continuance which is not based on constitutional guarantees is ordinarily addressed to the sound discretion of the trial court. In the absence of an abuse of discretion, the denial of a continuance will not be held error on appeal. *State v. Easterling, supra; State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978).

Defendant's assignment of error on this point is overruled for the reason that there is no showing that the trial court abused its discretion in denying the motion for continuance.

Defendant, in three assignments of error related to witness Linda Massey's statements to police and trial testimony, argues that the indictments should have been quashed and the charges against him dismissed, and that Massey should have been precluded from testifying against him at trial.

[7] By assignment of error number 3 defendant asserts that the trial court erred in denying his motion to quash the indictments and dismiss the charges against him on the ground that the indictments were based upon a coerced confession by the witness Massey which implicated defendant. A motion to quash an indictment lies where a defect appears on the face of the indictment and will be granted when it appears from an inspection of the indictment that no crime is charged or that the indictment is otherwise so defective that it will not support a judgment. *State v. Underwood*, 283 N.C. 154, 195 S.E. 2d 489 (1973); *State v. Springer*, 283 N.C. 627, 197 S.E. 2d 530 (1973); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913 (1969); *accord, Wolfe v. North Carolina*, 364 U.S. 177, 4 L.Ed. 2d 1650, 80 S.Ct. 1482 (1960). Such is not the case here. The indictments are proper in form and nothing appears upon the face of either indicating that it will not support a judgment.

[8] By assignments of error numbers 46 and 47, defendant attempts to assign error to the admission of Massey's testimony at trial. In our opinion, neither defendant's right to due process nor his right to confrontation was violated by the admission of Massey's statement.

Our holding in *State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976), squarely answers defendant's contention regarding Massey's allegedly coerced statements. There we said:

> It is self evident that a denial of due process occurs when the State contrives a conviction by the knowing use of perjured testimony. However, when a witness testifies as to facts earlier obtained by coercive police action and all of the circumstances surrounding the alleged coercive acts are before the jury, the requirements of due process are met. It is then for the jury to determine the weight, if any, to be given to the testimony. (Citations omitted.)
>
> * * *
>
> Evidence of any police coercion or of contradictory statements and withholding of information on the part of the witnesses goes to their credibility. This, of course, is a jury question.

Id. at 240-41, 229 S.E. 2d at 907-08.

Evidence of any police coercion in obtaining Massey's statement went to the credibility of the witness, which was a jury question. The force of defendant's argument on this assignment of error is further diluted by failure of counsel to pursue the judge's permission to take the matter to another judge for ruling. Therefore, neither the statements to police nor the trial testimony complained of here violated defendant's right of due process and the testimony of the witness Massey was admissible.

[9] Neither do we find any merit in defendant's contention that he was denied his constitutional right of confrontation because the witness Massey refused to testify at the pretrial voir dire concerning the alleged inculpatory statements made by her to police officers. At the time of the pretrial voir dire hearing, Massey was a co-defendant charged with the same crime as defendant. She exercised her fifth amendment guarantee against self-incrimination, and the trial judge properly sustained her objection to giving testimony at this hearing. The charges against her were later dropped, and at the time Massey was called as a witness at defendant's trial, she was no longer a co-defendant. At trial defense counsel extensively cross-examined the witness Massey, and therefore defendant is in no position to complain that he was denied his constitutional right to confront a witness who testified against him.

[10] Defendant attacks the constitutionality of the death statute contending that it is discriminatory and constitutes cruel and

unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution. He further argues that the statute impermissibly extends the court's jurisdiction without a constitutional amendment in violation of Article IV, Section 12, of the North Carolina Constitution. This Court rejected a contention that our death penalty statute is unconstitutional on the ground that it constituted cruel and unusual punishment in *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050, *reh. denied*, 448 U.S. 918, 65 L.Ed. 2d 1181, 101 S.Ct. 41 (1980). Even so, defendant now contends that the statute is unconstitutional because it is discriminatory in that its provisions result in a differential treatment of minorities. We reject this argument. The very contention that defendant here advances is one of the principal precipitating factors that caused the General Assembly to adopt our present death statute. It is drafted and implemented so as to preclude the arbitrary and capricious imposition of the death penalty upon any segment of the state's population.

Defendant's challenge to G.S. 15A-2000(d) as an impermissible expansion of this Court's jurisdiction is groundless. *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976), recognizes that this Court's jurisdiction is limited "to review upon appeal any decision of the court below upon any matter of law or legal inference" as allowed by Article IV, Section 12, Constitution of North Carolina. G.S. 15A-2000(d) provides by way of review of judgment and sentence that:

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon

a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

Further, the above-quoted provisions of the statute destroy defendant's contention that there are no standards and guidelines for review of the death sentence by this Court.

We hold that the North Carolina capital punishment statute is constitutional.

[11] Defendant avers that the trial court erred in denying his motion for a bill of particulars pursuant to G.S. 15A-925.

G.S. 15A-925 provides *inter alia* that:

(b) A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.

(c) If any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars. Nothing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence.

Defendant's motion for a bill of particulars requested the following information:

a) The exact floor plan and location of floor displays of the 7-11 Store when the alleged shooting occurred.

b) The position of the purported victim of the shooting within the 7-11 Store at all times before and after the shooting.

c) The size of windows in the front of said 7-11 Store, plus any and all decorations, lettering or signs and displays mounted on and in said window.

d) The size and pattern of marked parking spaces in the parking lot of said 7-11 Store and where each automobile or automobiles were at the time of the alleged shooting.

e) The alleged positions of each of the four named defendants and the alleged paths each traveled during the entire duration of the time they allegedly were present at the 7-11 Store with particular emphasis on the exact positions of the four named defendants with respect to each other and to the victim at the time of the actual shooting incident.

In *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979), we reiterated the well established rule that:

> The function of such a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial and (2) to limit the course of the evidence to the particular scope of inquiry. [Citations omitted.]
>
> The granting or denial of motions for a bill of particulars is within the discretion of the court and is not subject to review except for palpable and gross abuse thereof. [Citations omitted.]

Id. at 611, 260 S.E. 2d at 574.

In this case, defendant's motion for a bill of particulars requested some matters which were capable of being ascertained by viewing the murder scene. Such information was discoverable under G.S. 15A-901, *et seq.* The record in the case before us is silent concerning how much, if any, of this type evidence defendant sought to obtain through discovery.

Defendant's request also sought information concerning the paths that each of the defendants traveled within the store during the robbery and the position of the victim within the Seven-Eleven at all times before and after the shooting. This lat-

ter information is clearly beyond the scope of G.S. 15A-925(c) since it requests "matters of evidence."

Further an examination of defendant's pretrial motions reveals a keen understanding of the charges against him and the factual bases therefor. The trial court correctly denied defendant's motion for a bill of particulars.

[12] Defendant next assigns error to the trial court's refusal to grant his motion for one judge to retain jurisdiction of the case throughout its pendency both during the pretrial stage and at trial. Defendant cites no authority for this proposition and opines only that our system of rotating Superior Court Judges somehow denies him due process of law.

Our system of Superior Court Judge rotation is embodied in our state constitution (Article IV, § 11) and makes it likely that more than one Superior Court Judge might rule on motions in a lengthy, protracted trial such as the one here.

Article IV, Section 11, of the North Carolina Constitution has been examined by the federal courts and found to be constitutionally sound. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D. N.C. 1971), *aff'd*, 409 U.S. 807, 34 L.Ed. 2d 68, 93 S.Ct. 43 (1972), held *inter alia* that the provision of our state constitution requiring that the State be divided into divisions and districts and the judges rotated among the districts was valid.

Defendant failed to demonstrate error or show prejudice because more than one Superior Court Judge took part in the pretrial proceedings. We discern no prejudice to defendant in the denial of this motion.

[13] Defendant next contends that the trial court erred when it refused to release him from custody in order that he might seek out alibi witnesses.

Defendant argues that because of his continuous incarceration without bond in Gaston and Cabarrus Counties from the date of his arrest through trial he was unable to locate alibi witnesses in Mecklenburg County. Defendant asserts that the necessity to gain his release to seek alibi witnesses was compounded by the fact that although he did not know the names of his witnesses he could recognize them upon sight. Defendant graciously suggested that a sheriff's deputy might be detailed to accompany him into

Mecklenburg County in search of his elusive witnesses. We note that there were no supporting affidavits or documentation which would have indicated to the trial court that there was even a possibility that such witnesses existed, or that efforts had been made to locate such witnesses without success. Defendant's primary defense was that of alibi. He claimed to have been in Charlotte with his wife and three children on Saturday, 2 June 1979, and Sunday morning, 3 June 1979. Defendant's wife, his sister, and his sister-in-law gave testimony which tended to corroborate defendant's alibi testimony.

Defendant's assignment of error can be likened to a request for continuance based upon the absence of a witness. Such a request is within the sound discretion of the trial court, and absent a showing of abuse of such discretion, the ruling must stand. *E.g., State v. Tolley,* 290 N.C. 349, 226 S.E. 2d 353 (1976). No abuse of discretion is shown.

[14] Defendant assigns as error the denial of numerous additional pretrial motions. Apart from inclusion of the motions themselves, no reference to them occurs elsewhere in the record or in the exhibits, except for the following "Entry of Exceptions" wherein defendant alleges:

> That on January 7, 1980, the Court heard motions of the defendant, Larry Darnell Williams, and after hearing arguments of Counsel, the Court denied motions as follows:
>
> #19 Motion to Prohibit Jury Dispersal.
>
> #24 Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire.
>
> #25 Motion to Limit Disqualification for Particular Juror Views on Punishment.
>
> #28 Motion to Allow Defendant to Act as Co-counsel.
>
> #32 Request for Instructions During Voir Dire.
>
> #33 Motion to Disclose Aggravating Circumstances.
>
> #34 Motion to Voir Dire Jury at End of Guilt Innocence Phase.
>
> #38 Motion for Separate Trial Jury and Separate Punishment Jury.

#39 Motion for Two Separate Juries and No Death Qualification of the First Jury.

#40 Motion to Strike Jurors After Individual Voir Dire is Completed.

#41 Motion for Sequestration of the Jury During the Jury Trial.

#48 Motion to Regulate the Dress of Police Witnesses.

#50 Motion for Funds to Acquire Adequate Clothing.

#51 Motion to Reconsider Change of Venue or Special Venire.

#52 Motion to Limit Jury Inquiry.

#53 Supplement to Motion to Reconsider Change of Venue of Special Venire.

#54 Motion in Limine.

Exception No. 4

To the Courts ruling and the rendition thereof, the defendant excepts and gives notice of appeal.

Nowhere in the record does there appear an Order by the trial court denying these motions. Neither have we found any record of the proceedings which allegedly occurred on 7 January 1980 in which the motions are said to have been denied. While we have no doubt that the motions were indeed denied, we fail to see how we can review the action of a trial court when that action does not appear of record. App. R. 9(b)(3)(vii) (specifying that the record on appeal in criminal cases shall contain copies of "the judgment, order, or other determination from which appeal is taken"). *See also State v. McCain*, 39 N.C. App. 213, 249 S.E. 2d 812 (1978) (failure to include in record an order appealed from is a violation of App. R. 9(b)(3)). Further, we have nothing before us to indicate the grounds presented for granting these motions, or upon what grounds they were denied. This Court is bound by the record before it, and in the absence of anything in the record to indicate otherwise, must assume that the trial judge ruled properly on matters before him, correctly applying the applicable law. *E.g., State v. Mullis*, 233 N.C. 542, 64 S.E. 2d 656 (1951). We do

not, however, dismiss the assignments of error without due consideration.

Upon close examination we discover that the motions designated numbers 51 and 52 are properly raised elsewhere in defendant's appeal and are considered under separate assignments of error. Other motions, numbers 28, 33, and 54, are closely related to properly raised assignments of error and are considered in the discussion accompanying these assignments.

Although defendant has failed properly to raise the remaining assignments of error, we elect because of the gravity of this case to examine these matters insofar as the information in the record permits. Our careful examination discloses no error in the denial of these motions.

As to defendant's remaining pretrial motions, first we find no merit in his argument that the trial judge erred when he denied defendant's motion for thirty days' notice of the jury pool prior to trial.

Initially we note that the judge ordered that defense counsel be furnished a copy of the jury list "immediately upon its availability." The record does not contain the jury *voir dire*, and we therefore cannot determine whether there was any possibility that defendant was forced to accept a prejudiced juror. Defendant cites no authority in support of this argument. Neither does he even argue that the ruling was prejudicial to him.

[15] Finally, defendant asserts that the court below erred in denying his motion to require the district attorney and his staff to disclose personal, business, social, church, and civic ties with prospective jurors. The recognized and proper way to inquire into such matters is on the jury *voir dire*. The record does not disclose whether potential jurors were questioned on these matters, neither does it contain any indication that the jurors failed to disclose ties with the State's attorney. Defendant cites no authority for this argument but informs this Court, "People have a natural dislike toward people speaking about such relationships on voir dire." This may or may not be, but defendant has failed to show either that the prospective jurors in instant case possessed such a dislike, or that he was prejudiced thereby.

We find no prejudicial error in the denial of any of defendant's pretrial motions.

II. GUILT PHASE OF TRIAL

Defendant assigns as error several rulings by the trial court during the guilt-innocence phase of the trial.

[16] Defendant's assignment of error number 36 is as follows:

> The court erred in allowing numerous leading questions by the district attorney.

We have examined all of the questions to which defendant excepts under this assignment of error. Five of these questions simply restated facts to which the witness had just testified without objection. For example, the witness Massey testified that "Larry Williams also stayed with me starting about Easter." Immediately thereafter the district attorney asked, "Ms. Massey, did he stay there off and on from Easter of 1979 and times forward?" Defendant objected, and the witness did not answer.

Later the witness Massey testified that defendant told her "to pull the car next to a booth in the center of the parking lot." The next question was, "Is that sort of in the middle of the parking lot?" There were three other exceptions to questions which followed this same pattern. There was exception to a question which was not answered and finally an exception to a question where the objection came after the answer was given and there was no motion to strike.

The vice in leading questions is that they embody a question which could be answered by a simple yes or no answer *and* suggest the answer desired. *State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568, *cert. denied*, 429 U.S. 932, 50 L.Ed. 2d 301, 97 S.Ct. 339 (1976). The majority of the questions were not prejudicially leading since they suggested no facts which were not obviously a part of the witness's prior testimony. In the remaining question which elicited an answer, defense counsel failed to properly object or preserve his exceptions by a motion to strike. *See State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975). Further, we find nothing in the content of the challenged questions or answers which added strength to the State's case. At best the questions were merely introductory or calculated to elicit the truth. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). At worst they were nonconsequential and repetitive questions which added nothing to the case.

A presiding judge has wide discretion in permitting or restricting leading questions, and his ruling will not be disturbed when the evidence is otherwise competent, absent a showing of abuse of discretion. *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975). Here no abuse of discretion was shown, and the trial judge correctly admitted this otherwise competent evidence.

[17] Defendant assigns as error the overruling of an objection to a question which defendant characterizes as an attempt by the State to impeach its own witness. The question came after the District Attorney had inquired into several statements made by the witness to the effect that she did not believe defendant had committed the murder. The District Attorney continued:

Q. Ms. Massey, were you saying that you were uncertain that he was the man that walked in the store with the gun?

MR. MEDLIN: OBJECTION. He is impeaching his own witness, Your Honor.

COURT: OVERRULED. Answer the question.

EXCEPTION NO. 16

A. No, I am not saying that I an unsure that he was with me. In other words, I was just saying that I hoped that he wasn't the one that did it.

Q. Did what, ma'am?

A. The murder.

Q. You mean the one that actually fired the shot?

A. Yes, sir.

Obviously the purpose of this question was not to discredit the witness's testimony but merely to clarify the fact that her doubts were directed not to defendant's involvement in the shooting but to the question of whether defendant was the one who actually pulled the trigger. While the State ordinarily may not impeach its own witness, *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973), this Court has approved efforts by the State directed to clearing up confusion as to a witness's statements, *State v. Berry*, 295 N.C. 534, 246 S.E. 2d 758 (1978).

The trial judge properly overruled defendant's objection.

Defendant assigns error to the admission of rebuttal testimony by a police detective who interviewed defendant about the Gastonia killing. Defendant argues that the testimony related only to the Gastonia incident and had no tendency to rebut the evidence of defendant concerning the Concord killing. We disagree. The portion of the witness's testimony to which defendant excepts tended to show that during his interrogation about the Gastonia killing, the defendant stated that he spent the night of 2 June and the morning of 3 June 1979 with Linda Massey and a fourteen-year-old boy smoking reefers (marijuana) and drinking wine. This statement was in direct contradiction to defendant's statement at trial that he spent that night at his wife's house in Charlotte and was clearly admissible for the purpose of impeachment as a prior inconsistent statement on a material matter. *E.g., State v. Green*, 296 N.C. 183, 250 S.E. 2d 197 (1978). We note that defendant failed to request a limiting instruction regarding this testimony.

This assignment of error is likewise without merit.

The defendant assigns error to the denial of his motions to dismiss, and to set aside the verdict and order a new trial, and to the entry of judgment. All of these motions are directed to the sufficiency of the evidence. *See, e.g., State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980); *State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1977).

These assignments of error appear to be formal. However, we note that there was ample substantial evidence in this record of each essential element of first-degree felony murder and that defendant was the perpetrator of that crime. *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971).

The trial judge correctly denied each of these motions.

By assignments of error numbers 40 and 41, defendant contends that the trial judge erred in his charge to the jury in both the guilt-innocence phase and the sentencing phase of the trial.

This record discloses that defendant has not entered a single exception to the trial judge's charge. This Court will not ordinarily review questions of law or legal inference when not supported by exceptions duly entered in the court below and brought for-

ward in the briefs. *State v. Taylor*, 240 N.C. 117, 80 S.E. 2d 917 (1954).

Apparently defendant was attempting to allege that it was error to charge the jury at all because his motions to dismiss, to set aside the verdict, and for a new trial were erroneously denied by the trial judge.

We have previously discussed defendant's motions to dismiss, to set aside the verdict, and for a new trial.

Although these assignments of error are not properly before us, we have nevertheless carefully considered this entire charge and find no error as it relates to the guilt-innocence phase of the trial. Any error in the charge relating to the sentencing phase of the trial will be hereinafter considered.

We find no error in the guilt determination phase of defendant's trial.

III. SENTENCING PHASE OF TRIAL

[18] Defendant assigns error to the form of the indictment presented against him for its failure to indicate what aggravating circumstance(s) the State would attempt to show to invoke the death penalty during the sentencing phase of trial. He asserts that failure to so inform him is violative of the constitutional guarantee of due process. He argues that unless at least one aggravating circumstance which will support the death penalty is set forth in the indictment that it cannot support a judgment imposing the death penalty.

The indictment reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That Larry Darnell Williams late of the County of Cabarrus on the 3rd day of June 1979, with force and arms, at and in the said County, feloniously, wilfully, and of his malice aforethought, did kill and murder Susan Hicks Pierce contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

This indictment complies with the short form indictment authorized by G.S. 15-144 which requires that:

> In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the per-

son accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be.

In *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928, 54 L.Ed. 2d 288, 98 S.Ct. 414 (1977), we said that:

> In numerous cases, this Court has held that an indictment drawn in accordance with G.S. 15-144 is sufficient to sustain a verdict of guilty of murder in the first degree based upon a finding that defendant killed with malice, premeditation and deliberation, or that defendant killed in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony. (Citations omitted.) If defendant had deemed it necessary, he could have moved for a bill of particulars to ascertain the theory which the State intended to rely upon at trial. (Citations omitted.)

Id. at 661, 235 S.E. 2d at 189.

On 2 October 1979, defendant was arraigned in the Superior Court of Cabarrus County on charges of murder in the first degree.

G.S. 15A-2000(a)(1) and (b) inform any criminal defendant charged with a capital offense that a separate proceeding on the issue of penalty will be convened following conviction or adjudication of guilt in a capital felony wherein the jury will be instructed that it must consider any aggravating circumstance(s) or mitigating circumstance(s) from the lists provided by G.S. 15A-2000(e) and (f), respectively.

Defendant cites no statutory or case law which requires an indictment in a death case to list the aggravating circumstances

upon which the State will rely in seeking the death penalty. Nor does he contend that he was prejudiced because of lack of actual notice of the aggravating circumstances the State would rely upon. The thrust of defendant's argument is that, since an indictment will not support a conviction of an offense more serious than is charged in the indictment, an indictment must allege at least one aggravating circumstance to support a judgment imposing a death penalty. We do not agree. Here the indictment charged first-degree murder, and defendant was duly arraigned upon that charge, it being the only felony for which the death penalty may be imposed in North Carolina. G.S. 14-17. G.S. 15A, Article 100, does not create a new offense or add new elements to the crime of first-degree murder. The statutes merely set forth sentencing standards to guide the jury's discretion to the end that the death penalty will not be imposed arbitrarily or capriciously.

G.S. 15A-2000(e) sets forth eleven aggravating circumstances which may be considered by the jury. Therefore, defendant was apprised of the aggravating circumstance or circumstances that the State must prove before the death penalty could be imposed. *See Spinkellink v. Wainwright*, 578 F. 2d 582 (5th Cir. 1978); *State v. Berry*, 592 S.W. 2d 553 (Tenn. 1980); *Andrews v. Morris*, 607 P. 2d 816 (Utah 1980).

We hold that the indictment met the due process requirement of the United States Constitution, met the requirements of the North Carolina Constitution, and properly activated the provisions of G.S. 15A-2000 *et seq.*

[19] Defendant assigns as error the denial of his motion *in limine* and the subsequent admission at the guilt-innocence phase and the sentencing phase of the trial of evidence concerning a crime committed in Gaston County. By these assignments, he challenges the evidence tending to show that he and another robbed and killed Eric Joines at the Service Distributing Company in Gastonia, just hours prior to robbing and killing Susan Pierce at the Seven-Eleven store on North Church Street in Concord shortly after 6:00 a.m. on 3 June 1979. Defendant contends that the evidence of the Gastonia robbery and murder is unrelated, irrelevant, and prejudicial to his trial.

The landmark case of *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), *inter alia*, holds that the State cannot offer evidence

of other crimes committed by the defendant where the only relevancy of such evidence is its tendency to show the defendant's disposition to commit a crime of the nature of the one for which he is on trial. However, there are numerous exceptions to this general rule which include evidence of identity and intent. *Accord, State v. Cherry,* 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied,* 446 U.S. 941, 64 L.Ed. 2d 796, 100 S.Ct. 2165 (1980); *State v. Barfield, supra; State v. May, supra; State v. Williams,* 292 N.C. 391, 233 S.E. 2d 507 (1977). In *Williams* this Court approved the admission of evidence of an armed robbery and murder occurring shortly before the felony murder therein charged for the purpose of showing intent. Likewise, in *May* we approved admission of evidence tending to show defendant's participation in an armed robbery of a dry cleaning business five days earlier in which defendant used the same sawed-off shotgun he had used in the robbery for which he stood charged. This evidence was admitted to show defendant's intent and *quo animo.*

Here the evidence shows that defendant left Charlotte with his accomplices to commit armed robbery. Darryl Brawley's testimony was that, "I handed (defendant) the shotgun shells . . . (defendant) put one shell in the shotgun . . . and said 'Let's go to Concord or Gastonia and make some money.'" The evidence shows that the manner in which Joines was robbed and killed with a shotgun blast in Gastonia established the same *modus operandi* as was used in the killing of Pierce in the case before us.

The evidence further reveals that defendant attempted to establish an alibi by testifying that he remained overnight with his wife in Charlotte on the night of 2 June and the morning of 3 June 1979 and offered several witnesses to corroborate his testimony in this regard. Thus the question of identity was raised.

We hold that the trial judge correctly admitted the evidence of the Gastonia crime to show intent and identity. In our opinion, the evidence was sufficient to permit the admission of this evidence on the ground of other exceptions to the McClain rule; however, we need not discuss those other exceptions since the trial judge limited the use of this testimony to the showing of intent and identity.

[20] Defendant contends that the trial court erred in submitting the aggravating circumstance that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." G.S. 15A-2000(e)(4). The jury found this to be one of the aggravating circumstances.

The challenged aggravating circumstance was submitted on the theory that Susan Pierce was killed in order to eliminate her as a witness who could later identify the perpetrators of the armed robbery.

In *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), we held that the isolated fact that a killing occurred during the commission of a felony is not sufficient to justify the submission of the aggravating circumstance set out in G.S. 15A-2000(e)(4). We there stated and now reiterate that there must be evidence from which the jury could infer that at least one of the purposes which motivated the killing was defendant's desire to avoid or prevent a lawful arrest or effect an escape.

Justice Britt, for the majority in *Goodman*, wrote:

> This provision, on its face, is unambiguous, but it must also be construed properly so that instructions on this aggravating circumstance will only be given the jury in appropriate cases. In a broad sense every murder silences the victim, thus having the effect of aiding the criminal in the avoidance or prevention of his arrest. It is not accurate to say, however, that in every case this "purpose" motivates the killing.

298 N.C. at 26, 257 S.E. 2d at 586.

Goodman carefully analyzed the Florida case of *Riley v. State*, 366 So. 2d 19 (Fla. 1979). Obviously this case was chosen for analysis because of the similarities between the death statutes in the respective states and the similarity of the aggravating circumstances involved in the two cases. In *Riley* the Florida court concluded that "proof of the requisite intent to avoid arrest and detection must be very strong. . . ." *Goodman*, 298 N.C. at 27, 257 S.E. 2d at 586.

Although in *Goodman* we did not adopt the *burden* of proof required by the Florida court, we concluded:

> Before the trial court can instruct the jury on this aggravating circumstance there must be evidence from which the jury can infer that at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime. We repeat that "the mere fact of a death is not enough to invoke this factor."

Id.

In the case before us, we do not find that there is sufficient evidence from which a jury could reasonably infer such a motivating factor in the killing. The defendant's statement, as related by the witness Massey, to the effect that defendant wanted to leave the Seven-Eleven parking lot at a slow rate of speed so as not to attract attention does not support such an inference. This single statement by the defendant occurred after the killing and at that point it was extremely likely that the statement reflected defendant's wish to avoid detection for the killing. However, such a statement cannot raise a reasonable inference as to his motivation before or at the time of the killing. It is a post-killing expression evidencing an after-the-fact desire not to be detected or apprehended. In our opinion, it does not raise a reasonable inference that at the time of the killing defendant killed for the purpose of avoiding lawful arrest. Therefore, the challenged aggravating circumstance should not have been submitted to the jury.

We turn to the question of whether the error in submitting this aggravating circumstance was so prejudicial as to warrant a new trial on the sentencing phase of the case.

The test for harmless error is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972).

In our consideration of the harmless error test in *Goodman* we stated:

> We believe a similar test should be applied when one of the aggravating circumstances listed in G.S. 15A-2000(e) is erroneously submitted by the court and answered by the jury against the defendant. It follows that in cases coming before

> us presenting this question we must answer the question based on the evidence in the particular case.
>
> Of course, we have no way of *knowing* if submission of the erroneous issue in the case at hand tipped the scales in favor of the jury finding that the aggravating circumstances were "sufficiently substantial" to justify imposition of the death penalty. (Emphasis in original.)

298 N.C. at 29, 257 S.E. 2d at 587.

Here the jury answered issues submitted on three aggravating circumstances against defendant and one or more of seven mitigating circumstances in his favor. Due to the potential imbalance between aggravating circumstances and mitigating circumstances in this case, it is reasonably possible that the submission of the erroneous issue may have tipped the balance in favor of the death sentence. We therefore hold that the erroneous submission of this aggravating circumstance was prejudicial since we cannot say that there was not a reasonable possibility that its submission might have contributed to defendant's conviction.

We do not reach defendant's contention that the court should review the sentence in this case to determine if the sentence was disproportionate to the sentences imposed in similar cases, since "this review function should be employed only in cases where both phases of the trial of a defendant have been found to be without error." *Goodman*, 298 N.C. at 35, 257 S.E. 2d at 591. Neither do we deem it necessary to consider the remaining assignments of error relating to the sentencing phase of the trial since we find some of them to be without merit while others have been previously answered by this Court. *See e.g. State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981) (regarding form of the verdict sheet enumerating the mitigating circumstances). In our opinion, the remaining errors assigned will most likely not recur at the new sentencing trial.

We likewise do not reach defendant's assignment of error to the exclusion for cause from the jury of a venireman who expressed opposition to the death penalty since his exclusion from the jury panel is moot in light of our decision on the sentencing phase of the trial.

For the reasons stated, the verdict rendered in the sentencing phase of defendant's trial and the judgment of death imposed

thereon are vacated, and this cause is remanded to the Superior Court of Cabarrus County for a new trial on the sentencing phase.

New trial on sentencing phase.

No error in guilt phase.

GREAT SOUTHERN MEDIA, INC., AND B. E. FOWLER, PLAINTIFFS v. McDOWELL COUNTY, A BODY POLITIC AND CORPORATE; PAUL RICHARDSON, CHAIRMAN, McDOWELL COUNTY BOARD OF COMMISSIONERS; GUY L. HENSLEY, VICE CHAIRMAN, McDOWELL COUNTY BOARD OF COMMISSIONERS; GEORGE G. ELLIS; JANE GREENLEE; AND NED L. McGIMSEY, MEMBERS, McDOWELL COUNTY BOARD OF COMMISSIONERS; RONI HALL, McDOWELL COUNTY TAX COLLECTOR; AND JACK H. HARMON, COUNTY MANAGER, McDOWELL COUNTY; ALL INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES; AND JAYVEE PUBLISHING COMPANY, A PARTNERSHIP, DEFENDANTS

No. 7

(Filed 1 December 1981)

1. **Notice § 2; Taxation § 39.2— notice of tax lien sales—choice of newspaper by tax collector—ratification by county commissioners**

The decision to place tax lien sales notices in a specific newspaper was properly made by a county on the ground either that the county tax collector himself could make this decision or, if he could not, the decision was duly ratified by the county commissioners.

2. **Notice § 2; Taxation § 39.2— publication of notices of tax lien sales—general circulation requirements for newspaper**

In order for a newspaper to qualify to publish notices of tax lien sales, it must meet the "general circulation" requirements of both G.S. 105-369(d) and G.S. 1-597, *i.e.*, it must be a newspaper of general circulation to actual paid subscribers in the taxing unit.

3. **Notice § 2; Taxation § 39.2— publishing notices of tax lien sales—general circulation requirements for newspaper**

In order for a newspaper to meet the requirement for publishing notices of tax lien sales that it be one of general circulation to actual paid subscribers in the taxing unit, (1) it must have a content that appeals to the public generally; (2) it must have more than a *de minimis* number of actual paid subscribers in the taxing unit; (3) its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit; and (4) it must be available to anyone in the taxing unit who wishes to subscribe to it.

4. **Notice § 2; Taxation § 39.2— publication of notices of tax lien sales—newspaper meeting general circulation requirements**

The Old Fort Dispatch, a weekly newspaper published in McDowell County, qualifies under the statutory "general circulation" provisions for publica-

tion of notices of ad valorem tax lien sales where it carries items of interest to the general public; it has 499 paid subscribers in the county; subscribers are predominantly located in the Old Fort area, but 77 are also located in Marion; one or more subscribers live on all ten of the rural postal routes; and it is available to anyone in McDowell County.

Justice MEYER concurring in result.

Chief Justice BRANCH joins in the concurring opinion.

Justice CARLTON dissenting.

Justice HUSKINS joins in the dissenting opinion.

ON appeal pursuant to G.S. 7A-30(2) from a divided panel of the Court of Appeals, 50 N.C. App. 705, 275 S.E. 2d 226, affirming a judgment of *Judge Ferrell* entered 24 December 1979 in MCDOWELL Superior Court.

Goldsmith & Goldsmith, by C. Frank Goldsmith, Jr., for plaintiff appellants.

Story, Hunter, and Evans, P.A., by Robert C. Hunter, and Carnes and Little, by Stephen R. Little, for defendant appellees.

EXUM, Justice.

The principal question presented on this appeal is whether *The Old Fort Dispatch*, a weekly newspaper published in McDowell County, qualifies under the "general circulation" provisions of G.S. 1-597[1] and G.S. 105-369(d)[2] for publication of notices

1. "§ 1-597. *Regulations for newspaper publication of legal notices, advertisements, etc.* — Whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published *in a newspaper with a general circulation to actual paid subscribers* which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails as second class matter in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least twenty-five of the twenty-six consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; provided that in the event that a newspaper otherwise meeting the qualifications and having the characteristics prescribed by §§ 1-597 to 1-599, should fail for a period not exceeding four weeks in any calendar year to publish one or more of its issues such newspaper shall nevertheless be deemed to have complied with the requirements of regularity and continuity of publication prescribed herein." (Emphasis supplied.)

of ad valorem tax lien sales. Both Judge Ferrell and a majority of the Court of Appeals (Judges Hedrick and Robert Martin, Judge Clark dissenting) concluded that the newspaper qualified. We agree and affirm the decision of the Court of Appeals.

Plaintiffs published *The McDowell News*, one of two newspapers published in McDowell County at the time of the incident giving rise to this action. The other one is *The Old Fort Dispatch*. Until 1979 McDowell County published its tax lien sales notices in *The McDowell News*. In 1978 *The McDowell News* raised its rates for such notices from $1.95 per column inch to $2.20 per column inch. Noting that a rate of $1.15 per column inch could be obtained from *The Old Fort Dispatch*, McDowell County's tax collector and its manager, after consultation with the County Board sitting as the Board of Equalization and Review, determined to publish all of the county's notices of tax lien sales for 1978 delinquent taxes in *The Old Fort Dispatch*. Pursuant to this determination such notices were published in *The Old Fort Dispatch* in May 1979. At its 1 June 1979 meeting the County Board unanimously ratified this action.

Plaintiffs, in their capacities as McDowell County taxpayers and as publishers of the only McDowell County newspaper qualified, they contend, to publish tax lien sales notices, bring this action. They seek a judgment declaring invalid the decision of the tax collector and the county manager to publish such notices in *The Old Fort Dispatch* on the grounds, first, that this newspaper does not meet the "general circulation" provision of G.S. 1-597 and G.S. 105-369(d) and second, that the decision was not duly authorized by the County Board of Commissioners. Plaintiffs also seek to enjoin the county from such actions in the future. Defend-

2. "(d) Advertisement of Sale.—Notice of the time, place, and purpose of the tax lien sale shall be given by advertisement at some public place at the courthouse (in the case of county taxes) or city or town hall (in the case of municipal taxes) and by advertisement once each week for four successive weeks preceding the sale *in one or more newspapers having general circulation in the taxing unit.* The final newspaper publication shall be not less than five days before the date of the sale. If there is no newspaper having general circulation in the taxing unit, the advertisement shall be posted in at least one public place in each township (in the case of county taxes) or in at least three public places in the municipality (in the case of municipal taxes) in addition to the notice posted at the courthouse or city or town hall." (Emphasis supplied.)

ants in their answer allege essentially that *The Old Fort Dispatch* is a qualified newspaper for the publication of tax lien sales notices and that the decision to use it for such publications was properly made.

After hearing evidence, Judge Ferrell, sitting without a jury and upon full findings of fact, made conclusions of law and entered judgment in favor of defendants. A majority of the Court of Appeals affirmed. For the reasons which follow we agree with the foregoing decisions and affirm the Court of Appeals.

[1] We note first our agreement with the Court of Appeals' conclusion, for the reasons stated in Judge Hedrick's opinion, that the decision to place tax lien sales notices in *The Old Fort Dispatch* was properly made by the county on the ground either that the county tax collector himself could make this decision or, if he could not, the decision was duly ratified by the Board.

[2] We next conclude that in order to qualify to publish notices of tax lien sales a newspaper must meet the "general circulation" requirements of both G.S. 105-369(d), and G.S. 1-597.[3] General Statute 105-369(d) delineates the timing and placement requirements for notices of tax lien sales. These include advertisement at a public place and in a newspaper of general circulation. Section 1-597 sets forth the qualifications a newspaper must possess in order to be a valid medium for publication or advertisement of legal notices generally. One qualification is that it be a newspaper with a "general circulation to actual paid subscribers."

It is a basic principle of statutory construction that different statutes dealing with the same subject matter must be construed

3. We recognize that G.S. 1-597 may not apply to legal notices generally in certain situations. General Statute 1-599 states that "[t]he provisions of §§ 1-597 to 1-599 shall not apply in counties wherein only one newspaper is published, although it may not be a newspaper having the qualifications prescribed by § 1-597; nor shall the provisions of §§ 1-597 to 1-599 apply in any county wherein none of the newspapers published in such county has the qualifications and characteristics prescribed by § 1-597."

General Statute 105-369(d), however, provides, in the case of tax sales notices, for publication by posting of such notices in public places in the taxing unit when "there is no newspaper having general circulation in the taxing unit."

Thus, if no newspaper has general circulation in the taxing unit publication by posting of notice is all that is statutorily required.

in pari materia and reconciled, if possible, so that effect may be given to each. *Justice v. Scheidt, Commissioner of Motor Vehicles*, 252 N.C. 361, 113 S.E. 2d 709 (1960); *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E. 2d 898 (1956). Clearly the legislature intended that G.S. 1-597 apply to all legal notices required to be published in newspapers. The sweeping, all inclusive nature of the introductory phrases of the statute demonstrate this intent; it provides that "[w]henever a notice . . . shall be authorized or required . . . to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers." The "general circulation" provision in G.S. 105-369(d) does not conflict with its counterpart in G.S. 1-597. It simply specifies the geographic area, *i.e.*, "the taxing unit" in which there must be a newspaper of general circulation and the times at which publication must be made. Reading both statutes together and giving effect to each, we conclude that in order for a newspaper to qualify to publish notices of tax lien sales it must be a newspaper of general circulation to actual paid subscribers in the taxing unit.[4]

Since the taxing unit here is McDowell County the pivotal question becomes whether *The Old Fort Dispatch* is a newspaper of general circulation to actual paid subscribers in McDowell County.

On this issue the material evidence was fully developed before and the necessary facts found by Judge Ferrell. This evidence and Judge Ferrell's findings are set out at great length in Judge Hedrick's opinion. Essentially they are as follows:

4. G.S. 1-597 contains several other criteria which newspapers must meet in order to qualify to publish legal notices. The newspaper, in addition to meeting the "general circulation" criterion, must be a newspaper which

> "at the time of such publication, advertisement or notice, shall have been admitted to the United States mails as second class matter in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least twenty-five of the twenty-six consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice."

Since these criteria, it is conceded, are met by *The Old Fort Dispatch* we have no occasion to elaborate on them here.

The Old Fort Dispatch contains items of general interest to persons within and without McDowell County, with its masthead proclaiming its intent to serve Old Fort and McDowell County. It features local news and sports items of county-wide interest, political columns from congressmen and senators, human interest stories, jokes, cartoons, and religious and social news of interest throughout the county. It contains advertising from a great variety of businesses throughout the county. It has regularly published various legal notices since 1976.

The population of McDowell County is approximately 30,000 and in October 1978 there were 15,864 registered voters in the county. Of the registered voters, 11.7 percent live in Old Fort and 52.4 percent live in Marion, which is the county seat located in the eastern portion of the county and about ten miles east of Old Fort. Of the paid subscribers to *The Old Fort Dispatch*, 77 live in Marion, 33 live on six Marion rural routes, 162 live in Old Fort, 220 live on two Old Fort rural routes, and seven live in other parts of the county. There are 425 paid subscribers who live outside McDowell County.

In addition to copies to paid subscribers some 15 copies of the newspaper are delivered to Marion for sale from newsstands and paper racks and some 285 copies are delivered to Old Fort for similar sales. Approximately 40 to 50 copies are delivered to two newsstands in other areas in the county. All advertisers in *The Old Fort Dispatch* receive complimentary copies of the paper. This distribution is to a wide range of different businesses, public offices, government agencies, and libraries, in both Old Fort and Marion, the two major population centers. Approximately 330 complimentary copies go to the Marion area. There is substantial free distribution to the public, so that *The Old Fort Dispatch* customarily prints 1500 copies of its weekly edition. It printed 1700 copies, however, for the editions which contained the tax sale notices.

Plaintiffs contend that because *The Old Fort Dispatch* is distributed primarily in Old Fort, a town containing only 11.7 percent of the registered voters of the county and, more particularly, because there are only 117 paid subscribers for all of the county outside Old Fort, the newspaper does not meet the "general circulation to actual paid subscribers" criterion. In his dissent Judge

Clark agreed, noting that "the record on appeal indicates a paid circulation of 499 copies, 382 copies in Old Fort Township, and 117 copies in the remainder of the county with 88.3 percent of the population."[5] Defendants, on the other hand, argue that because *The Old Fort Dispatch* has content of interest to the general reader, is available throughout the county to all who wish to subscribe, and has more than a *de minimis* number of paid subscribers in the county, it satisfies the "general circulation" criterion of the statutes.

Since the meaning of the term "general circulation" is a question of first impression with us,[6] we look to decisions in other states construing statutes similar to ours for guidance.[7]

Cases from our sister jurisdictions make clear that the term "general circulation" when applied to newspapers refers not so much to the numerical or geographic distribution of the newspaper as it does to the contents of the paper itself. The primary consideration is whether the newspaper contains information of general interest. "Whether a newspaper is one of general circulation is a matter of substance, and not of size." *Burak v. Ditson*, 209 Iowa 926, 929, 229 N.W. 227, 228 (1930). Recognizing that "every newspaper is, in greater or less[er]

5. Judge Clark assumed that the voter registration figures accurately reflected the population distribution.

6. Although the case of *Jones v. Percy*, 237 N.C. 239, 74 S.E. 2d 700 (1953), dealt with whether a particular North Carolina newspaper satisfied the requirements of G.S. 1-597, the Court there did not define "general circulation." Rather the case turned on the trial court's failure to instruct the jury that the newspaper must have actual paid subscribers and on its allocation of the burden of proving that the newspaper satisfied the statutory requirements. The Court did not comment on the portion of the trial court's instructions stating that the *Washington Progress*, a Beaufort County newspaper, was a newspaper of "general circulation" if it was "distributed generally in Beaufort County" and if it carried "general news, advertisements, editorials, although these editorials were lifted from the *Washington Daily News* or some other newspaper." *Id.* at 241, 74 S.E. 2d at 702.

7. The question of the meaning of "general circulation" as used in the various statutes has usually arisen in the context of a challenge to an action taken by a government agency or private person after giving notice by publication. Specifically, the complaining party is generally the person against whom the action was taken and the cases involve an attack against the adequacy of the notice by publication under the relevant statutes. *See, e.g., Moore v. State*, 553 P. 2d 8 (Alaska 1976); *Lynn v. Allen*, 145 Ind. 584, 44 N.E. 646 (1896); *Burak v. Ditson*, 209 Iowa 926, 229 N.W. 227 (1930).

degree, devoted to some special interest," *Lynn v. Allen*, 145 Ind. 584, 587, 44 N.E. 646, 647 (1896), the courts have examined the content of the newspaper to determine if its avowed purpose, manifested by its actual content, is to attract and serve more than a particular class or calling in the community. As summarized in *Burak v. Ditson*, *supra*, 209 Iowa at 930, 229 N.W. at 228:

> "A study of the decisions bearing on the question before us suggests the following criteria: First, that a newspaper of general circulation is not determined by the number of its subscribers, but by the diversity of its subscribers. Second, that, even though a newspaper is of particular interest to a particular class of persons, yet, if it contains news of a general character and interest to the community, although the news may be limited in amount, it qualifies as a newspaper of 'general circulation.' " (Citations omitted.)

Thus, courts have deemed a number of newspapers to be ones of general circulation because they contained news of general interest, despite their primary appeal to a particular group in the community. For example, in *Burak*, the paper specialized in news of legal matters but contained some general information. Its subscribers numbered between four and five hundred and included "[a]ttorneys, automobile dealers, repair shops . . . wall paper companies, undertaking establishments, newspapers, florists, storage houses, drug stores, and individuals." *Id.* at 928, 229 N.W. at 228.

In *Hesler v. Coldron*, 29 Okla. 216, 116 P. 787 (1911), the court interpreted its pertinent statute requiring notice to "be published in a newspaper of the county having general circulation therein." The court held that the *Daily Legal News*, with "a circulation of from 205 to 215, among bankers, merchants, lawyers, real estate agents, insurance agents, wholesale merchants, hardware merchants, physicians, and almost every class of business in the country [and] circulated in almost every town in the county," *Id.* at 218, 116 P. 2d at 787, met the statutory requirement.

Similarly, in *Shulansky v. Michaels*, 14 Ariz. App. 402, 484 P. 2d 14 (1971), the challenged document was the county's official newspaper. It carried news on a variety of topics and had subscribers from different professions, but dealt primarily with legal and business news. Its circulation numbered 2,169 in

Phoenix, and it was sold through newsstands, coin boxes and by delivery to paid subscribers. These circumstances were held sufficient to satisfy the statutory requirements that notice of the sale of a treasurer's tax deed be in "a newspaper of general circulation published in the area in which the property is located" despite a circulation of only five people within a one mile radius of the property. *Id.* at 404-05, 484 P. 2d at 15-17. *See also, Lynn v. Allen, supra,* 145 Ind. 584, 44 N.E. 646 (newspaper primarily devoted to news of legal community with circulation of 550 in Indianapolis and 2500 throughout the state was a paper of "general circulation"); *Hanscom v. Meyer,* 60 Neb. 68, 82 N.W. 114 (1900); *Puget Sound Pub. Co. v. Times Printing Co.,* 33 Wash. 551, 74 P. 802 (1903) (newspaper publishing primarily legal news with 750-1000 subscribers in Seattle qualified as paper of "general circulation").

Other cases have dealt with newspapers directed at special groups other than the legal community. In *State ex rel. Miami Leathercote Co. v. Gray,* 39 So. 2d 716 (Fla. 1949), *The Jewish Floridian* was held to be a newspaper of general circulation in which legal notices of corporate dissolution could be published. Similarly, the *Ohio Jewish Chronicle* was held to be a newspaper of general circulation in the county in which it was published. *In Re Castanien,* 15 Ohio Op. 161, 164 (1939). The court examined the paper and determined that the greatest portion of the news pertained to the Jewish community, but there were other topics of general interest presented. Although the majority of the 1500 to 1800 subscribers were Jewish persons, several hundred went to non-Jewish persons and organizations. *Focusing on the content of the paper, rather than the extent of circulation,* the court held this paper qualified as a newspaper of general circulation.

California courts have held a newspaper primarily devoted to news of labor unions, with three-fourths of its distribution among persons affiliated with labor unions, to be a newspaper of "general circulation." *In Re Labor Journal,* 190 Cal. 500, 213 P. 498 (1923). A newspaper printed almost entirely in Spanish, with 15,000 paid circulation has been held to be a newspaper of "general circulation." In reaching this conclusion it focused on "the content of the newspaper and not the persons to whom it appeals." *In re La Opinion,* 10 Cal. App. 3d 1012, 89 Cal. Rptr. 404 (1970). In contrast, a newspaper that almost exclusively dealt with

information about the construction industry was found not to be a newspaper of general circulation because it lacked news of general interest. *In Re David*, 98 Cal. App. 69, 276 P. 419 (1929).

On the other hand, courts have acknowledged, as did the court in *Lynn v. Allen, supra*, 145 Ind. at 587, 44 N.E. at 647, that some periodicals have content of such limited scope they cannot qualify as a newspaper of general circulation. "There is no doubt that where a publication is devoted purely to a special purpose it would be an unfit medium to reach the general public. A medical, literary, religious, scientific or legal journal is professedly but for one class, and that class but a comparatively small part of the whole population; and it would be manifestly unjust, as well as against the letter and spirit of the statute, to use such a journal for the publication of a notice affecting the property or personal rights of citizens in general."

Although courts have focused on content in defining "general circulation," the term is not devoid of quantitative aspects. "The proper construction of the term 'general circulation' requires consideration of both the qualitative and quantitative aspects of the publication." *Moore v. State*, 553 P. 2d 8, 21 (Alaska 1976). In *Moore* the *Anchorage Times* was held to be a "newspaper of general circulation in the vicinity" even though it had a circulation of only 130 in a town with a population of 3,500. "The number of readers, albeit small, was not so insignificant that the newspaper would fail to reach a diverse group of people in the community." *Id.* at 21-22. The court noted that "a statistical analysis for the issue at hand would be most inappropriate because size of readership is only one factor which must be considered in determining whether a particular newspaper is one of general circulation." *Id.* at 22, n. 21.

At issue is *Ruth v. Ruth*, 39 Ind. App. 290, 79 N.E. 523 (1906), was whether the *Morgantown Truth* was a newspaper of general circulation in the county. An examination of the paper itself revealed it was "manifestly intended for general circulation." *Id.* at 293, 79 N.E. at 524. Its circulation numbered 520, two-thirds of which was in the county. Although it circulated in six or seven townships, one-half of that circulation was concentrated in two townships and no copy was sent to four towns in the county. There were two other papers that circulated generally throughout the county, one with a circulation of 1800 and the

other with 1000 or 1100. Yet the court held this to be sufficient evidence to support the finding that the *Morgantown Truth* was of general circulation because "[n]o fixed number of subscribers is required to constitute general circulation. A newspaper's circulation does not necessarily mean that it is read by all the people of the county or township. As a matter of fact, county newspapers are devoted to local interests, and of limited circulation." *Id.*

In determining whether a newspaper was "a secular newspaper of general circulation published in the city, town or county," the court in *People v. South Dearborn Street Bldg. Corp.*, 372 Ill. 459, 462, 24 N.E. 2d 373, 374 (1939), recognized previous decisions holding

> "that by the use of the words 'general circulation' the legislature intended that of a general newspaper as distinguished from one of special or limited character; a newspaper that circulates among all classes and is not confined to a particular class or calling in the community. *Eisenberg v. Wabash*, 355 Ill. 495, 189 N.E. 301, *Polzin v. Rand, McNally & Co.*, 250 Ill. 561, 95 N.E. 623."

In *South Dearborn*, the court specifically addressed the question whether distribution must be general throughout the municipal district. It concluded that to require that a newspaper have "a general circulation throughout the area of the city, county, or State or forest preserve district, is to require something that is not in the statute." *Id.* The court, *id.* at 461-62, 24 N.E. at 374-75, recognized the practical considerations in a state in which many counties have newspapers with limited circulation:

> "No Illinois authorities have been called to our attention holding that the circulation of a newspaper designated by law for publication purposes must be general throughout the municipal area. Throughout the many counties in Illinois newspapers are published whose circulation, in many instances, is limited to a village, small town or neighborhood. Newspapers of this class have been used for many years as the medium of publications required by law and, in the few instances where their sufficiency has been questioned, the question was not based upon how thoroughly the newspaper was circulated throughout the area under consideration. There are many counties containing several small cities, each

> of which has its main newspaper circulating to a very large extent in the immediate neighborhood, but not generally throughout the county or State, which has been used for legal publications."

Thus, it concluded that a newspaper with a circulation of 6000, largely in the southeast part of Chicago but with a few subscribers elsewhere in the city and county, was a newspaper of "general circulation" in the forest preserve district of Cook County.

In *Wahl v. Hart*, 85 Ariz. 85, 332 P. 2d 195 (1958), however, a newspaper with no subscribers in the relevant district, was held not to meet the statutory requirement of "general circulation within the proposed district." The court stated, *id.* at 87, 332 P. 2d at 196-97:

> "We do not mean to suggest from [decisions cited] that a ratio of circulation to population is to be inferred. We simply conclude that the term is not wholly devoid of a quantitative connotation. *It implies a necessity for some circulation among those affected by the contents of the notice.*" (Emphasis supplied.)

A second case that concluded the paper at issue was not one of "general circulation" was *Times Printing Co. v. Star Pub. Co.*, 51 Wash. 667, 99 P. 1040 (1909). In that case the court equated "general" with "extensive" and found that a circulation of 1000 at a time when Seattle had a population of 242,000 was insufficient to qualify as "general circulation." Upon several bases it distinguished its precedent of *Puget Sound Pub. Co. v. Time Printing Co.*, *supra*, 33 Wash. 551, 74 P. 802, which held that a paper which circulated among all classes of people in Seattle, and with 750-1000 subscribers in a population of 121,813 was a newspaper of "general circulation." The newspaper in *Puget Sound* had regular subscribers, was read by 3000 people, circulated among all classes of people, and had regularly published legal notices. The newspaper in *Times Printing Co.* was sold only on the street in the business district, and there was no evidence that it was read by any more than 1000 purchasers or that legal notices had ever been published in it. Furthermore, the population of Seattle had doubled since the *Puget Sound* case. *Times*

Printing Co. v. Star Pub. Co., supra, 51 Wash. at 671-72, 99 P. at 1041-42.

Thus, the Washington Supreme Court emphasized two elements of the quantitative aspect of the term "general circulation." It examined the number of subscribers in relation to the population in the relevant area, and it examined the geography of the newspaper's distribution.

A number of courts have concluded that a newspaper qualifies as one of "general circulation," despite a relatively small numerical distribution. *See, e.g.*, in addition to cases already discussed, *Board of Com'rs. of Decatur County v. Greensburg Times*, 215 Ind. 471, 19 N.E. 2d 459 (1939); *State v. Board of County Com'rs.*, 106 Mont. 251, 76 P. 2d 648 (1938); *Robinson v. State*, 143 S.W. 2d 629 (Tex. 1940).

Courts have varied in the significance they have attached to the geographic distribution of the newspaper in determining whether it is one of general circulation. The *Hesler*, *Shulansky*, *Ruth* and *South Dearborn* courts believed a newspaper need not be distributed in every part of the county in order to qualify as one of general circulation. In *Hesler*, the Oklahoma Supreme Court noted that the newspaper "circulated in *almost* every town in the county" in determining that it was one of general circulation. *Hesler v. Coldron, supra*, 29 Okla. 216, 218, 116 P. 787. (Emphasis supplied.) The newspaper in *Shulansky* was held to be one of general circulation in the county although it was distributed to only five people within a one mile radius of the property. *Shulansky v. Michaels, supra*, 14 Ariz. App. 402, 404-05, 484 P. 2d 14, 15-17. The Indiana Court of Appeals and the Illinois Supreme Court dealt with the geographic distribution question in factual situations very similar to the one now before us. In both *Ruth v. Ruth, supra*, 39 Ind. App. 290, 79 N.E. 523, and *People v. South Dearborn Street Bldg., supra*, 372 Ill. 459, 24 N.E. 2d 373, the courts concluded that newspapers were ones of general circulation even though their distribution was generally confined to a particular portion of the county.

In contrast, some courts have required distribution to be throughout the county. In a cursory, one paragraph treatment of the question, a New York trial court inferred that the legislature intended that a newspaper be distributed throughout the entire area and that it contain matters of general interest in order to

qualify as a "newspaper having general circulation." *Barrett v. Cuskelly*, 52 Misc. 2d 250, 275 N.Y.S. 2d 280, 284 (1966), *aff'd*, 28 A.D. 2d 532, 279 N.Y.S. 2d 380 (1967). In reaching this conclusion the court discussed only the number of readers in the district, however, and not their geographic location in the district. In *State v. Board of County Com'rs.*, 106 Mont. 251, 76 P. 2d 648 (1938), the court noted that the newspaper reached every community in the county in finding that the newspaper was one of general circulation.

We now compare our statutory requirement that the newspaper's general circulation be "to paid subscribers" with formulations in other jurisdictions. A California statute contains language similar to our own when it states that to qualify for the publication of legal notices a newspaper published in the county must, among other things, have "a *bona fide* subscription list of paying members." *See In re Green*, 21 Cal. App. 138, 131 P. 91, 92 (1913). (Current version of statute in Cal. Gov't Code §§ 6000-01 (West 1980)). In *Application of Herman*, 183 Cal. 153, 191 P. 934 (1920), the court held that the newspaper in question, although not one of general circulation because it contained no news of general interest, did meet the *bona fide* subscription criterion because it had 25 subscribers in various lines of business "in ten cities and towns, scattered through three counties, among at least ten 'professions, trades, and callings.' " *Id.* at 165, 191 P. at 939. Because the legislature did not require a minimum number of paid subscribers the court held that its determination on this issue "must depend largely upon the diversity of . . . subscribers rather than upon mere numbers." *Id.* (*Quoting In re Green, supra*, 21 Cal. App. 138, 131 P. 91).

A second California statute provides that for a newspaper not published in the county to qualify it must have "a *substantial distribution* to paid subscribers in the city, district, or judicial district," a requirement not imposed on papers published in the county. Cal. Gov't Code § 6008 (West 1980). (Emphasis supplied.) In construing this statute the California Appellate Court has held that a newspaper with only twelve paid subscribers out of a population of 79,000 did *not* qualify. *In re Carson Bulletin*, 85 Cal. App. 3d 785, 149 Cal. Rptr. 764 (1978).

These California cases demonstrate the difference between statutory language requiring *"substantial distribution* to paid

subscribers" and language, like our statute, requiring that there be a "*general circulation* to paid subscribers." "Substantial distribution" obviously refers more to the quantitative aspects of a paper's geographic coverage; whereas "general circulation" refers more to the qualitative aspects of its contents.

Other statutory formulations are more specific in terms of paid circulation requirements than ours. Kentucky requires that the newspaper "have the largest bona fide circulation in the publication area" and be "paid for by not less than fifty per cent (50%) of those to whom distribution is made." In addition, it must be "circulated generally in the area." Ky. Rev. Stat. § 424.120(1)(b) (1970) (several additional requirements specified). Wisconsin requires that a newspaper be published in the relevant city or town, have a *bona fide* paid circulation that constitutes at least 50 percent of its circulation, and have actual subscribers to 1000 copies in "1st or 2d class" cities or 300 copies in "3rd and 4th class" cities. Wisc. Stat. Ann. § 985.03 (West 1981). Idaho and Minnesota also have a statutory minimum number of paid subscribers required to qualify as a newspaper for printing legal notices. *See* Idaho Code § 60-106 (1976) (200 *bona fide* subscribers living in the county); Minn. Stat. § 331.02(4) (West 1981) (500 subscribers or free circulation to 500 required).

[3] Considering, therefore, the relatively general language of our statutory formulation in light of decisions construing similar language and the more specific statutory formulations from our sister states, we conclude that for a newspaper to be one of general circulation to actual paid subscribers in the taxing unit it must meet this four-pronged test. First, it must have a content that appeals to the public generally. Second, it must have more than a *de minimis* number of actual paid subscribers in the taxing unit. Third, its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit. Fourth, it must be available to anyone in the taxing unit who wishes to subscribe to it.

To have a content that appeals to the public generally, the newspaper should contain items of general interest. Although a newspaper may be primarily directed to a particular locality or group, it must nevertheless contain some items of interest to persons who do not live in that locality or who are not members of that group. These items of general interest may include national,

state, or county news; editorials; human interest stories; and advice columns, among others. The possibilities are endless.

The requirement that there be more than a *de minimis* number of actual paid subscribers in the taxing unit derives from the proposition, already noted, that the term "general circulation" in itself is not devoid of quantitative aspects and, further, from our statute which expressly adds the "paid subscriber" limitation. In order to satisfy the quantitative considerations inherent in the term "general circulation," the newspaper must enjoy more than a *de minimis* number of readers in the taxing unit. This number must not be so insignificant that the newspaper simply fails "to reach a diverse group of people" in the area prescribed. *See Moore v. State, supra*, 553 P. 2d 8, 21-22. To determine under our statute whether more than a *de minimis* number of readers exists only actual paid subscribers may be considered.[8] Our statute, however, mandates no minimum number of paid subscribers and requires no minimum ratio of paid subscribers to population. To impose such minimums would be to require something more than specified by the statute. Whether a given newspaper has a *de minimis* number of subscribers must always be determined in context. What may be a *de minimis* number in Mecklenburg County may not be in Dare County.

The need for more than a *de minimis* number of paid subscribers does not mean, however, that those subscribers must be evenly distributed in every city, town or section of the county or taxing unit. Nor must publication be in the paper with the widest geographical distribution in the county. Neither G.S. 1-597 nor G.S. 105-369(d) so require.

To hold that a newspaper must have significant distribution in every community or section in the taxing unit would be to ig-

8. In this connection, plaintiffs correctly argue that unpaid distribution such as complimentary copies may not be considered in determining whether *The Old Fort Dispatch* meets this prong of the test. Nor may sales other than those to paid subscribers be considered in light of explicit statutory direction that we consider only sales "to actual paid subscribers." Thus, both free distribution and sales from newsstands and vending racks are excluded from consideration under our statute.

We agree, however, with the Court of Appeals' conclusion that even if Judge Ferrell erroneously admitted and considered this evidence, there was competent evidence of a sufficient number of paid subscribers which standing alone was enough to support Judge Ferrell's findings and conclusions in favor of defendants.

nore the demographic and geographic realities in North Carolina. The case now before us illustrates the problem. McDowell County is located in the western, mountainous region of the state. Pisgah National Forest extends through most of the northern and western portions of the county. In consequence, the population of the county is largely found in the central and southeastern sections. Thus, a newspaper could be adequately distributed within the more populated regions, without reaching every hollow and gap in the county.

Neither need a newspaper have significant distribution throughout the populated regions of a taxing unit. Frequently, in North Carolina, as is the situation presented here, counties have two or more newspapers, each with primary distribution in one community and more limited distribution in other communities or rural areas. Without more specific legislative limitations than "general circulation to actual paid subscribers in the taxing unit" we are unwilling to hold that the legislature intended to eliminate from participation in tax sales notice advertising the many legitimate general interest newspapers which exist throughout North Carolina but which have limited geographical distribution. All that is required under the third prong of the test is that the newspaper's paid subscribers not be located entirely in one community or geographic section of the taxing unit.

Finally, the newspaper must be available to the general public in the taxing unit. This means that anyone in the area may subscribe to the paper and receive delivery. In other words, subscriptions may not be limited to persons in a particular neighborhood or other lesser geographic area than the taxing unit or to members of a particular group therein.

[4] When we apply this test to the facts at bar, *The Old Fort Dispatch* passes. It is a newspaper which carries items of interest to the general public. It has 499 paid subscribers in the county—far more than a *de minimis* number. Subscribers are predominantly located in the Old Fort area, but 77 are also located in Marion. One or more subscribers live on all ten of the rural postal routes. It is available to anyone in McDowell County.

In conclusion we desire to make clear that we are deciding only that *The Old Fort Dispatch* qualifies under the statutory criteria for publishing notices of tax lien sales. Plaintiffs argue vigorously in support of their contentions that notices in *The Old Fort Dispatch* will not comport with constitutional due process. Whether notices of tax lien sales or any other kind of legal notice in *The Old Fort Dispatch* satisfies due process is a question which is not and cannot now be before us. Such a question cannot be decided in the abstract. It can only be decided in the context of a case in which a party entitled to notice claims that notice deficiencies denied that party due process. The resolution of such a claim then hinges on the facts and circumstances in the particular case regarding the manner in which notice was given and the process which was constitutionally due. There could be instances arising in McDowell County, for example, in which due process requirements would be more nearly satisfied by publication in *The Old Fort Dispatch* than in *The McDowell News*, and vice versa. These kinds of decisions must await determination on a case by case basis.

For the reasons given, therefore, the decision of the Court of Appeals is

Affirmed.

Justice MEYER concurring in result.

I concur in the result reached by the majority that the Old Fort Dispatch satisfies the statutory criteria for publishing notices of tax lien sales. I believe, however, that the majority opinion fails to adequately emphasize that the newspaper should be one whose circulation (*i.e.*, distribution) reaches the general body of the taxpayers in the county as was, in my view, intended by the legislature.

Chief Justice BRANCH joins in this concurring opinion.

Justice CARLTON dissenting.

The result in this particular case does not particularly disturb me although I think Judge Clark's dissent in the Court of Appeals expresses the better view. I am the first to concede that the facts disclosed by this record present a close case to call.

I strongly dissent, however, to the formula adopted by the majority to determine whether a newspaper is one of general circulation in this and future cases.

My primary concern is with the third of the four-pronged test adopted by the majority. It provides that, "subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit." This, read with other parts of the test, could lead to ridiculous results which I can best illustrate by a hypothetical.

Suppose County A, with a population of 40,000, has 20 townships. Townships 1 and 20, at opposite ends of the county, have the greatest percentage of the county's population; each has 11,000 people. The remainder of the county's population is about evenly divided between the remaining 18 townships; each has a population of approximately 1,000 people. Each of these 2 townships has a town with a newspaper which meets requirements 1, 2 and 4 of the majority's formula. That is, both papers have a content which appeals to the public generally, both have more than a *de minimis* number of paid subscribers in the taxing unit and both papers are available to anyone in the taxing unit who wishes to subscribe to it. The newspaper in Township 1 has a paid circulation of 500; 499 in Township 1. One person outside Township 1, the county tax collector who lives in Township 20, also subscribes to the paper.

Under the formula adopted by the majority, the paper will qualify as one of "general circulation" since it meets the requirements of parts 1, 2 and 4 of the formula and, since one person outside the township is a paid subscriber, the paper, under step 3, is "not entirely limited geographically to one community, or section, of the taxing unit."

While unimportant to the decision concerning the paper in Township 1, the paper in Township 20 has a paid circulation of 400 in Township 20 and no less than 10 subscribers in every other

township. I agree with the majority that Township 20's paper should qualify as one of general circulation.

The result qualifying the paper in Township 1, however, as one of "general circulation" is simply absurd. I cannot imagine that our legislature intended for notice to have such little meaning.

That our legislature intended that such notices be circulated in *every township* of a county is demonstrated by the statute itself. G.S. 105-369(d) provides that if a county has no newspaper of general circulation, advertisements should be posted in *at least* one public place *in each township*. Clearly, the statute contemplates *countywide* notice. Why else would the legislature require a posted notice in Township 17 for a tax lister who resides on his only property in Township 3? The answer, of course, is that the legislature intended for "the word to get around." Under the majority's formula, I submit, the word will not "get around." An advertisement is also required to be posted at the county courthouse *even with* the notices to run in the newspapers. Moreover, the statute does not limit the notice to *a* paper of general circulation. The statute provides that notice shall be run for four successive weeks in *"one or more* newspapers having general circulation in the taxing unit." From all of this, it is crystal clear that our legislature considered notice to delinquent taxpayers far more important than does the majority of this Court.

I would vote to make the third prong more stringent: that the paid subscriber distribution must be more than *de minimis* in a substantial number of townships within the taxing unit. This requirement will ensure that the notice will have wide geographic distribution. Such I believe is inherent in the statutory requirement of general circulation.

I vote to reverse the decision of the Court of Appeals.

Justice HUSKINS joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. PETER LYNND BARNETTE, JAMES ALLEN CASHWELL, SHELLMON HUGHES, GRAHAM ALLEN SMITH, BOBBY RAY COLES

No. 15

(Filed 1 December 1981)

1. Rape § 1— first degree rape defined

First degree rape is defined as vaginal intercourse by force and against the will of the victim when the perpetrator employs or displays a deadly weapon or an article which the victim reasonably believes is a deadly weapon, inflicts serious bodily injury, or is aided or abetted in the commission of the offense by one or more other persons. G.S. 14-27.2(a).

2. Criminal Law § 9— aider and abettor defined

An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense. Even though not actually present during the commission of the crime, a person may be an aider and abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator.

3. Rape § 5— first degree rape—community of unlawful purpose—use of force—sufficiency of evidence

The State's evidence of community of unlawful purpose and of the use of force was sufficient for the trial court to submit to the jury an issue of defendant's guilt of first degree rape under theories that defendant, acting by himself or together with a codefendant, employed or displayed a deadly weapon or that the codefendant aided and abetted defendant by threatening the victim with a shotgun where it tended to show that the codefendant, while holding a shotgun, told the victim that they had decided on "something" for her; later, while defendant was in a bedroom with the victim and the victim was lying on the bed naked, the codefendant entered the bedroom, forced the victim to put the shotgun in her mouth and, when she had done so, laughed and left the room; and defendant then proceeded to have sexual intercourse with the victim even though she asked him not to do so.

4. Rape § 6— instructions—consent induced by fear

The trial court's instruction in a rape case that "consent induced by fear is not consent at law" was not inadequate in failing to require that the fear be reasonable and of violence since there is no objective standard of reasonableness by which the jury must judge consent. Moreover, even if the reasonableness standard were the rule, further elaboration on the issue of consent would have been unnecessary where the evidence showed that the fear which induced the victim's submission to intercourse was the threatened use of a shotgun, which is *per se* a deadly weapon, since a fear engendered by the use of a *per se* deadly weapon is both reasonable and of violence.

5. Rape § 6— instructions—consent induced by fear

The trial court's instruction in a rape case that "consent induced by fear is not consent at law" was not inadequate in failing to instruct that, in order to be convicted, defendant must be found to have known of a codefendant's threats which induced the void consent since defendant could be convicted of first degree rape based in part on the actions of the codefendant upon a showing only that the two shared a common unlawful purpose, *i.e.*, that the two aided and abetted one another in the commission of the crime, and it was not necessary for each to have full knowledge of all acts committed by the other. Nor was the instruction insufficient in failing to require the jury to find that defendant knew of the lack of consent where the evidence was conflicting as to whether the victim physically resisted the assault or whether she encouraged defendant's sexual advances, and no version of the evidence supported the view that the victim was induced by force to consent to defendant's advances without his knowledge.

6. Rape § 5— first degree sexual offense—aiding and abetting—insufficiency of evidence

The State's evidence was insufficient to support one defendant's conviction for first degree sexual offense as an aider and abettor where it tended to show that defendant threatened the victim with a shotgun on two occasions, once in the kitchen and once in the bedroom, but there was no evidence that the actual perpetrator was present in the room on either occasion or that he was aware of defendant's actions, since there was no evidence from which it could reasonably be inferred that defendant and the actual perpetrator shared a common purpose to commit a first degree sexual offense.

7. Rape § 6.1— first degree offense—proof of aiding and abetting—erroneous instruction on second degree offense

Where the only theory that would sustain defendant's conviction of a sexual offense was aiding and abetting, defendant could only be tried for a first degree sexual offense and the court's instruction on second degree sexual offense was error, since the offense is always first degree when aiding and abetting is proven. G.S. 14-27.4(a) and .5(a).

8. Rape § 5— insufficient evidence of first degree rape—sufficient evidence of second degree rape

The State's evidence was insufficient to support defendant's conviction of first degree rape under the theories that a deadly weapon was used or that defendant was aided and abetted in the crime where it tended to show that a codefendant threatened the victim with a shotgun on two occasions, but there was no evidence that defendant was present when the victim was threatened or that defendant knew of the codefendant's actions. However, the evidence was sufficient to justify submission of a charge of second degree rape where it tended to show that defendant had intercourse with the victim although she asked him to leave her alone; that while defendant was on top of her, the victim tried to push him away with her hands on his chest, and when she did so, defendant restrained her arms with his hands; when defendant tried to turn the victim over, she fought him and told him that she had just had a baby; and

defendant then turned her so that she was lying on her back and continued the intercourse.

9. Rape § 7— insufficient evidence of first degree rape—guilty verdict treated as for second degree rape

When the jury found defendant guilty of first degree rape, it necessarily found facts which would support a conviction of second degree rape, and where there was insufficient evidence of use of a deadly weapon and aiding and abetting which would make the crime first degree rape, the verdict returned by the jury must be considered as a verdict of guilty of second degree rape.

10. Rape § 6— instruction on consent

No issue as to consent induced by fear arose on the evidence in this rape case, and a general instruction on the issue of lack of consent was all that was required, where the victim testified that she never consented and that her resistance was overcome by force, and defendant testified that the victim initiated the intercourse and that the intercourse was with her full consent.

11. Rape § 5— second degree rape—sufficiency of evidence

The evidence was sufficient to support one defendant's conviction of second degree rape where it tended to show that defendant restrained the victim with his hands to overcome her resistance and will and that he had intercourse with her although she asked him to leave her alone.

12. Rape § 5— insufficient evidence of first degree sexual offense—sufficient evidence of second degree sexual offense

The evidence was insufficient to support a conviction of defendant for a first degree sexual offense on the theory that he was aided and abetted where it showed only that another unknown person was present while defendant committed the crime. However, the evidence was sufficient on the elements of sexual offense and force to justify submission of the charge of second degree sexual offense to the jury where it tended to show that defendant forced the victim into a sitting position with her back against the wall, forced her legs apart and held her legs down with his hands and arms while he performed cunnilingus, and the victim asked defendant to leave her alone and resisted him as best she could throughout the assault.

13. Rape § 7— insufficient evidence of first degree sexual offense—verdict treated as for second degree sexual offense

In finding defendant guilty of a first degree sexual offense the jury necessarily found as fact all the elements constituting second degree sexual offense, and where the evidence was insufficient to show that defendant was aided and abetted which would make the crime a first degree offense, the verdict of guilty of a first degree sexual offense must be viewed as a verdict of guilty of a second degree sexual offense.

BEFORE *Llewellyn, Judge*, at the 28 April 1980 Criminal Session of Superior Court, NEW HANOVER County. Judgments were entered 6 May 1980.

Defendants were charged in separate indictments, proper in form, with first degree rape, G.S. § 14-27.2, and first degree sexual offense, G.S. § 14-27.4. Upon pleas of not guilty they were tried before a jury. The jury found defendant Barnette guilty of first degree rape, defendant Cashwell guilty of first degree rape, defendant Hughes guilty of first degree rape and first degree sexual offense, defendant Smith guilty of first degree sexual offense and defendant Coles guilty of second degree rape. Barnette, Cashwell and Hughes were sentenced to life imprisonment for their convictions of first degree rape. Hughes also received a life sentence for his conviction of a first degree sexual offense to run concurrently with the sentence imposed for rape. Smith received a sentence of life imprisonment for first degree sexual offense. For his conviction of second degree rape Coles was sentenced to seventeen to twenty years imprisonment. From the life sentences imposed, defendants Barnette, Cashwell, Hughes and Smith appeal to this Court as of right pursuant to G.S. 7A-27 (1981). We allowed defendant Coles's motion to bypass the Court of Appeals on his second degree rape conviction on 8 May 1981.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Tharrington, Smith & Hargrove, by Roger W. Smith, for defendant-appellant Barnette; Jack E. Carter for defendant-appellants Cashwell, Hughes, Smith and Coles.

CARLTON, Justice.

I.

At trial, evidence for the State tended to show that late in the evening on 14 March 1980 Paula Stone Jackson went to the Shamrock Bar and Grill in Castle Hayne with Andy Howard. Jackson noticed some motorcycles parked outside and saw some men in motorcycle attire inside the bar. While there, she struck up a conversation with Robert Wallace, who was not dressed in motorcycle attire. Wallace invited Jackson to a party later that evening and she accepted. Howard then left the bar alone. Jackson then left the bar with Wallace in a van in which two other men and three other women were riding. One of the men was defendant Barnette.

The group in the van drove to another bar. At the second bar were some of the same people who had been at the Shamrock and who were dressed in motorcycle attire. The group had some beer and, after the last call was made, Jackson and the same group left again in the van.

They drove to a trailer in Castle Hayne. According to Jackson, it appeared that the people who lived in the trailer were asleep. The driver of the van got out, awoke the occupants of the trailer and went into the kitchen. Jackson heard one of the other women in the van remark that someone in the trailer had reached into his pocket, and defendant Barnette jumped out of the van and went into the trailer. Later, when Barnette and the driver came back to the van, one of them said "did you see that black person's face when he saw the gun?" and acted as though it was "a big joke."

After leaving the first trailer, the group in the van drove to a trailer in Woodland Trailer Park, the home of the defendant Hughes. They arrived at about 2:00 a.m. Jackson saw motorcycles parked in the yard. She and Wallace went inside. A "few people" were already in the trailer. One man had badly cut his hand and had sealed the wound with a heated knife. None of the people at the party spoke to Jackson except Wallace. She felt that the others did not want her there.

Initially, there were eleven or twelve in the trailer. Thereafter, people were continually entering and exiting the trailer, but there were never more than about ten people in the trailer at one time. The people there were drinking, but Jackson denied that she had anything to drink at the trailer. Mr. Milstead, one of the partygoers, passed out some capsules that were allegedly amphetamines, known as "speed." Both Jackson and Wallace took one.

Within fifteen or twenty minutes Jackson fell asleep in a chair. She awoke to find herself being carried down the hallway by defendant Barnette. Her shirt was torn open and her brassiere was cut. Jackson asked Barnette what he thought he was doing, and he became angry. Jackson went into the bathroom, removed her brassiere and threw it in the trash can. She then returned to the living room. Wallace was just awakening and gave her "a bewildered look" as though he didn't know what was going on.

Within a few minutes, defendant Hughes entered the trailer through the front door carrying a sawed-off shotgun by the handle in his hand. He walked through the living room to the kitchen and told Jackson and Wallace that he wanted to talk to them. They went in the kitchen, and Hughes said to Jackson, "do you remember what you said to me at the Shamrock Grill?" She replied, "No, I don't know." Hughes then stated, "Well, you told me to screw off," to which Jackson replied, "Well, I don't remember saying that. I don't remember even talking to you." Hughes responded, "Well, nobody gets away with talking to me like that." At that point, Hughes pointed the shotgun at her and said, "Well, we have decided on something and you can either fight us or go along with it." Jackson turned to Wallace and he gave her another "bewildered" look.

Hughes turned and left. Wallace and Jackson walked to the bathroom in the back of the trailer to talk. They discussed trying to escape through the bathroom window but did not attempt it because there were people in the back yard. Wallace told her that the back door was bolted. Jackson asked Wallace for help and Wallace told her he could do nothing to help her, that she should not resist because they would hurt her and that he was sorry. Someone knocked on the bathroom door and told them to hurry, and Wallace suggested that he and Jackson go into a bedroom, get in bed, and feign sexual intercourse until the others tired of the idea.

Jackson agreed. She and Wallace went into a bedroom. They were alone. They removed their clothes and got in bed, but they did not have intercourse. Jackson kept asking him what was going to happen and why but Wallace didn't give her any answers. He seemed afraid. Someone opened the door, and Jackson and Wallace embraced. Whoever had opened the door left without comment. Soon, however, someone began knocking on the door. The knocks became more frequent, and Wallace was told to leave the room.

After Wallace left, "another person" came into the room. Jackson could not identify this man because she didn't look at him the entire time he was in the room. The unidentified male removed his clothes, got in bed with Jackson and had intercourse with her. Jackson tried to keep his body off hers and did not consent to the intercourse.

The first man left and defendant Barnette entered the bedroom. He undressed and got in bed. Jackson asked him how many times she would have to go through this, and he said he didn't know. Barnette had intercourse with her. Jackson was certain that Barnette was the second person with whom she had intercourse because he returned to the bedroom twice. During one of his visits Jackson asked him if she could leave and he told her no. He asked Jackson to go to California with him and told her she had a beautiful body. While Barnette was in the room defendant Hughes and another person walked in. Jackson was in bed, lying on her back. Hughes was carrying the shotgun and forced Jackson to put the barrel of the shotgun in her mouth. Hughes then walked out of the room laughing. Barnette then had intercourse with her again.

Jackson testified that sometime during the early morning hours defendant Cashwell entered the bedroom, undressed and had sexual intercourse with her while she was lying on her back. He tried to turn her over and have intercourse while she was lying on her stomach, but she refused. She told him that she had just had a baby and asked him not to do it. He did not force her to lie on her stomach but continued to have intercourse with her while she was lying on her back. Jackson testified that she resisted with her hands: "I would push as much as I could before I was pushed back, or restrained back. I did not embrace or do anything to entice what was going on."

After Cashwell had finished, Barnette re-entered the room and again had intercourse with her. At that time, Jackson was crying.

The next person to enter the room was defendant Coles. He entered the bedroom and told Jackson how good he was going to make her feel. Coles then had sexual intercourse with her. While Coles was in the room or immediately thereafter, someone came in and took Jackson's pocketbook. Later, the pocketbook was brought back and dumped on the floor. Jackson's pants were similarly removed and then returned. All valuables from Jackson's purse and pants were removed.

Defendant Smith entered the room after Coles left. Another man came in with him and sat down across the bedroom. Smith pushed Jackson into a sitting position with her back against the

wall. He separated her legs and held them down. He performed cunnilingus on her while the other person sat and watched. At that time Jackson was bleeding in her vaginal area, and she asked Smith, "What are you trying to do, earn your red wings?" The term "earn your red wings" is one used by motorcycle gangs to refer to cunnilingus performed while the female is having her menstrual period. When Jackson asked Smith this question, the other man in the room laughed. Smith tried to have vaginal intercourse with Jackson but was unable to penetrate. Then, Elizabeth Baker came into the room and told them they had to leave because she had to put her baby to bed. Jackson was allowed to dress and to go to bathroom to clean herself up.

While she was in the bathroom, the man who watched while Smith performed cunnilingus on her, known to Jackson as the "Enforcer," came in and told her not to say anything about what had happened and that he would "take care" of anyone who didn't follow his instructions.

After Jackson cleaned up she left the trailer and went out into the yard. A pig was being cooked, and about twenty people were in the yard. One of the men whom she had seen in the bedroom called her over and asked her to stay for the party. Hughes ordered her to leave, and she turned and began to walk away. Before she got to the road she was jumped by a Ms. Edwards and a Ms. Baker, the woman with the baby, and she fell to the ground. Jackson tried to fight back and yelled that she would fight one of them at a time. Hughes pulled Jackson up from the ground and punched her in the face. She fell back down to the ground and was again told to leave. During the struggle, her shoes had come off and she had lost her purse, and these items were thrown at her as she was leaving.

Jackson stopped at a nearby home and called the police. She had bruises and scratches over her upper body. A vaginal smear taken at the New Hanover Hospital revealed the presence of spermatozoa.

Evidence for the defendants tended to show that the Fayetteville and Wilmington chapters of the Satan's Avengers, a motorcycle gang with which the defendants were associated, were having a "pig-pickin' " at defendant Hughes's home. The Fayet-

etteville chapter arrived around ten o'clock on the evening of March 1980. They went to the Shamrock Bar and Grill with Hughes and other members of the Wilmington chapter. Although not a member of the Satan's Avengers, Wallace was trying to join the Wilmington club and accompanied them to the bar. When they left the bar, Jackson accompanied them. In the van where Hughes, Barnette, Mrs. Milstead (the wife of a club member), Coles, Smith, Wallace and Jackson. They drove to the Portside Bar to have some beer. The bartender there refused to serve Wallace because he was too drunk.

After the last call at the Portside, the group left in search of more beer. They were not able to buy any at a convenience store and drove to a trailer belonging to a friend of Hughes, where they hoped to get some beer. On the way there Jackson and Wallace were lying on the bed in the back of the van, hugging and kissing. After they arrived at the friend's trailer, Barnette went to the back of the van and sat on the bed, and Jackson put her arm around him and hugged and kissed Barnette.

After they had been at the trailer about forty-five minutes, Barnette went inside to get Hughes. While in the trailer he had a beer. The friend gave them two six-packs of beer, and they left to go to Hughes's trailer.

When they arrived, they all went into the living room. Jackson sat on Wallace's lap. She had several drinks, sniffed some white powder through a rolled-up dollar bill and took a black pill.

Hughes testified that he left his home a few minutes after he arrived with the group in order to get the pig cooker and did not return until after 6:00 a.m. The pig cooker was located about thirty miles from Hughes's home, and he made several stops along the way. His alibi testimony was corroborated by three witnesses, one of whom said that Hughes was at his, the alibi witness's, home, some thirty miles from Hughes's trailer, at 5:30 a.m. on 15 March 1980. A convenience store clerk testified that Hughes was at the store at about 3:00 a.m. on 15 March 1980.

Barnette testified that he fell asleep in the living room of Hughes's trailer. He was awakened by someone pulling on his feet and telling him that "the girl" was in the back room. He went back to the bedroom where he found Jackson, nude. He told her that he wasn't ready to do anything, and they talked. He told her he was from Northern California. After a while, Barnette undress-

ed. They engaged in foreplay because Barnette wasn't "up to it" and needed assistance in order to perform. They then had intercourse. At no time did Jackson resist. Barnette left the bedroom, went back to the living room and went to sleep. Later, someone woke him up and told him that Jackson was asking for him. He went to the bedroom, sat on the bed and talked to her. They did not have intercourse. When he left the bedroom he went outside and sat in the yard. Jackson opened the bedroom window and said, "You call yourselves big bad bikers; com (sic) on back in here." It was light by this time. Barnette left with Hughes to buy some beer. They went to the Shamrock Bar and arrived about 7:00 or 8:00 a.m. They bought two cases of beer and returned to the trailer. Barnette then left in search of a beer keg tapper. He drove all over town but could not find one. When he returned to the house, Jackson had already gone.

Barnette stated that no one else was present while he was in the bedroom with Jackson, that Jackson never asked for assistance and that he never saw or heard of Jackson being threatened with a weapon.

Cashwell testified that he was a member of the Fayetteville chapter of the Satan's Avengers and came to Wilmington on 14 March 1980 to attend a "pig-pickin'." He arrived at the Shamrock Bar and Grill in Castle Hayne at about 9:30 or 10:00 p.m. While he was there he saw Jackson enter the bar. He did not see her talking to any members of his group. When he left the bar she was still there. He left with Jimmy Kye, the group's road captain, Smith and Coles. They drove to a place called River Road and dressed out the pig which Cashwell had brought from Fayetteville. While dressing the meat, Cashwell accidentally stabbed Kye in the hand with a buck knife. Blood spurted from the wound. Kye did not wish to go to the hospital, so he and Cashwell went to Hughes's trailer, where Cashwell heated his knife and cauterized the wound. While there, the group from the Shamrock, including Jackson, arrived. Hughes came in the trailer, got a couple of beers and left, saying he was going to get the pig cooker. When Hughes left, Jackson was still in the living room.

She left the living room and went to the back of the trailer about forty-five minutes after Hughes had gone. Wallace was with her. Cashwell went to sleep in the living room.

He was awakened at 4:00 or 4:30 a.m. when someone sat on him. He was very hot and took off two thermal shirts and a flannel shirt. He walked back to the bedroom to put the clothing in his duffle bag, which he had placed in the bedroom earlier. He walked in, saw Jackson and began to back out. She said, "no, come on in. Let's talk." She was lying under a blanket and was nude. She asked Cashwell if he liked anything he saw, to which he replied, "Yes." They talked, and she asked him several times if he wanted to have intercourse. He replied, "not necessarily," because he had been up for the past forty-eight hours getting his motorcycle ready for the trip to Wilmington and was tired. He did, however, engage in intercourse with her assistance. She wrapped her legs around his back and pulled him down closer. No one else was present. When they finished, he dressed, put his shirts in the duffle bag and went back to the living room.

He was awake when Hughes arrived back at the trailer between six and seven o'clock. He never heard Jackson ask for a ride home or for any kind of assistance. She never pleaded with him to leave her alone.

Coles took the stand and admitted that he had had intercourse with Jackson but that it was with her consent and that she initiated it. After they finished he went outside and went to sleep in a van. When he awoke at 10:00 or 10:30 a.m., she was gone.

Smith testified that he had never been with Jackson and had never performed cunnilingus on her. He spent his evening dressing the pigs, going with Hughes to get the pig cooker, and gathering firewood. He saw Jackson leave the trailer on the morning of the fifteenth. When she came out, she called to Wallace, but Wallace walked away because he had his wife or girlfriend with him. Jackson looked hurt. She walked over to the pig cooker. Cricket, Hughes's girlfriend, asked her to leave. They fought, and Hughes separated them and told Jackson to leave.

At the close of all evidence the trial judge denied all defendants' motions to dismiss the charges. He submitted the case to the jury with instructions on first and second degree rape and first and second degree sexual offense. The instructions are the subject of numerous assignments of error and will be more fully set out within the discussion of the assignments.

From verdicts and sentences imposed as set out above defendants appealed to this Court.

II.

A. BARNETTE'S APPEAL

Defendant Barnette first contends that the State did not produce sufficient evidence of the crime of first degree rape to warrant submission of that charge to the jury and that his motion to dismiss the charge should have been allowed.

[1, 2] In reviewing the denial of the motion to dismiss, this Court must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime of first degree rape. *See State v. Wright*, 302 N.C. 122, 126, 273 S.E. 2d 699, 703 (1981). Evidence is "substantial" if a reasonable person would consider it sufficient to support the conclusion that the essential element in question exists. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Put another way, we must examine the evidence to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *see Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). First degree rape is defined as vaginal intercourse by force and against the will of the victim when the perpetrator employs or displays a deadly weapon or an article which the victim reasonably believes is a deadly weapon, inflicts serious bodily injury, or is aided or abbeted in the commission of the offense by one or more other persons. G.S. § 14-27.2(a) (1981). An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense. *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961); 4 Strong's North Carolina Index 3d, Criminal Law § 9, 9.1 (1976). Even though not actually present during the commission of the crime, a person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator. W. LaFave & A. Scott, *Criminal Law* § 63 (1972); R. Perkins, *Criminal Law* 660-61 (2d ed. 1969); 21 Am. Jur. 2d

Criminal Law § 169 (1981); *see State v. Jarrell*, 141 N.C. 722, 53 S.E. 127 (1906).

[3] The trial court submitted the first degree rape charge to the jury against Barnette on two alternative theories allowed by the bill of indictment: that Barnette, acting by himself or together with any other defendant employed or displayed a deadly weapon or that defendant Hughes aided and abetted Barnette by threatening the victim with the shotgun. Barnette contends that there is insubstantial evidence under either theory and of the use of force to take the case to the jury.

We disagree. When viewed in the light most favorable to the State, the evidence shows that on one occasion while Barnette was in the bedroom with the victim, Hughes entered and forced her to place the gun in her mouth. Jackson was lying on the bed, naked, covered only by a blanket. After Hughes forced Jackson to put the gun in her mouth, he laughed and left the room. Barnette then forced Jackson to engage in sexual intercourse even though she asked him to leave her alone. These circumstances give rise to a reasonable inference that Hughes helped prepare for the commission of the crime by displaying or employing a deadly weapon in order to overcome the victim's resistance and to enable Barnette to commit the crime. Thus, there is sufficient evidence that Barnette "acting either by himself or acting together with one or more of the other defendants, employed or displayed a shotgun" and that Barnette was aided and abetted by Hughes. The evidence supports a reasonable inference that Barnette shared with Hughes the community of unlawful purpose necessary for aiding and abetting, *see State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939 (1972). The trial court properly denied the motion to dismiss.

Defendant Barnette also contends that the evidence was deficient on the essential element of force. He argues that there is no evidence that Jackson was forced to submit to rape. He points out that while there is evidence that Hughes arrayed such physical force as to engender fear of great bodily harm, there is no evidence that the force, the display of a shotgun, was directed against the will of the victim to resist sexual activity.

Barnette is correct in stating that the evidence shows that Hughes never told Jackson that she must submit to intercourse.

The absence of an explicit threat, however, is not determinative. It is enough if the totality of the circumstances surrounding the actions of Hughes gives rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual contact. The evidence here shows that Hughes entered the bedroom while Jackson was lying on the bed naked. Barnette was also in the bedroom. Jackson had previously been told by Hughes, while holding the gun, that they had decided on "something" for her to do. Hughes forced Jackson to put the gun in her mouth. Barnette made no attempt to stop him. When she had done so, Hughes laughed and left the room. Barnette then proceeded to have intercourse with Jackson although she asked him not to do so. These facts, which also show community of unlawful purpose, give rise to a reasonable inference that the force displayed by Hughes, acquiesced in by Barnette, was intended to make Jackson submit to intercourse. Thus, the evidence of force was sufficient to be submitted to the jury, and the motion to dismiss on this ground was properly denied.

[4] Defendant next argues that the trial court's instructions on lack of consent to the intercourse were inadequate. The trial court instructed the jury that "consent induced by fear is not consent at law." He contends that the instruction failed to require that the fear be reasonable, that the fear be of violence, that the individual defendant either induce the fear or know of its inducement by another, and that the individual defendant know of the lack of consent.

We discuss Barnette's first two contentions together, as it appears to us that they are inextricably related. Barnette concedes that the trial court's instruction on consent is a correct statement of the law, *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902 (1976), but contends that it is incomplete. In support of this contention, he cites us to statements contained in prior cases. Indeed, in *State v. Burns*, 287 N.C. 102, 116, 214 S.E. 2d 56, 65, *cert. denied*, 423 U.S. 933 (1975), we stated that "[a] threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force and negates consent." *Accord, State v. Hall*, 293 N.C. 559, 238 S.E. 2d 473 (1977); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969); *State v. Carter*, 265 N.C. 626, 144 S.E. 2d 826 (1965). In

none of these cases, however, was the jury instructed that in order to be void the consent must have been induced by a reasonable fear of serious bodily harm, and we do not interpret these cases as establishing an objective standard of reasonableness by which the jury must judge consent. Additionally, even if the reasonableness standard were the rule, further elaboration on the issue of consent would have been unnecessary under the facts of this case.

First, the record discloses that the fear which induced Jackson's submission to intercourse was the threatened use of a sawed-off shotgun. Hughes on one occasion pointed it at her and on another forced her to put it in her mouth. A shotgun is *per se* a deadly weapon. When a *per se* deadly weapon is the force used to overcome the victim's resistance, we think that the issues of whether the fear engendered by the deadly weapon is reasonable and whether the fear is of violence are not in issue. If the jury believed that Jackson was threatened with a shotgun, then it follows that the fear engendered was both reasonable and of violence. Thus, the only issue raised by the evidence here was whether Jackson was threatened with a shotgun; instructions that the victim's fear must be reasonable and of violence were unnecessary.

Secondly, the victim testified that she *never* consented to the intercourse, that she resisted, and that resistance was overcome by physical force.

[5] Barnette also contends that the Court erred in failing to instruct that, in order to be convicted, he must be found to have known of Hughes's threats which induced the void consent. We cannot agree. For Barnette to be convicted of first degree rape based in part on the actions of Hughes, it is necessary to show only that the two share a common unlawful purpose, *i.e.*, that the two aid and abet one another in the commission of the crime. It is not necessary for each to have full knowledge of all acts committed by the other. An aider and abettor is fully responsible for the acts of the other done in perpetration of the crime. *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967). The trial court fully and adequately instructed on the elements of aiding and abetting; nothing more is necessary.

We also reject Barnette's argument that the perpetrator of the actual rape must have knowledge of the lack of consent. Jackson testified that she never consented, that she resisted his advances and that he overpowered her. Barnette testified that she enticed him into bed. Thus, the testimony presents two possible versions of the facts: that the victim physically resisted the assault and that the victim encouraged Barnette's sexual advances. No version of the evidence supports the view that Jackson had been induced by force to consent to Barnette's advances without his knowledge.

Moreover, we think this assignment also relates more to the element of aiding and abetting and not to the issue of consent. Since Hughes and Barnette were aiding or abetting one another, Jackson's forced consent, if any, induced by Hughes's threats need not be known by Barnette.

We conclude that as to defendant Barnette the instructions were adequate and that the case was properly submitted to the jury.

B. HUGHES'S APPEAL

Defendant Hughes brings forward challenges to the sufficiency of the evidence on the issue of aiding and abetting and to the jury instructions on consent. With regard to the jury instructions he argues, as did defendant Barnette, that the trial court erred in failing to instruct that the fear which induced the consent must be both reasonable and of violence.

These same assignments were raised by Barnette and we have found no error in his trial. Our discussion of the law and the evidence in considering Barnette's appeal applies with equal force to Hughes's appeal. It is unnecessary to repeat that discussion here. For the reasons stated in our discussion of Barnette's appeal, we find no error in Hughes's conviction of first degree rape.

[6] With regard to defendant Hughes's conviction for first degree sexual offense, however, we conclude that there was insufficient evidence of aiding and abetting the alleged perpetrator of that offense, Graham Smith, and conclude that Hughes's motion to dismiss that charge at the close of all evidence should have been granted.

In its most favorable light, the evidence for the State shows that Hughes threatened Jackson with the shotgun on two separate occasions, once in the kitchen and once in the bedroom. On neither occasion does the record disclose that Smith was present in the room, nor is there any evidence that Smith was aware of Hughes's actions. Although Jackson testified that Hughes initially threatened her in the kitchen, which was adjacent to the living room, she never placed Smith in the living room. There is no evidence from which it can be reasonably inferred that Smith and Hughes shared a common purpose to commit a first degree sexual offense. For this reason, the motion to dismiss the first degree sexual offense charge should have been granted.

[7] Although the trial court instructed the jury on the offense of second degree sexual offense, we conclude that Hughes could be guilty only of the first degree offense and that the submission of the second degree offense was error. Because there is no evidence that Hughes himself committed a sexual offense, the only theory which would sustain a conviction for that crime is aiding or abetting. This is an essential element of a first degree sexual offense only. G.S. § 14-27.4(a) & .5(a) (1981). Under the statute, when aiding and abetting is proven, the offense is first degree; it can never be a second degree offense. *Id.* Thus, Hughes could be tried only for a first degree sexual offense and the instruction on the lesser included offense was error. Because the State's proof was deficient on an essential element of the crime of first degree sexual offense, we conclude that this motion to dismiss should have been granted and reverse his conviction for first degree sexual offense.

C. CASHWELL'S APPEAL

[8] Defendant Cashwell was convicted of first degree rape and brings forth assignments identical to those urged by Barnette. Like Barnette, Cashwell could be found guilty of first degree rape only if a deadly weapon were used or if he were aided and abetted in the crime. We begin our review of his conviction by an examination of the evidence on these issues.

When Hughes threatened Jackson with the shotgun in the kitchen, they were only a few feet away from the center of the living room. In the living room were a number of people. Hughes spoke in a loud voice; those people in the living room probably

could have heard him. Although Cashwell admitted that he was in the living room when Jackson arrived, there is no evidence that he was in the living room when Hughes threatened Jackson with the shotgun nor can his continued presence in the living room be inferred: Jackson herself testified that people were constantly entering and exiting the trailer.

At the time of Hughes's second threat with the shotgun, only he, Jackson and Barnette were present. There is no evidence from which it can be reasonably inferred that Cashwell knew of Hughes's actions.

With regard to Cashwell, Jackson testified:

> [After] Mr. Barnette was in there the first time, I don't know the name of the person who came in next. The one in the black suit. He had reddish hair, small, tiny person, skinny. I did notice him at this time. I don't know what caused me to notice him.
>
> The sun had started to come up or it was brighter in the room or something. Whenever the door would open there would be light from the hallway, and after I realized that I was going to, obviously, be in there for longer, I had started to look at what was coming through the door. Later on, in the morning or in the later hours after I had been in there for a while, the sun did start to come up I could tell who each person was just by the light in the room. At that time, I was feeling disgust. I felt degraded. I felt very sick at that time. The man with the red hair, Mr. Cashwell, is in the Courtroom today, seated the fourth person down. (The witness pointed out Cashwell in the courtroom). When he came in the room, the same thing happened. He undressed and had intercourse with me. He did penetrate me. After the man I have identified as Mr. Cashwell entered the room again, he undressed, just like the others and jumped in the bed and had sexual intercourse with me. I did have intercourse on my back with him. And he tried to turn me over and have intercourse with me another way and I refused. I fought him and told him that — I don't know why I told him that — but I didn't know what to say, I told him I just had a baby and to "please don't do that to me" and he didn't force me in that way. After that transpired, I was then on my back again and intercourse was

continued with — at that time, I was positioned just on my back. With my hands, I would push as much as I could before I was pushed back, or restrained back. I did not embrace or do anything to entice what was going on.

During intercourse at this time, I was just laying there. I was feeling disgusted, helpless. No one else was in the room with me when Mr. Cashwell was in the room. When he stopped having intercourse, he left the room.

. . . .

Mr. Cashwell, the fellow over there with the red hair, had been in the room before Mr. Smith had. Mr. Cashwell did not have a weapon of any kind while he was in the room that I know of. As to whether Mr. Cashwell threatened me with any injury while he was in the room with me, when I would try to resist he would forcefully put a restraining arm on me. I do not know whether Mr. Cashwell had all his clothes off when he had intercourse with me. Mr. Cashwell was on top of me when he had intercourse with me. As to what he did to me physically with his arms, I had my hands up against his chest, as I did with more than just him, and when I would try to push him away my arms were restrained. As to whether that was from his weight or his bearing down on me, his hands. Mr. Cashwell did not ever threaten to harm me or beat me up. He did not say that he would kill me or anything like that. Neither Mr. Smith nor Mr. Cashwell beat me, pounded me or pawed you or choked you or anything like that. As to whether I asked Mr. Cashwell to leave me alone, I asked all of them to leave me alone.

Cashwell admitted the intercourse with Jackson but claimed that she initiated it when he came into the bedroom to put away some clothes.

None of this evidence shows that Cashwell, acting by himself or with another person, employed a deadly weapon or that he was aided and abetted. For this reason, the charge of first degree rape should have been dismissed.

Because Cashwell, unlike Hughes, had intercourse with Jackson, we must now consider whether the evidence was sufficient to justify the submission of the charge of second degree rape.

Second degree rape is vaginal intercourse by force and against the will of the victim. G.S. § 14-27.3(a) (1981). Because Cashwell admitted the intercourse, the only question for our consideration is whether, when considered in the light most favorable to the State, there is substantial evidence that the intercourse was by force and against the will of the victim. Jackson testified that she asked him to leave her alone and that, while he was on top of her, she tried to push him away with her hands on his chest. When she did so he restrained her arms with his hands. During Cashwell's visit, he tried to turn her over and she fought him and told him that she had just had a baby. He then turned her so that she was lying on her back and continued the intercourse. In our opinion, this evidence is substantial on every element of second degree rape and justified the submission of that charge.

[9] The sole distinction between the crimes of first and second degree rape is the element of the use of a deadly weapon or aiding and abetting.[1] *Compare* G.S. § 14-27.2(a) *with* G.S. § 14-27.3(a). Otherwise, the elements of the offenses are the same. When the jury found Cashwell guilty of first degree rape, it necessarily found facts which would support a conviction of second degree rape. Because there is insufficient evidence with regard to this defendant on the alternative elements of deadly weapon and aiding and abetting which would make his crime first degree rape, it follows that the verdict returned by the jury must be considered as a verdict of guilty of second degree rape. *See State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980); *State v. Jolly*, 297 N.C. 121, 130, 254 S.E. 2d 1, 7 (1979). To paraphrase *Jolly*,

> Hence, leaving the verdict undisturbed but recognizing it for what it is, the judgment upon the verdict of guilty of first degree rape is vacated and the cause is remanded to the Superior Court, New Hanover County, for pronouncement of a judgment as upon a verdict of guilty of second degree rape. The Clerk of the Superior Court, New Hanover County, shall thereupon issue a revised commitment with respect to the revised judgment on the first count in case number 80CRS5873 bearing the same date as the original commit-

1. If serious bodily injury is inflicted, the crime is also first degree rape. G.S. § 14-27.2(a) (1981).

ment for first degree rape. The effect will be, and it is so intended, that defendant will receive credit upon the new commitment for all the time heretofore served for first degree rape.

Id.

[10] Cashwell also assigns error to the instructions on consent. However, as with defendant Barnette, no issue as to consent induced by fear arises on the evidence: Jackson testified that she never consented and that her resistance was overcome by force, and Cashwell testified that she enticed him into bed. Thus, a general instruction on the issue of lack of consent was all that was required.

D. COLES'S APPEAL

[11] Defendant Coles was convicted of second degree rape. He challenges the sufficiency of the evidence on the issue of whether the intercourse was by force and against the will of the victim and also assigns error to the instructions on consent.

The evidence of force against Coles is quite similar to that against Cashwell. Indeed, the prosecutrix testified that Coles came into the room, told her how good he was going to make her feel, had intercourse, and left. On cross-examination she testified that Coles restrained her by holding her down with his hands, the same method used by Cashwell. He did not have a weapon and did not threaten or injure her in any way. Additionally, Jackson testified that she asked all of her assailants to leave her alone.

This evidence, taken in the light most favorable to the State, shows that Coles used force, *i.e.*, restrained Jackson with his hands, to overcome her resistance and will and is sufficient to enable a rational trier of fact to conclude that the intercourse was by force and against the will of the victim. Because defendant admitted the intercourse and there is substantial evidence of the remaining element of the crime of second degree rape, the trial court properly submitted that charge to the jury.

[10] Defendant Coles also assigns as error the instructions on consent. Defendant was found guilty of second degree rape. The jury, therefore, must have found as fact that Coles was not aided or abetted and that a shotgun was not involved. Thus, Coles cannot complain that the judge failed to instruct that he had to know

of Hughes's actions in threatening the victim. When the evidence concerning only the intercourse between Jackson and Coles is considered, there are only two possible versions of the facts. Jackson testified that she never consented and that her resistance was overcome by physical force. Coles, on the other hand, claimed that Jackson initiated the intercourse and that the intercourse was with her full consent. On this evidence, there is no issue as to consent induced by fear or as to whether Coles had to have knowledge of her lack of consent. She either voluntarily consented or resisted, and the jury was fully instructed on that question. Defendant cannot complain that the jury chose to credit Jackson's version of events. We conclude that there was no error in the instructions on consent.

E. SMITH'S APPEAL

[12] Defendant Smith was convicted of a first degree sexual offense. Like the other defendants, he challenges the sufficiency of the evidence on the issue of whether Smith was aided and abetted by Hughes and concluded that such evidence was deficient. The question remaining for our consideration is whether there is substantial evidence that Smith was aided and abetted in his act by any other person.

According to Jackson, while Smith was in the bedroom with her, another man, whom she could not identify, was also in the room. He sat and watched the entire incident but never said a word. When Smith completed his act, he and the other man left. This evidence is not sufficient on the issue of aiding and abetting. All it shows is that another person was present while Smith committed the crime. Mere presence is not enough to constitute aiding and abetting; it must also be shown that the alleged aider or abettor knowingly encouraged, instigated or aided Smith to commit the crime. *E.g.*, *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973). Because there is evidence only that another person stood by and watched the commission of the crime, it is not sufficient to show that Smith was aided and abetted, and the trial court erred in failing to dismiss the charge of first degree sexual offense. The judgment imposed on the verdict of guilty of first degree sexual offense must be vacated.

[13] Under the authority of *Jolly*, we now consider whether the evidence is substantial on all the elements of a second degree sex-

ual offense. A second degree offense differs from a first degree offense only in the absence of the alternative elements of aiding and abetting, use or display of a deadly weapon, or infliction of serious bodily injury. *Compare* G.S. § 14-27.4(a) *with* G.S. § 14-27.5(a). Thus, if the evidence, viewed in the light most favorable to the State, would allow a reasonable person to conclude that Smith performed a sexual act, cunnilingus, upon Jackson by force and against her will, it would support a verdict of guilty of a second degree sexual offense.

Jackson testified that Smith entered the bedroom, forced her into a sitting position with her back against the wall, forced her legs apart and held her legs down with his hands and arms while he performed cunnilingus. Jackson asked him to leave her alone and resisted him as best she could throughout the assault. This evidence is sufficient on both the element of a sexual act and the element of force and justifies the submission of the charge of second degree sexual offense to the jury. Because in finding defendant Smith guilty of a first degree sexual offense the jury necessarily found as fact all the elements constituting second degree sexual offense, and the evidence is insufficient on the element which would make it a first degree offense, the verdict of guilty of a first degree sexual offense must necessarily be viewed by this Court as a verdict of guilty of a second degree sexual offense.

Smith's assignments of error with regard to the consent instruction may be disposed of similarly to Coles's corresponding assignments. Jackson testified that she never consented to the act and that her resistance was overcome by force. Smith denied that he had performed cunnilingus on Jackson and also denied that he was ever in the bedroom with her. There is no evidence that Jackson consented to the act whether through fear or on her own volition. Therefore, the only instruction necessary was that Jackson must not have consented to the sexual act; further explanation was unnecessary.

Because we find no error with regard to the charge of second degree sexual offense, we leave the verdict undisturbed but recognize it as a verdict of guilty of the lesser included offense, vacate the judgment imposed upon the verdict of guilty of first degree sexual offense, and remanded the cause to the Superior

Court, New Hanover County, for pronouncement of judgment as upon a verdict of guilty of second degree sexual offense. The Clerk of the Superior Court, New Hanover County, shall thereupon issue a revised commitment with respect to the revised judgment on the second count in case number 80CRS5869 bearing the same date as the original commitment for first degree sexual offense. The effect will be, and it is so intended, that defendant will receive credit upon the new commitment for all time heretofore served for first degree sexual offense.

III.

In conclusion, we find no error in the first degree rape conviction of Hughes and Barnette and in the second degree rape conviction of Coles; we reverse the conviction of Hughes for first degree sexual offense; we affirm the verdicts entered against Cashwell and Smith, vacate the judgments and remand with instructions to enter judgment on a lesser included offense.

As to defendant Barnette's conviction of first degree rape—No error.

As to defendant Hughes's conviction of first degree rape—No error.

As to defendant Hughes's conviction for first degree sexual offense, we find that the motion to dismiss should have been granted and order the verdict and judgment vacated and the action dismissed—Reversed.

As to defendant Cashwell's conviction of first degree rape—Remanded for Judgment as for Verdict of Guilty of Second Degree Rape.

As to defendant Coles's conviction of second degree rape—No error.

As to defendant Smith's conviction of first degree sexual offense—Remanded for Judgment as for Verdict of Guilty of Second Degree Sexual Offense.

STATE OF NORTH CAROLINA v. CHARLES SILSBY FEARING

No. 28

(Filed 1 December 1981)

1. **Criminal Law § 102.6— prosecutor's jury argument invited by defense counsel's argument**

In this prosecution for hit and run driving and death by vehicle, the district attorney's argument that the State could not call defendant's wife, an occupant of the car, as a witness was invited by defense counsel's argument that the State could have called occupants of the car as witnesses and was not error.

2. **Criminal Law § 16.1— misdemeanor consolidated with felony—original jurisdiction of superior court**

The superior court had original jurisdiction of a prosecution for the misdemeanor of death by vehicle where that charge was consolidated for trial with a felony charge of hit and run driving and both offenses were based on the same act or transaction. G.S. 7A-271(3); G.S. 15A-926(a).

3. **Automobiles § 131— hit and run driving—required knowledge**

In a prosecution for failing to stop at the scene of an accident resulting in injury or death in violation of G.S. 20-166(a), the State must prove that defendant had actual or implied knowledge (1) that he had been involved in an accident or collision, and (2) that a person was killed or physically injured in the collision. Therefore, the trial court in this prosecution under G.S. 20-166(a) erred in failing to instruct the jury that the State had to prove that defendant knew that the collision had resulted in injury or death to a person.

Justice HUSKINS dissenting in part.

Chief Justice BRANCH and Justice MEYER join in the dissent.

Justice CARLTON concurring.

Justice EXUM joins in the concurring opinion.

ON certiorari to review decision of the Court of Appeals, 48 N.C. App. 329, 269 S.E. 2d 245 (1980), finding no error in trial presided over, and judgments entered, by *Strickland, Judge*, at the 25 June 1979 Session of CHOWAN Superior Court.

Upon pleas of not guilty, defendant was tried on separate bills of indictment charging him with (1) failing to stop his automobile at the scene of an accident in which Cloise H. Creef was killed, a violation of G.S. 20-166(a), and (2) death by vehicle, a violation of G.S. 20-141.4. The charges were consolidated for trial and defendant was found guilty of both offenses. He was sentenced to prison terms of not more than three years for the of-

fense of hit-and-run and not more than one year for the offense of death by vehicle, the sentences to run concurrently.

Defendant appealed to the Court of Appeals and on 19 August 1980 that Court found no error. He then petitioned this court for a writ of certiorari and the petition was denied on 16 September 1980. Thereafter, in a case arising out of the same accident, *State v. Malcolm Keith Fearing, III*[1], the defendant in that case being convicted of accessory after the fact of felonious hit-and-run, the Court of Appeals with one judge dissenting ordered a new trial. The basis for the new trial was that the trial judge erred in his jury instructions with respect to knowledge on the part of the driver of the vehicle, the defendant in the present case. The state appealed to this court in the Malcolm Fearing case. Inasmuch as defendant Charles Fearing had challenged the same jury instruction that the defendant Malcolm Fearing had challenged, and there were conflicting decisions of the Court of Appeals on the question, on 19 March 1981 we allowed defendant Charles Fearing's petition for a writ of certiorari.[2]

An adequate summary of the evidence presented at trial is set forth in the Court of Appeals' opinion, 48 N.C. App. at 330, *et seq.* No worthwhile purpose would be served by restating the evidence here.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the state.

Charles Aycock, III; Stewart and Hayes, by David K. Stewart; and Brenton D. Adams, for defendant-appellant.

BRITT, Justice.

By numerous assignments of error argued in his brief, defendant contends that the trial court erred in the admission of certain evidence, in denying his motions to dismiss, and in its in-

1. 50 N.C. App. 475, 274 S.E. 2d 356 (1981).

2. There is a third case arising out of the same accident, *State v. Duvall*, 50 N.C. App. 684, 275 S.E. 2d 842 (1981). In that case the defendant was convicted of being an accessory after the fact of felonious hit and run. The Court of Appeals found no error and this court allowed defendant's petition for a writ of certiorari in that case.

structions to the jury. After careful review we conclude that the trial court committed no prejudicial error in the death by vehicle case. In the hit-and-run case we conclude that the trial court erred in its jury instructions and that defendant is entitled to a new trial in that case.

I

The Court of Appeals held that the trial court did not err in denying defendant's motions to dismiss both charges on the ground of insufficiency of the evidence. We agree with this holding and with the reasoning given by the Court of Appeals in support of its holding.

II

[1] Defendant contends the trial court erred in failing to sustain his objection to the district attorney's jury argument relating to the failure of defendant's wife to testify, and in failing to instruct the jury to disregard the argument.

The record indicates that one of defendant's attorneys, Mr. Aycock, made the opening argument to the jury; that no request was made prior to arguments that they be recorded; that Assistant District Attorney Teague followed Mr. Aycock in the jury arguments; that during Mr. Teague's argument, defendant made an objection to Mr. Teague's reference to the fact that the state could not call defendant's wife, an occupant of the car, as a witness; and that the court instructed the jury to "disregard counsel's last statement." The record further indicates that Mr. Aycock in his argument informed the jury that the state could have called occupants of the car as witnesses.

When the argument of the district attorney is challenged, preceding arguments by defense counsel should be contained in the record. *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977); *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975). This is so in order that the appellate court may judge the challenged remarks in context and determine if they are invited or provoked. It would appear that in the instance complained of here, the district attorney was responding to the argument made by defense counsel. We conclude that defendant has failed to show error.

III

Defendant contends that the Court of Appeals erred in holding that the trial court did not err in failing to instruct the jury on justification and excuse. For the reasons stated in the Court of Appeals' opinion, we agree with its holding on this point.

IV

[2] Defendant contends that the trial court erred in trying him on the death by vehicle charge, a misdemeanor, when that charge "had not been heard or tried in District Court."

"Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors." G.S. 7A-272(a).

G.S. 7A-271 (1979 Cum. Supp.) provides in pertinent part:

> *Jurisdiction of superior court.*—(a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:
>
> (1) . . . .
>
> (2) . . . .
>
> (3) Which may be properly consolidated for trial with a felony under G.S. 15A-926;

G.S. 15A-926(a) provides:

> *Joinder of offenses and defendants.*—(a) Joinder of Offenses—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

Clearly the two offenses with which defendant was charged were based "on the same act or transaction." We hold that under

the facts in this case, the superior court had jurisdiction of the offense of death by vehicle.

V

[3] Defendant contends that the trial court committed prejudicial error in the hit-and-run case by failing to properly instruct the jury on the elements of knowledge and intent. This contention has merit.

The court instructed the jury on the offense of hit-and-run driving as follows:

> Now I charge that for you to find the defendant guilty of failing to immediately stop his vehicle at the scene of an accident or collision involving injury or death, the State must prove six things beyond a reasonable doubt:
>
> First, that the 1972 Mercedes Benz automobile was involved in an accident.
>
> Second, that at that time the defendant, Charles S. Fearing, was driving the 1972 Mercedes Benz automobile.
>
> [Third, that the defendant knew of the accident.]
>
> EXCEPTION NO. 27
>
> Fourth, that Cloise H. Creef was physicially injured or killed in the accident.
>
> Fifth, that the defendant failed to immediately stop his vehicle at the scene of the accident.
>
> And sixth, that the defendant's failure was wilful, that is, intentional and without justification or excuse.
>
> So I charge that if you find from the evidence and beyond a reasonable doubt that on or about February 19th, 1979, the defendant, Charles Silsby Fearing, while driving a 1972 Mercedes Benz automobile was involved in an accident in which Cloise H. Creef was physically injured or killed, and that Charles Silsby Fearing
> [knew of the accident]

EXCEPTION NO. 28

and wilfully failed to immediately stop at the scene,
[it would be your duty to return a verdict of guilty as charged.]

EXCEPTION NO. 29

However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Prior to the jury charge, defendant requested an instruction on the element of knowledge to the effect that defendant knew that he had struck the decedent. The court denied the request.

The statute in question, G.S. 20-166(a), provides:

> The driver of any vehicle involved in an accident or collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident or collision, and any person violating this provision shall upon conviction be punished as provided in G.S. 20-182.

G.S. 20-166(c) sets forth the actions required of a driver whose vehicle is involved in an accident or collision resulting in injury or death to any person. G.S. 20-182 provides that "every person convicted of *wilfully* violating G.S. 20-166, relative to the duties to stop or render aid or give the information required in the event of accidents, . . . , involving injury or death to a person, shall be punished by imprisonment for not less than one nor more than five years, . . . , or by fine of not less than five hundred dollars ($500.00) or by both such fine and imprisonment." (Emphasis added.)

Defendant argues that it was incumbent on the state to show that he not only knew that the vehicle he was driving had been involved in an accident or collision, but that he also knew that the collision had resulted in injury or death to a person; and that the court should have charged the jury to that effect. In support of his argument, defendant strongly relies on the decisions of this court in *State v. Ray*, 229 N.C. 40, 47 S.E. 2d 494 (1948), and *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). Both of these cases involved prosecutions pursuant to G.S. 20-166.

In *Ray*, Justice Ervin, speaking for the court said:

> It would be a manifest absurdity to expect or require the driver of a motor vehicle to perform the acts specified in the statute in the absence of knowledge that his vehicle has been involved in an accident resulting in injury to some person. Hence, both reason and authority declare that such knowledge is an essential element of the crime created by the statute now under consideration. *Herchenbach v. Commonwealth*, 185 Va. 217, 38 S.E. 2d 328; Blashfield's Cyclopedia of Automobile Law and Procedure (Perm. Ed.), section 781; 16 A.L.R., Annotation, 911-919. This position is expressly sustained by our statute prescribing the punishment for persons "convicted of willfully violating G.S. 20-166, relative to the duties to stop in the event of accidents . . . involving injury or death to a person." G.S. 20-182.

229 N.C. at 42.

In *Glover*, a *per curiam* opinion, we find:

> Defendant contends that he had no knowledge that he had struck Willie Quick with a motor vehicle and that Willie Quick had received any injury. Both reason and authorities declare that such knowledge is an essential element of the crime created by the statute now under consideration, and charged in the indictment. *State v. Ray*, 229 N.C. 40, 47 S.E. 2d 494.

270 N.C. at 321-22.

The state argues that the instructions given were sufficient and that the state should not be required to prove that the defendant knew that a person was killed or physically injured in the collision.

We agree with defendant and hold that in prosecutions under G.S. 20-166(a) the state must prove that the defendant knew (1) that he had been involved in an accident or collision, *and* (2) that a person was killed or physically injured in the collision. However, the knowledge required may be actual or may be implied. Implied knowledge can be inferred when the circumstances of an accident are such as would lead a driver to believe that he had been in an accident which killed or caused physical injury to a person. When

such circumstances exist, the jury may find that the defendant had the knowledge we find to be essential for conviction under the statute.

An analogy to our holding is found in this court's decisions relating to the statute on receiving stolen property. For many years prior to 1975, G.S. 14-71 made it unlawful for a person to receive stolen property "such person knowing the same to have been feloniously stolen or taken." In numerous cases decided prior to 1975, this court held that knowledge that property was stolen could be inferred from incriminating circumstances, the test being whether the defendant knew, or must have known, that the property was stolen. *See, e.g., State v. Oxendine,* 223 N.C. 659, 27 S.E. 2d 814 (1943); *State v. Miller,* 212 N.C. 361, 193 S.E. 388 (1937); *State v. Stathos,* 208 N.C. 456, 181 S.E. 273 (1935); *State v. Hart,* 14 N.C. App. 120, 187 S.E. 2d 351, *cert. denied,* 281 N.C. 625, 190 S.E. 2d 469 (1972).[3]

In *State v. Stathos, supra,* the trial court charged the jury as follows:

> If the State has convinced you beyond a reasonable doubt from the evidence that at the time he bought the violin the circumstances, facts, and the knowledge of the defendant were such as to let him know or to cause an honest man who intended to be reasonably prudent in his business transactions to inquire further before he received the violin, and he failed to do so and took the violin without making inquiry, although in possession of such facts, then, gentlemen of the jury, if you should find those facts, and find them beyond a reasonable doubt, it would be your duty to render a verdict of guilty.

In declaring the instruction erroneous, this court said:

> C.S., 4250, (now G.S. 14-71) under which the bill of indictment was drawn, makes guilty knowledge one of the essen-

3. In 1975 the General Assembly amended G.S. 14-71 to provide that the person receiving stolen property was guilty of the offense if he received the property knowing "or having reasonable grounds to believe" the same to have been feloniously stolen or taken. 1975 S.L., c. 163, s.1. The effect of the 1975 amendment was to alter the standard of proof established by this court in prosecutions under G.S. 14-71.

tial elements of the offense of receiving stolen goods. *This knowledge may be actual, or it may be implied when the circumstances under which the goods were received were sufficient to lead the party charged to believe they were stolen.* However, while it is true that it is not necessary that the person from whom the goods are received shall state to the person charged that the goods were stolen, and while the guilty knowledge of the person charged may be inferred from the circumstances of the receipt of the goods, still it is necessary to establish either actual or implied knowledge on the part of the person charged of the facts that the goods were stolen. The question involved is whether the person charged had knowledge of the fact that the goods had been stolen at the time he received them, and not whether a reasonably prudent man in the transaction of his business would have gained such knowledge, under the circumstances. The test is as to the knowledge, actual or implied, of the defendant, and not what some other person would have believed from the facts attending the receipt of the goods. (Emphasis added.)

Our holding in the case at hand is in keeping with the spirit of numerous decisions in other jurisdictions. *See People v. Holford*, 63 Cal. 2d 74, 403 P. 2d 423, 45 Cal. Rptr. 167 (1965); *Kimoktoak v. State*, 584 P. 2d 25 (Alaska 1978); *Herchenbach v. Commonwealth*, 185 Va. 217, 38 S.E. 2d 328 (1946); *Touchstone v. State*, 42 Ala. App. 141, 155 So. 2d 349 (1963); *State v. Porras*, 125 Ariz. 490, 610 P. 2d 1051 (1980); *State v. Blevins*, 128 Ariz. 64, 623 P. 2d 853 (1981); *Idaho v. Parish*, 79 Idaho 75, 310 P. 2d 1082 (1957); *State v. Minkel*, 89 S.D. 144, 230 N.W. 2d 233 (1975); *Commonwealth v. Hyman*, 117 Pa. Super. Ct. 585, 178 A. 510 (1935); *Commonwealth v. Adams*, 146 Pa. Super. Ct. 601, 23 A. 2d 59 (1941); *People v. Rocovich*, 269 Cal. App. 2d 489, 74 Cal. Rptr. 755 (1969).

We hold that the instructions given in the case at bar were inadequate. Defendant admitted that he knew that the car he was driving had collided with something. He stipulated that the body of the decedent was the object he hit. He insisted, however, that at the time of the accident he did not know that the object he struck was a human being or that anyone had suffered physical injury as a result of that collision. He was entitled to have the

jury determine on proper instructions whether he had such knowledge. Defendant is, therefore, entitled to a new trial on the hit-and-run charge.

VI

We have considered the other assignments of error argued in defendant's brief and conclude that they have no merit.

Death by vehicle case, affirmed. 79 CRS 879 (Chowan)

Hit-and-run case, new trial. 79 CRS 878 (Chowan)

Justice HUSKINS dissenting in part.

I respectfully dissent from that portion of the majority opinion which holds that the trial court's instructions in the hit-and-run case were erroneous.

The pertinent portions of G.S. 20-166 read as follows:

> (a) The driver of any vehicle involved in an accident or collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident or collision, and any person violating this provision shall upon conviction be punished as provided in G.S. 20-182.
>
> (b) The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision . . . . Any person violating the provisions of this subsection shall be guilty of a misdemeanor and fined or imprisoned for a period of not more than two years, or both, in the discretion of the court.
>
> (c) The driver of any vehicle involved in any accident or collision resulting in injury or death to any person shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the per-

son struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident or collision reasonable assistance, . . . and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in G.S. 20-182.

G.S. 20-182 provides in pertinent part:

Every person convicted of willfully violating G.S. 20-166, relative to the duties to stop or render aid or give the information required in the event of accidents . . . involving injury or death to a person, shall be punished by imprisonment for not less than one nor more than five years, or in the State prison for not less than one nor more than five years, or by fine of not less than five hundred dollars ($500.00) or by both such fine and imprisonment.

Thus it may be seen that a violation of G.S. 20-166(a) is a felony punishable as provided in G.S. 20-182, while a violation of G.S. 20-166(b) is a misdemeanor punishable by a fine or imprisonment for not more than two years, or both, in the discretion of the court. Moreover, the misdemeanor described in subsection (b) is not a lesser included offense of the crime described in subsections (a) and (c) of this statute. *State v. Chavis*, 9 N.C. App. 430, 176 S.E. 2d 388 (1970).

My dissent in the hit-and-run case is grounded on the dual position that: (1) G.S. 20-166 requires the driver of a vehicle who knows he has been involved in an accident to stop at the scene regardless of whether he knew he had injured or killed some person, and (2) even if the law requires, as the majority holds, that the driver must know not only of his involvement in an accident but also that a person had been injured or killed, the jury charge sufficiently embraced such requirement. It is my position that, on either ground, defendant's conviction in the hit-and-run case should be upheld.

The guiding star in the interpretation of a statute is the intent of the legislature in enacting that statute. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). To discover this legislative intent, courts consider the language of the statute, the spirit of the act and what the act seeks to accomplish. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972).

The language of G.S. 20-166 indicates that the legislature intended to require any and every motorist involved in an accident to stop at the scene. Failure to stop is the conduct proscribed by the statute. The gist of the offense is failure to stop. *State v. Smith*, 264 N.C. 575, 142 S.E. 2d 149 (1965).

In *State v. Ray*, 229 N.C. 40, 47 S.E. 2d 494 (1948), the State offered in evidence a statement by defendant that he had just driven the highway in question but that he had no knowledge or notice that he had struck any vehicle or injured any person during the trip. This statement was not contradicted or shown to be false by any other fact or circumstance in evidence. Other evidence offered by the State did show that the occupants of another car met a large tractor-trailer, and as the two vehicles passed, the rear end of the trailer swerved across the center of the road and struck the left side of the other vehicle causing personal injury to one of its occupants. The truck continued on its way without stopping or reducing its speed. A few minutes later the defendant Ray was arrested at a service station and at that time was in possession of a tractor-trailer. Defendant was convicted of the felony denounced by G.S. 20-166(a)(c). Defendant appealed and Justice Ervin, writing for the Court, said: "It would be a manifest absurdity to expect or require the driver of a motor vehicle to perform the acts specified in the statute in the absence of knowledge that his vehicle had been involved in an accident resulting in injury to some person." The majority construes this statement to mean not only that a defendant must know he had been involved in a collision, but he must further know that a person was killed or injured in that collision. In my view, this interpretation is not supported by the holding of *Ray* and is not permitted when G.S. 20-166 is construed consistent with the legislative intent.

The phrase "resulting in injury to some person" following the word "accident" was used by Justice Ervin only to modify the word "accident," *i.e.*, to indicate which accident a defendant must be aware of before he can be prosecuted under G.S. 20-166. If the phrase is interpreted to mean that a defendant must know the accident resulted in injury to some person, then it is mere dictum and should be disavowed. This is so because defendant in *Ray* denied knowledge that he had been involved in an accident or had injured any person. Since the State offered his statement in

evidence and since the statement was uncontradicted, his motion for judgment of nonsuit was sustained by this Court. If he did not know he had been involved in an accident, he did not have to stop. Whether Ray was required to know, in addition to knowledge that he had been involved in an accident, that some person had been injured in that accident was not the determinative question. Hence the words "resulting in injury to some person" are dictum and should not be regarded as binding on this Court.

The majority's interpretation of the statute and of the holding in *Ray* renders the statute internally inconsistent and practically destroys it. If a driver knows he has been involved in an accident resulting in property damage but no physical injury to a person, he is guilty of a misdemeanor under G.S. 20-166(b) for leaving the scene of that accident. If a driver knows he has been involved in an accident and knows someone has been injured or killed in that accident, he is guilty of a felony under G.S. 20-166(a) for leaving the scene of that accident. The problem arises when a defendant knows, or has reasonable grounds to believe, that he has been involved in an accident resulting in property damage but does not know that it also resulted in injury or death to some person. The majority holds that a motorist who leaves the scene of an accident under those circumstances is not guilty of any violation of G.S. 20-166(a), (b) or (c). He has not violated subsection (a) becuase he did not know that any person had been injured or killed. He has not violated subsection (b) because that subsection applies only when "there is not involved injury or death of any person." Thus the anomalous consequence of the majority decision is that one who leaves an accident scene knowing only that he was involved in an accident is completely immune to prosecution under G.S. 20-166 if some person was in fact injured or killed, yet he is guilty of a misdemeanor under subsection (b) if no person was in fact injured or killed. The legislature could not have intended such a result. Justice Ervin in writing the Court's opinion in *Ray* could not have intended such a result. In the construction of statutes, courts should adopt an interpretation which avoids bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results. *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978).

Reason dictates that the legislature intended to punish hit-and-run drivers involved in accidents resulting in either property damage or injury to some person. Knowledge of the accident is all the knowledge that the law requires. If a motorist knows he has been involved in an accident and willfully fails to stop, he is guilty of violating G.S. 20-166. If only property damage was done in the accident, he is guilty of a misdemeanor for failure to stop. If injury or death to a person resulted from the accident, he is guilty of a felony for failure to stop. That is my interpretation of the statute and of the decision in *Ray* and its progeny, *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967).

I believe my interpretation is grounded not only in logic but also is supported by the practicalities of the situation as well. Since the actual physical result of a collision is often unknown, the statute requires that a motorist stop to investigate. This serves the underlying rationale of facilitating investigation of accidents and providing immediate assistance to those injured. It seems to me that the majority's interpretation encourages a driver to remain ignorant of the actual consequences of the accident. If he does not stop to investigate and never learns whether anyone was injured or killed, he is guilty at most of the misdemeanor proscribed by G.S. 20-166(b). If some person was in fact injured or killed in the accident, he has violated no part of G.S. 20-166 by his failure to stop. Such an interpretation of the law rewards a motorist who deliberately remains ignorant of the results of his accident.

Finally, it is my position that even if the Court's opinion today accurately delineates the knowledge requirement, the trial court's instructions adequately advised the jury with respect thereto. The charge is accurately set out in the majority opinion and I shall not repeat it here. It suffices to say that the trial judge charged the jury that if it found beyond a reasonable doubt that defendant was involved in an accident in which Cloise H. Creef was physically injured or killed and that defendant "knew of the accident" and willfully failed to immediately stop at the scene, the jury should return a verdict of guilty as charged. It is perfectly clear that the phrase "if Charles S. Fearing knew of *the* accident" relates to the preceding clause and other portions of the charge describing "the accident" as that accident "in which Cloise

H. Creef was physically injured or killed." Thus, when the charge is considered as a whole, as we are required to do, it indicates that in order to convict defendant the jury was told it must find that defendant knew a person had been physically injured or killed in the accident, *i.e.*, in the very accident defendant admits he knew had occurred. When the charge is considered in its entirety, it adequately complied with the law as interpreted by the majority.

I have outlined the bases for my dissent in the hit-and-run case. Even so, it must be conceded that there is a reasonable basis for the majority decision. I simply believe that the opposite result should have been reached in deference to the legislative intent and what I believe to be the adequacy of the trial court's charge. Surely the General Assembly will now give the appropriate attention to a revision of G.S. 20-166 so as to remove all doubt concerning its meaning and intent.

Chief Justice BRANCH and Justice MEYER join in this dissent.

Justice CARLTON concurring.

I am in the majority solely because of our prior decisions. I wish to join Justice HUSKINS in urging the General Assembly to revise G.S. 20-166 to clarify its meaning and intent. The interpretation of G.S. 20-166 argued by the State and expressed in Justice Huskins' dissent is clearly what the law ought to be.

Justice EXUM joins in the concurring opinion.

STATE OF NORTH CAROLINA v. JAMES LUTHER GALLOWAY

No. 72

(Filed 1 December 1981)

1. Rape and Allied Offenses § 4.2— medical expert's testimony concerning examination of victim proper

In a prosecution for first degree rape, there was nothing improper in a medical expert's testimony that an examination of the victim revealed evidence of traumatic and forcible penetration consistent with an alleged rape as it was a proper expression for an expert witness to establish whether the victim had been penetrated by force.

2. Rape and Allied Offenses § 4.3- prosecuting witness's prior sexual activity—questions concerning—properly disallowed

In a prosecution for first degree rape, the trial court did not err in refusing to allow defendant to ask the prosecuting witness: (1) "Are you or are you not a virgin?" and (2) "Are you or are you not on birth-control pills?" The questions were irrelevant to any issue in the case as (1) the medical expert did not imply that the prosecuting witness was a virgin, as defendant contended, and (2) the tendered questions did not fit within any of the exceptions listed under G.S. 8-58.6(b).

3. Rape and Allied Offenses § 4— evidence of prosecuting witness's "night blindness"—properly admissible

Evidence of the prosecuting witness's "night blindness" in a prosecution for first degree rape was clearly relevant to explain the witness's inability to give a clearer description of the circumstances surrounding the crime. Moreover, the testimony of the prosecuting witness and her friend was not improper despite their lack of medical expertise, and it was proper to allow a medical assistant technician to a doctor to testify that the doctor's opthalmological records disclosed that the prosecuting witness had an eye disease commonly known as "night blindness."

4. Criminal Law § 89; Witnesses § 1.3— competency of deaf and mute witness

Deaf and mute persons are not incompetent as witnesses merely because they are deaf and mute if they are able to communicate the facts by a method which their infirmity leaves available to them and are of sufficient mental capacity to observe the matters as to which they will testify and to appreciate the obligation of an oath. Any confusion arising from the use of sign language to communicate with a deaf and mute witness goes to the weight, and not the admissibility, of the evidence.

5. Criminal Law § 102.5— evidence concerning testimony at preliminary hearing—impropriety cured by instructions

In a trial for first degree rape, there was nothing to indicate that the State was making inquiry of witnesses as to what their testimony was at a preliminary hearing as defendant contended; however, if there had been any impropriety, it was cured by the trial court's correcting instructions.

6. Criminal Law § 102.5— question concerning defendant's tatoo—improper—not prejudicial

The trial court erred in a prosecution for first degree rape by allowing the district attorney to make inquiry concerning a tatoo of the word "sex" on defendant's arm; however, the error was not prejudicial as there was no reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.

7. Criminal Law § 102.5— pretrial agreement concerning defendant's record—no evidence of violation—questions proper

Defendant was not entitled to a new trial for prosecution of first degree rape on the basis that the district attorney violated a pretrial agreement that no questions concerning his record would be asked where (1) the record tended

to support the view that the district attorney agreed only not to submit the written record before the jury and (2) a question concerning prior misconduct by defendant was asked to impeach defendant's character and was properly admitted.

Justice EXUM dissenting.

BEFORE *Mills, Judge,* at the 2 February 1981 Criminal Session of Superior Court, FORSYTH County. Judgment was entered 6 February 1981.

Defendant was convicted by a jury of first degree rape. He appeals his mandatory life sentence to this Court as a matter of right pursuant to G.S. 7A-27.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

L. G. Gordon, Jr., for the defendant.

CARLTON, Justice.

I.

Only a brief summary of the evidence is necessary here for an understanding of the case giving rise to this appeal.

The prosecuting witness, Enola Kay Conrad, is a deaf mute and testified at trial through an interpreter. She told the jury that late on the night of 9 June 1980, she and two girlfriends, who were also deaf, and several males went out to dance and drink beer. They first went to Patterson's, and then left for Curt's Place. They arrived at Curt's at about midnight or one o'clock in the morning. At Curt's Place, she saw the defendant, James Luther Galloway. He bought her three beers and asked her to dance. They danced, and when they were through, defendant pulled her by the arm and led her outside. Conrad resisted by pulling back and asked defendant, "Where are we going?" by signing. Defendant said nothing and pulled her out the door, which was about three feet from where they had stopped dancing. He forced her into a car and got in beside her. Defendant continued to hold her arm while they were in the car. He drove to a house several blocks away. He got out of the car and then pulled Conrad out by her arm. He pushed her up the steps, through the door and into a bedroom. He told her to remove her clothes and

when she refused, he pulled them off. She screamed, and he covered her mouth and tried to choke her. He hit her on the face and then bit her face. Defendant had a knife and cut her on the neck, arm and shoulder. He then, with the knife, forced her to submit to intercourse. They had intercourse three times during the night. Each time she refused. Defendant went to sleep. Because she cannot see at night, Conrad decided to wait until morning to leave and went to sleep for a short period. After awakening, she left the house while defendant was still asleep. She went to a nearby house and, through use of a written note, requested the woman there to call a friend to come and get her. When she arrived at the friend's home, she told what had happened, and the rape was reported to the police.

After she reported the rape, Conrad was taken to the emergency room of the North Carolina Baptist Hospital, where she was examined by Dr. Fry. Dr. Fry testified that Conrad had a large bruise in the left maxillary area of her face which, because of its dark purple color, was consistent with being inflicted within the past twenty-four hours. On her left forearm and shoulder area there were several superficial skin lacerations. A pelvic exam revealed injury in the genital area consistent with traumatic and forcible penetration.

Defendant took the stand and admitted having intercourse with the prosecuting witness in the home of a friend but denied that any force was involved. He testified that Conrad voluntarily had sex with him more than once and that they both fell asleep. He also testified that he had to leave the house for a short while in the early morning hours to return a car to his sister. Conrad was still in the bed when he returned and he went back to sleep. When he awoke, she was gone.

Other facts necessary for an understanding of the questions involved on this appeal are noted below.

II.

[1] Defendant first contends that the trial court erred in allowing certain testimony by the medical expert in obstetrics and gynecology who examined Conrad after the alleged rape. After reading to the jury his medical findings, Dr. Richard Fry was asked whether he had an impression or finding from his examina-

tion of the prosecuting witness. He replied, "Yes, this examination would be consistent with a virginal pelvic exam, with evidence of traumatic and forcible penetration, which would be consistent with an alleged rape." Defendant's objection was overruled and he contends that the testimony improperly invaded the province of the jury. We disagree.

Clearly, a medical expert may not testify that the defendant raped the prosecuting witness. It is equally clear that the witness did not do so in this instance. A physician who is properly qualified as an expert may offer an opinion as to whether the victim in a rape prosecution had been penetrated and whether internal injuries had been caused thereby. *State v. Atkinson*, 278 N.C. 168, 176, 179 S.E. 2d 410, 415, *death sentence vacated*, 403 U.S. 948 (1971). Testimony that an examination revealed evidence of traumatic and forcible penetration *consistent with* an alleged rape is a proper expression for an expert witness to establish whether the victim had been penetrated by force. The doctor had previously testified as to injuries found during his examination and the challenged testimony was merely a shorthand statement summarizing those findings. We find nothing improper about this testimony. *See State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980). This assignment of error is overruled.

III.

[2] Upon the reconvening of court on the morning of 4 February 1981, defense counsel, out of the presence of the jury, requested that the trial court make an advance ruling on the admissibility of two questions which he proposed to ask the prosecuting witness: (1) "Are you or are you not a virgin?" and (2) "Are you or are you not on birth control pills?" Defense counsel made this request primarily on the basis of an article in the morning newspaper which implied that Dr. Fry, the examining physician, had testified that the prosecuting witness was a virgin. Defendant contended then and now that Dr. Fry's testimony implied that the prosecuting witness was a virgin and that, since his entire defense was based on consent, the trial court should have allowed him to refute the implications of that testimony. Defendant argues that allowing testimony giving rise to the implication that he had raped a virgin without affording him an opportunity to refute the evidence was extremely prejudicial. The trial court ruled that the

requested questions were irrelevant to any issue in the case. Defendant now concedes that the question concerning birth control pills would have been impermissible under the rape victim shield statute, G.S. § 8-58.6 (1981), but strongly contends that the question concerning the prosecuting witness's virginity should have been allowed and that its denial was prejudicial to him. We disagree.

First, we disagree with defendant that Dr. Fry implied that the prosecuting witness was a virgin. He did testify that, "Her vagina was examined with a Pedersen speculum. And that is an instrument that is small, that is used to examine vaginas that have not—we use the medical term virginal, *but that is not to imply the secular term* . . . . [T]his examination would be consistent with a virginal pelvic exam, with evidence of traumatic and forcible penetration . . . ." (Emphasis added.) We find nothing in the testimony of Dr. Fry which indicates that he considered this victim to be a virgin.

Moreover, the tendered questions were inadmissible under G.S. 8-58.6. That statute provides, in pertinent part, as follows:

> (b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

Clearly, neither of the questions which defense counsel desired to ask the prosecuting witness fall into the exception noted above. "Naked inferences of prior sexual activity by a rape victim with third persons, without more, are irrelevant to the defense of consent in a rape trial. G.S. 8-58.6 merely codifies this rule . . . ." *State v. Fortney*, 301 N.C. 31, 44, 269 S.E. 2d 110, 117 (1980). This assignment of error is overruled.

IV.

[3] Defendant next contends that the trial court erred in allowing the prosecuting witness to testify that she suffered from "night blindness," that the witness Diane Hill was also allowed to testify that the prosecuting witness suffered from "night blindness," and in allowing a medical assistant technician to an opthalmologist to read from the doctor's medical files that the prosecuting witness suffered from "retinitis pigmentosa," commonly referred to as "night blindness." With respect to the testimony of the prosecuting witness and Diane Hill, defendant argues that the testimony was irrelevant and prejudicial, introduced solely for the purpose of eliciting sympathy for the prosecuting witness and to stir up the emotions of the jury against the defendant. He also contends that "night blindness" is a medical term referring to a disease of the eye and that neither the prosecuting witness nor Hill were qualified to give such testimony. Defendant also contends that the introduction of the medical report was incompetent as hearsay testimony. We find no error in the trial court's rulings.

We note first that the testimony was clearly relevant. A review of the entire record discloses that the prosecuting witness had difficulty in identifying the location of the house in which she was attacked and the car in which she was abducted. The challenged testimony was therefore relevant to explain the witness's inability to give a clearer description of the circumstances surrounding the crime. Moreover, the testimony of the prosecuting witness and Hill was not improper despite their lack of medical expertise. Clearly, the prosecuting witness had full knowledge of her own state of health. Hill's testimony was given merely to corroborate that of the prosecuting witness. It is well established that a lay witness may give an opinion concerning the state of a person's health. *Carter v. Bradford*, 257 N.C. 481, 126 S.E. 2d 158 (1962); 1 *Stansbury's North Carolina Evidence* § 129 (Brandis rev. 1973).

The testimony of Maureen Brenna Anderson, medical assistant technician to Dr. Phillip McKinley, was properly admitted. Anderson was allowed to testify, in corroboration of the prosecuting witness, that Dr. McKinley's opthalmological records disclosed that the prosecuting witness had an eye disease called "retinitis pigmentosa," or night blindness. The testimony was properly admitted for the purpose of corroborating the prosecuting witness's testimony. Although the entry in the records was hearsay, it is admissible under the business records exception. In this jurisdiction if business entries are made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they were made, they are admissible as an exception to the hearsay rule. 1 *Stansbury's North Carolina Evidence* § 155. Anderson testified that she is the keeper and has the custody and control of the doctor's medical records, that they are made in the regular course of business and that they are made close to the time of the transaction indicated. She was clearly familiar with the records and the system under which they were made and her testimony was used since Dr. McKinley was on vacation at the time of the trial. The testimony was competent and admissible and this assignment of error is overruled.

V.

Defendant next contends that the court erred in allowing the district attorney to ask a State witness whether she was sitting with the defendant's mother and family in court. This question was asked after the witness had testified without objection that she had come to court with the defendant's family and prior to any substantive testimony. While defendant may be correct in arguing that the question elicited irrelevant information, we can perceive no prejudice to the defendant. This assignment is without merit.

VI.

[4] At the close of the State's evidence, defendant moved to strike all the testimony of the prosecuting witness on the primary ground that it was not understandable. As noted above, Conrad's testimony was presented through the aid of an interpreter utilizing the American sign language. Defendant points to numerous

discrepancies in the prosecuting witness's testimony and is particularly concerned with the testimony of the interpreter, Patricia Lewis, that, "It has been my experience with Enola Conrad in interpreting her signs that she will be talking about one thing completely different from what you are asking about." The trial court's denial of his motion to strike Conrad's testimony constitutes defendant's next assignment of error.

It is well settled in this jurisdiction that any question concerning the competency of a witness is left to the discretion of the trial judge and his decision is not reviewable except for a clear abuse of discretion. 1 *Stansbury's North Carolina Evidence* § 55. Defendant cites us to no North Carolina case regarding the competency of a deaf mute and our research discloses none. The general rule appears to be that deaf and mute persons are not incompetent as witnesses merely because they are deaf and mute if they are able to communicate the facts by a method which their infirmity leaves available to them and are of sufficient mental capacity to observe the matters as to which they will testify and to appreciate the obligation of an oath. 97 C.J.S. *Witnesses* § 61 (1957).

We find no error in the trial court's ruling nor do we find any abuse of discretion. The interpreter was honest in stating to the court and to the jury the difficulty inherent in interpreting the testimony of a deaf mute for a jury. She explained that had she been engaged in conversation with Conrad alone, she would have been able to better relate the questions to her because she would then be free to use more detail to establish a frame of reference necessary for one speaking through sign language. On the other hand, when interpreting before a jury, Lewis explained that, "I try to stay as close as I can to the exact language as the individual that is asking the question." This makes the communication more difficult. However, Lewis added:

> I have determined and seen whether she understood, and if I knew she hadn't understood, I would phrase it so that she would understand close to the question that you have given me, and sometimes you have heard me ask if I could use another word. Each time that I have asked to use another word that permission was given.

It is clear from the interpreter's testimony that she was extremely sensitive both to the severe handicap of the prosecuting

witness and to the necessity for interpretation in language practically identical to that used by the questioner and answerer. We agree with defendant that confusion undoubtedly arose during this lengthy trial conducted through an interpreter using sign language, but such confusion is, we think, inevitable in any circumstances similar to those disclosed by this record. Society has recognized the necessity for a means of communication under such circumstances, and the method employed here was proper in every respect. Indeed, we know of no other practical method by which a trial could be conducted under these circumstances. This Court, like the trial court, is unable to bestow upon the prosecuting witness the ability to hear and to speak. The jury was made aware of the problems of interpreting. Any confusion arising from the use of sign language to communicate with a deaf and mute witness goes to the weight, and not the admissibility, of the evidence. To hold otherwise would allow this defendant and others to commit crimes against persons born deaf and mute with impunity. This assignment of error is overruled.

Defendant next contends that his motion to dismiss at the close of the State's evidence and at the close of all the evidence should have been allowed. He concedes, however, that if we found no error in the trial court's ruling concerning the testimony of Conrad, as discussed in the preceding paragraphs, then the evidence would be sufficient to carry the case to the jury. In light of our ruling above, this assignment of error is also overruled.

VII.

[5] Defendant next contends that the trial court erred in failing to sustain his objections to the question posed to witnesses James Smith, Evonia Smith and Margarine Surles inquiring if they had testified to the same facts at the preliminary hearing. Defendant contends that the trial court first overruled his objection and then instructed the jury to disregard this line of questioning, but that such instructions failed to cure the resulting prejudice. As we understand it, defendant believes his fifth amendment rights were violated because a defendant is never required to offer evidence at a preliminary hearing and allowing the State to comment on the failure of defendant's witnesses to testify at a preliminary hearing places defendant in the predicament of having to decide as early as the hearing whether to put on evidence.

Defendant contends that jurors may believe that a preliminary hearing is a "full fledged trial" such that these same witnesses could have had the charges against him dismissed. Or, defendant contends, jurors might believe that defendant has been found guilty at a preliminary hearing and that the case on trial is merely an appeal.

Defendant's arguments here are completely devoid of merit. First, we think defendant has misread the record of these proceedings. At no point do we find the State asking any of the above witnesses whether they testified to the same matters at the preliminary hearing. The witness James Smith was asked, "did you testify to that matter down there?" He was not asked if his testimony at trial was the same as that at preliminary hearing. Our review of the record discloses that reference to the preliminary hearing arose during the questioning of these witnesses as a result of the State's inquiry as to whether the witnesses had told Officer Moorefield their versions of the alleged incidents. Officer Moorefield was present at the preliminary hearing, as were these witnesses, but did not testify. Each witness responded simply that they had not told Officer Moorefield at that time. We find nothing to indicate that the State was making inquiry of these witnesses as to what their testimony was at a preliminary hearing.

Moreover, had there been any impropriety, it was clearly cured by the trial court's correcting instructions. He instructed the jury as follows:

> Members of the Jury, in response to a question or questions asked by the District Attorney on cross-examination of some of the defendant's witnesses, it was brought out that some of these witnesses were in attendance at the preliminary hearing held in July in the District Court here in the courthouse, and it was further brought out that they did not testify at this preliminary hearing. Now, you are not to consider this evidence for any purpose in this trial; you are to disregard this evidence. A preliminary hearing is not a trial on the merits; it is merely held to determine whether or not there is probable cause to submit the case to the Grand Jury. A defendant is not required to put on evidence any time. Therefore, whether or not a witness testified at a

preliminary hearing is of no importance as far as this trial is concerned, and you shall not consider this evidence for any purpose. It is irrelevant. You shall disregard this evidence.

This instruction is clear and unequivocal and was sufficient to prevent prejudice to the defendant. This assignment of error is overruled.

VIII.

[6] Defendant next contends that the trial court erred in allowing the district attorney to make inquiry concerning a tatoo of the word "sex" on defendant's arm. Defendant argues that such evidence was clearly irrelevant and prejudicial to him. We agree with defendant that the testimony was irrelevant but disagree that any prejudice resulted.

It has long been the rule in this jurisdiction that not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered. Where evidence has been improperly admitted would not, if excluded, have changed the result of the trial, a new trial will not be granted. 1 *Stansbury's North Carolina Evidence* § 9. The burden is on the appellant not only to show error but also to show that there is a reasonable possibility "that, had the error in question not been committed, a different result would have been reached at the trial." G.S. § 15A-1443 (1978).

Here, we do not find any reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. Defendant gave a perfectly understandable explanation of the tatoo. He simply noted that it was something that young men often did in their youth. We cannot imagine that the jury gave any consideration to this testimony in reaching its verdict. Clearly, the matter was decided in the minds of the jurors by their choosing to believe the prosecuting witness's version of the events of that evening and not that of the defendant's. This assignment of error is overruled.

IX.

[7] Defendant finally contends that the trial court erred in allowing the district attorney to cross-examine defendant concerning prior misconduct by defendant. On cross-examination, the district

attorney asked defendant, "did you assault Sandra Richardson with the intent to commit rape?" The defendant answered in the negative.

Defendant's primary contention is that the district attorney violated a pre-trial agreement with his counsel that no questions concerning his record would be asked. Defendant concedes that he has no authority to support his allegation that violation of a pre-trial agreement between defense counsel and the State would constitute grounds for a new trial.

The State contends, and the record tends to support the view, that the district attorney agreed only not to submit the written record before the jury. Merely asking this question, the State contends, does not violate the agreement. From the record before us, we are unable to find any error in the trial court's disposition of this contention. Moreover, it is well settled in this jurisdiction that when a defendant becomes a witness and testifies in his own behalf, he is subject to cross-examination like any other witness, G.S. § 8-54 (1981), and, for purposes of impeachment, he may be cross-examined by the district attorney concerning any specific acts of misconduct which tend to impeach his character. *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979); *State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979). The question here was obviously asked to impeach defendant's character and was properly admitted.

We have carefully examined the record before us and all contentions presented by defendant. We conclude that defendant had a fair trial, free from prejudicial error.

No error.

EXUM, Justice, dissenting.

The factual question upon which defendant's guilt or innocence hangs is whether the prosecuting witness, Enola Conrad, consented to sexual intercourse with defendant. She swore she did not consent. Defendant swore she did. Both offered corroborating testimony. Thus, the case is close on the question of consent.

I believe three errors were committed in the trial; and, because of the closeness of the case, "there is a reasonable possibili-

ty that, had [they] not been committed, a different result would have been reached." G.S. 15A-1443(a). Therefore, I believe defendant is entitled to a new trial.

First, as the majority concluded, it was error to permit the state to show the jury that defendant had the word "sex" tattooed on his arm.

Second, I believe it was error to permit Dr. Fry to testify that, in his opinion, his findings on examining Conrad were "consistent with an alleged rape." It was permissible for the doctor to give his opinion that his findings were consistent with "traumatic and forcible penetration" because these are conclusions which a medical doctor is competent to draw. "Rape," however, is a legal, not a medical, term. Because a physician is incompetent to give legal conclusions, he is, therefore, incompetent to give an opinion as to whether a person has been raped, or whether his medical findings are "consistent" with a rape.

Rape, as a legal concept, includes several elements, only one of which is force. Another is that the sexual intercourse occurred without the consent of the woman. Sexual intercourse can be forcible and traumatic in the medical sense, yet with the consent of the woman. In such a case there is no rape. Medical findings which are consistent with traumatic and forcible intercourse are not *ipso facto* consistent with rape because they are not *ipso facto* consistent with the absence of consent. Whether the woman consented, furthermore, is not a medical question upon which a physician is competent to express an opinion. It is a question upon which only the jury can pass because a physician is in no better position than the jury to have an opinion on the question of consent. The test of admissibility of expert opinion is "whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E. 2d 905 (1978). To permit a physician to opine that his findings are consistent with "rape" is to permit him, improperly, to express an opinion on the question of consent, when he is in no better position to have an opinion than is the jury.

Finally, it was error to permit the district attorney to ask defendant on cross-examination whether he had assaulted "Sandra Richardson with the intent to commit rape." The record on

appeal shows that defendant had been convicted, in the past, of driving under the influence, possession of marijuana, and malicious injury to property. He had been *charged* with assault on Sandra Richardson but the charge had been voluntarily dismissed. Defendant was cross-examined about each incident. For the reasons stated in my dissent in *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979), and *State v. Ross*, 295 N.C. 488, 246 S.E. 2d 780 (1978), it was error to permit the state to cross-examine him about the Sandra Richardson incident.

STATE OF NORTH CAROLINA v. MALCOLM KEITH FEARING, III

No. 27

(Filed 1 December 1981)

1. Criminal Law §§ 73.3, 73.4— statements are part of res gestae—statements showing state of mind

In a prosecution for accessory after the fact to a felony hit and run, statements made by the driver to an officer in defendant's presence concerning the circumstances of the accident, after which defendant told the officer that he had nothing to add to the driver's account and the State at trial produced evidence tending to show that defendant did know about additional events of criminal significance, did not constitute inadmissible hearsay against defendant but were competent (1) as part of the *res gestae*, *i.e.*, the course of events attendant to the investigation of the hit and run, and (2) as evidence of defendant's knowledge and state of mind, *i.e.*, his intent to assist the driver in his efforts to avoid a felony prosecution by rejecting an opportunity to detail other relevant facts which he knew about the accident.

2. Criminal Law §§ 42.1, 43— admissibility of photographs of car and car itself

In a prosecution for accessory after the fact to hit and run driving, photographs of defendant's car were properly admitted to illustrate the testimony of an officer tending to show that the hit and run was committed with defendant's car and that subsequent efforts had been made to conceal this fact at a body shop; furthermore, the damaged car itself was properly admitted as direct real evidence of its wrecked condition as well as to illustrate the officer's testimony.

3. Criminal Law § 53.1— expert testimony as cause of death—hypothetical question not necessary

A pathologist was properly permitted to give an expert opinion on the cause of death based solely upon his personal observations and the factual knowledge he thereby obtained during his actual examination of the body of deceased without testifying in response to a hypothetical question.

4. Automobiles § 131.1— accessory after fact to hit and run driving—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction as an accessory after the fact to felonious hit and run driving.

5. Criminal Law § 91— Speedy Trial Act—delay caused by limited court sessions

G.S. 15A-702 does not exempt counties with limited court sessions from the operation of the time limits stated in G.S. 15A-701; rather, justifiable delay caused by a county's number of court sessions is a period which may be excluded from the required time table of G.S. 15A-701.

6. Criminal Law § 91— delay between indictment and trial—exclusions under Speedy Trial Act

The following periods of time are properly excluded from the 120-day period provided by the Speedy Trial Act: (1) the 23 days consumed by the disposition of the State's motions for a special jury venire from another county are properly excluded pursuant to G.S. 15A-701(b)(1)(d); (2) 102 days elapsing between the court's denial of the State's first motion for a special venire and the next regularly scheduled term of court in the county are properly excluded under G.S. 15A-701(b)(8); (3) 77 days during which a continuance was granted to defendant is properly excluded under G.S. 15A-701(b)(7); and (4) 69 days between the time the trial judge ordered the selection of a special jury venire from another county until the time of trial is excludable under G.S. 15A-701(b)(1)(d). Therefore, a total of 271 of the 336 days elapsing between defendant's indictment and trial are statutorily excluded from the speedy trial computation, and defendant was tried within the 120-day period of G.S. 15A-701(a1).

7. Courts § 9.1; Jury § 2.1— motion for special venire denied—renewed motion allowed by another judge

The trial judge erred in granting the State's renewed motion for a special jury venire from another county after another judge had denied the special venire approximately 6 months earlier.

Justice HUSKINS dissenting in part.

Justice MEYER joins in the dissenting opinion.

Chief Justice BRANCH joins in one portion of the dissenting opinion, and Justice CARLTON joins in another portion of the dissenting opinion.

APPEAL as a matter of right, pursuant to G.S. 7A-30(2), of the decision of the Court of Appeals (*Judge Wells*, with *Judge Robert Martin* concurring, and *Judge Hedrick* dissenting) reported at 50 N.C. App. 475, 274 S.E. 2d 356 (1981), ordering a new trial for defendant upon the judgment of conviction entered by *Brown, Judge*, at the 11 February 1980 Criminal Session of Superior Court, DARE County.

Defendant was charged in an indictment, proper in form, with being an accessory after the fact to a felony hit-and-run caus-

ing the death of Cloise H. Creef, in violation of G.S. 14-7. Upon his plea of not guilty, defendant was tried and convicted as charged. The court thereupon entered judgment imposing an active prison term of one year.

The State's evidence concerning the occurrence of the hit-and-run accident and defendant's participation in a subsequent attempt to cover up Charles Fearing's commission of this felony is adequately summarized in the three prior opinions rendered by the Court of Appeals in this matter. *See State v. Duvall*, 50 N.C. App. 684, 275 S.E. 2d 842 (1981); *State v. (Malcolm) Fearing*, 50 N.C. App. 475, 274 S.E. 2d 356 (1981); *State v. (Charles) Fearing*, 48 N.C. App. 329, 269 S.E. 2d 245 (1980). For purposes of this appeal by the State, it would be unduly repetitious, without being particularly helpful, to restate in detail the facts surrounding this tragic accident. We shall therefore incorporate into the opinion only those facts essential to an understanding of our specific legal conclusions.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White, and McCown & McCown, by Wallace H. McCown, for defendant-appellee.

COPELAND, Justice.

This is one of three cases decided by our Court today which arise out of the same accident in Dare County. *See State v. Charles Fearing*, 304 N.C. 471, 284 S.E. 2d 487 (1981); *State v. Duvall*, 304 N.C. 557, 284 S.E. 2d 495 (1981). The instant case, *State v. Malcolm Fearing*, is before us specifically upon the State's appeal from the Court of Appeals' decision ordering a new trial of defendant for error in the judge's instructions upon the essential elements of a hit-and-run offense under G.S. 20-166. This identical issue, concerning the adequacy of the instructions about the hit-and-run driver's knowledge and intent, has been fully and correctly addressed in the companion opinion of *State v. Charles Fearing, supra*, and, for the reasons there stated by Justice Britt, we affirm the Court of Appeals' award of a new trial upon this

ground without further ado. We thus direct our attention to the other assignments of error, properly raised by defendant, which may recur at his next trial.

I

[1] Defendant contends that the court erroneously admitted the content of a conversation between Trooper J. W. Bonner and Charles Fearing, the driver of the vehicle in the charged hit-and-run accident. Specifically, the trooper testified that Charles Fearing and defendant approached him at the scene of the accident, where the victim's body was found, on 20 February 1979. Charles Fearing told Trooper Bonner that he had "struck something" the night before, while he was driving defendant's car, and showed him a signpost (as an explanation of what he might have hit). Defendant stood within two to three feet of these conversants during their initial dialogue. A short while later, another trooper advised Charles Fearing and defendant of their *Miranda* rights. Charles Fearing, defendant and defendant's father then rode with Trooper Bonner to a body shop to inspect defendant's car. During the ride, Charles Fearing related further the circumstances surrounding his accident on 19 February 1979. When Charles finished his story, the trooper asked defendant "if he had anything else to relate, anything other to add. . . ." Defendant replied that he did not. At trial, however, the State produced evidence tending to show that defendant did know about certain additional events of criminial significance, which Charles had failed to mention, when Trooper Bonner made this inquiry of him.

Under such circumstances, we do not believe that Charles Fearing's conversation with the officer constituted inadmissible hearsay against defendant.[1] These declarations were obviously competent in at least two respects: (1) as part of the *res gestae*, *i.e.*, the course of events attendant to the investigation of the hit-and-run and (2) as evidence of defendant's knowledge and state of mind, *i.e.*, his intent to assist Charles Fearing in his efforts to avoid a felony prosecution by rejecting an opportunity to detail other relevant facts, personally known to him, about the accident to the trooper in a fuller, and hence more truthful, manner. *See* 1 Stansbury's North Carolina Evidence §§ 141, 158 (Brandis rev.

1. Defendant challenges the evidence upon this single ground.

1973); *see also State v. Duvall*, 50 N.C. App. 684, 695-96, 275 S.E. 2d 842, 852, *rev'd on other grounds* (this date), 304 N.C. 557, 284 S.E. 2d 495 (1981).

II

[2] Over defendant's objections, the trial court permitted the State to introduce photographs of defendant's vehicle and the damaged vehicle itself as exhibits at his trial. We find no error herein. First, the record plainly demonstrates that the photographs were admitted to illustrate Trooper Bonner's testimony concerning what he actually observed when he examined the car during his investigation of the accident on 20 February 1979, the day after its occurrence. The trooper affirmed that these photographs "fairly and accurately" depicted his observations of the car on that day. The photographs, thereby sufficiently authenticated, were admissible to portray the witness's statements which tended to show that the hit-and-run was committed with defendant's car and that subsequent efforts had been made to conceal this very fact at the body shop. *See State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971); 1 Stansbury's North Carolina Evidence § 34 (Brandis rev. 1973). Second, the tangible object of defendant's vehicle was also admissible as direct real evidence of its wrecked condition, as well as illustrative evidence of the trooper's testimony. *See* 1 Stansbury, *supra*, §§ 117-18. The officer testified at trial that he had inspected the car again and that it appeared "to be in the same condition today as it was on the 20th of February, 1979 when I examined it." Consequently, we hold that the trial judge correctly admitted these exhibits and that defendant's assignments of error are without merit.

III

[3] Defendant asserts that the State improperly elicited certain expert testimony by failing to propound its questions in a hypothetical form. We disagree. The assignments of error concern the State's direct examination of Dr. Lawrence S. Harris, a forensic pathologist. Defendant did not challenge the witness's medical expertise in that field. Dr. Harris performed the autopsy of the hit-and-run victim and described in detail the physical injuries and condition of the body. The record clearly shows that the State sought and received Dr. Harris's expert medical opinion on the cause of death based solely upon his own personal observa-

tions, and the factual knowledge he thereby obtained, during his actual examination of the body. Under such circumstances, the medical opinion was unquestionably competent, and there was no requirement that it be given only in response to a hypothetical question. *State v. Griffin*, 288 N.C. 437, 443, 219 S.E. 2d 48, 53 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3210, 49 L.Ed. 2d 1210 (1976); *State v. Holton*, 284 N.C. 391, 397, 200 S.E. 2d 612, 616 (1973); *see* 1 Stansbury's North Carolina Evidence § 136, at 446 (Brandis rev. 1973).

IV

[4] Defendant contends that the State did not adduce enough evidence to convict him. We disagree. The State had to prove three things in its prosecution of defendant as an accessory after the fact under G.S. 14-7: (1) the principal (Charles Fearing) committed a felony; (2) the alleged accomplice (defendant) personally aided the principal in his attempts to avoid criminal liability by any means calculated to assist him in doing so; and (3) the accomplice gave such help with knowledge that the principal had committed a felony. *State v. Atkinson*, 298 N.C. 673, 685, 259 S.E. 2d 858, 865 (1979). The State was, of course, required to present substantial evidence of defendant's guilt on each of these essential elements; however, the State was also entitled to have such evidence viewed in the light most favorable to its position, with the benefit of every reasonable inference arising therefrom. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981). The Court of Appeals concluded that the evidence was sufficient to sustain defendant's conviction under G.S. 14-7, *supra*, and overruled defendant's assignment of error. It suffices to say that our independent review of the record discloses ample evidence to support the Court of Appeals' conclusion, and we accordingly affirm its holding upon this point.

V

Defendant assigns as another error, properly presented in this Court, the trial judge's denial of his motion to dismiss pursuant to the Speedy Trial Act.[2] We hold that defendant has not

2. The Court of Appeals failed to address this assignment believing it to be an error "not likely to arise again" at defendant's new trial. Whether a particular defendant is entitled to a dismissal of the charges against him within the purview

shown, on this record, that the timing of his trial violated the provisions of that Act.

[5] Our legal analysis of this issue begins by taking note of the following three things. First, as the speedy trial motion was apparently made and ruled upon orally in open court, we do not have, for our review, the benefit of judicial findings of fact and conclusions of law detailing the basis for its denial. We must therefore rely solely upon the factual circumstances set forth in the record, *infra*, to determine whether the State met its burden in opposing such a dismissal under G.S. 15A-703. *See State v. Edwards*, 49 N.C. App. 426, 271 S.E. 2d 533 (1980), *appeal dismissed*, 301 N.C. 724, 276 S.E. 2d 289 (1981); *State v. Rogers*, 49 N.C. App. 337, 271 S.E. 2d 535, *discretionary review denied*, 301 N.C. 530, 273 S.E. 2d 464 (1980). Second, Dare County is a county which holds a limited number of court sessions. From the time of defendant's indictment in March 1979 until his trial at a special court session in February 1980, there were only six regularly scheduled criminal terms of court in Dare County, such being held on 14 and 21 May, 17 and 24 September, and 3 and 10 December 1979. Third, the time provisions governing this case are found in G.S. 15A-701(a1). In so stating, we expressly reject the State's argument that G.S. 15A-702 applies, due to the limited number of court sessions held in Dare County. By its terms, G.S. 15A-702 only addresses the situation where a defendant *elects* to move for a *prompt trial, after* the applicable time period of G.S. 15A-701 has expired due to the limited terms of court in the county of venue, and there is absolutely no evidence of such a motion here. Consequently, G.S. 15A-702 does not, as the State seems to suggest, exempt counties with fewer court sessions from the operation of the time limits stated in G.S. 15A-701. *See State v. Vaughan*, 51 N.C. App. 408, 276 S.E. 2d 518, *certiorari improvidently allowed*, 304 N.C. 383, 283 S.E. 2d 525 (1981). Rather, justifiable delay caused by a county's number of court sessions is

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of the Speedy Trial Act is *not*, however, a question which is mooted, resolved or properly deferred by an appellate court's award of a new trial to defendant upon another ground. For, if a defendant receives a dismissal under the Act with prejudice, the State is altogether prohibited from further prosecution for the same offense. G.S. 15A-703. On the other hand, even if the case were only subject to dismissal without prejudice under the Act, the State would still be required to commence its case against defendant *anew*, beginning at the indictment stage of the criminal process, in order to re-set the statutory speedy trial time clock.

a period which may be excluded from the required timetable of G.S. 15A-701. *See* G.S. 15A-701(b)(8). Against this legal background, we now proceed to examine the substance of defendant's statutory speedy trial claim.

[6] The pertinent facts are as follows. Defendant was indicted for the charged offense on 12 March 1979. The next criminal sessions of court in Dare County were scheduled for the weeks of 14 and 21 May 1979. On 16 May 1979, the State moved for a special jury venire in the case. Judge Browning took the matter under consideration and, after receiving the affidavits of various witnesses from both sides on the question, subsequently denied the State's motion on 7 June 1979. The next regularly scheduled criminal court session in Dare County was not until 17 September 1979. On 17 September 1979, defendant moved for a continuance until the December court session. Judge Barefoot granted the motion, and the case was set for trial on 3 December 1979. When the case was called for trial on 3 December, the State renewed its motion for a special jury venire and submitted additional supporting affidavits to the court. Judge Brown granted the State's motion on 4 December (despite Judge Browning's prior ruling to the contrary on an identical motion). As part of that order, Judge Brown directed that a special venire of jurors be selected from Perquimans County and set defendant's trial for 11 February 1980 at a special session of Superior Court in Dare County. Defendant thereupon moved for a dismissal contending that his trial would not then begin and be held within the time limits of G.S. 15A-701. Judge Brown denied the motion. Defendant was thereafter brought to trial on 11 February 1980.

In the instant case, the State was obligated to try defendant within 120 days of 12 March 1979, the date of his indictment. G.S. 15A-701(a1)(1). Defendant was not actually tried until 11 February 1980. This total time span of 336 days between indictment and trial is, however, reducible to a large degree according to the following exclusions under G.S. 15A-701(b). First, under G.S. 15A-701(b)(1)(d), the 23 days consumed by the disposition of the State's motions for a special jury venire are properly subtracted from the speedy trial computation. *See State v. Avery*, 302 N.C. 517, 276 S.E. 2d 699 (1981); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). Second, we also conclude that the 102 days, elapsing between the court's denial of the State's first motion for a special

venire in June and the next regularly scheduled term of court in Dare County in September, are also duly subject to exclusion. G.S. 15A-701(b)(8) expressly excludes from the applicable time calculation: "*Any* period of delay occasioned by the venue of the defendant's case being within a county where, due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met." (Emphasis added.) The postponement of defendant's case during the entire summer of 1979 was directly caused by the complete absence of any criminal court in Dare County from June through August. The prosecutor, having no control over this state of circumstances, did all that he could do—calendar defendant's case for trial at the very next court term. Thus, we believe that the summer delay of 102 days in this case constitutes precisely the type of delay envisioned and excluded in G.S. 15A-701(b)(8), *supra*.[3] Third, under G.S. 15A-701(b)(7), another 77 days must also be excluded in this case, as such period represents defendant's continuance during the fall of 1979. *See State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981). Fourth, and finally, we hold that the period of delay occurring after Judge Brown ordered the selection of a special jury venire from another county on 4 December 1979 until the trial on 11 February 1980 is also excludable from the 120-day limitation. G.S. 15A-701(b)(1)(d) does not count "[a]ny period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from . . . [h]earings on pretrial motions or the granting or denial of such motions." It is clear on this record that the additional 69 days expiring before defendant's trial resulted from the granting of the State's pretrial motion for a special venire. Judge Brown's order of 4 December required the selection and transportation of one

3. It should be remembered that a defendant does have a remedy when his trial has been deferred beyond the limits of G.S. 15A-701 due to the unavailability of court sessions in the county of venue. He may move for a prompt trial, in which event, the trial judge may order his trial within 30 days. G.S. 15A-702(a)-(b). Here, defendant could have exercised this protective option any time after 10 July 1979. He did not do so. Instead, he even moved for a continuance on 17 September when he could have legitimately moved for a dismissal under the Speedy Trial Act. Such facts strongly suggest defendant's waiver of his statutory speedy trial rights; however, for our purposes, we need only say that there certainly is no good or sufficient reason here to overcome the straightforward use of the exclusion provided in G.S. 15A-701(b)(8).

hundred special veniremen from another county, some seventy-five miles away. Obviously, the administrative procedures involved therein could not be completed prior to the last term of court in Dare County for 1979 on 10 December. The next available session of criminal court in Dare County was scheduled for 18 February 1980. Judge Brown, however, set an earlier date for defendant's trial by arranging a special term on 11 February 1980. Consequently, in light of the particularized facts of this case and its venue in a county with limited court sessions, we are not persuaded that the final postponement of defendant's trial from December to February constituted an unreasonable or impermissible delay under the Speedy Trial Act.

The sum of the matter is this: of the 336 days elapsing between defendant's indictment and trial, 271 days are statutorily excluded from the speedy trial computation. That being so, it appears that defendant was effectively tried within 65 days of his indictment, well within the 120 day period of G.S. 15A-701(a1). We therefore overrule the assignment of error.

VI.

[7] Defendant finally contends that Judge Brown erred in granting the State's renewed motion for a special jury venire on 4 December 1979 because he thereby effectively and improperly overruled the prior order of Judge Browning denying the special venire on 7 June 1979. The Court of Appeals incorrectly failed to address this assignment although obviously, if Judge Brown acted without judicial right in subjecting defendant to trial by jurors outside his home county (the venue of his case), such error would certainly persist and survive throughout the re-trial of this case. *See also* note 2, *supra.* Indeed, we do find that defendant's contention in this regard has much merit and sustain his assignment of error. We have fully addressed this identical issue, arising upon the very same facts, in our companion opinion of *State v. Duvall,* 304 N.C. 557, 284 S.E. 2d 495 (1981). For the reasons stated therein, we hold that, at this juncture of the case, defendant is entitled to a new trial by Dare County jurors.

VII

In conclusion, we affirm the Court of Appeals' decision awarding defendant a new trial for error in the instructions upon the essential elements of G.S. 20-166. *State v. Charles Fearing,*

304 N.C. 471, 284 S.E. 2d 487 (1981). In addition, we reverse the Court of Appeals' decision in so far as it failed to consider defendant's meritorious assignment of error to the order for a special jury venire and did not grant defendant a new trial by jurors from the county of the case's venue. *State v. Duvall*, 304 N.C. 557, 284 S.E. 2d 495 (1981). There shall be a new trial of the charge against defendant in accordance herewith.

Affirmed in part; reversed in part.

Justice HUSKINS dissenting in part.

For the reasons stated in my dissent in *State v. Charles Silsby Fearing* (Case No. 28, filed this date), I respectfully dissent from that portion of the majority opinion which affirms the decision of the Court of Appeals reported in 50 N.C. App. 475, 274 S.E. 2d 356 (1981), ordering a new trial for error in the judge's instructions upon the essential elements of a hit-and-run offense under G.S. 20-166.

It is my view that G.S. 20-166 requires the driver of a vehicle who knows he has been involved in an accident to stop at the scene regardless of whether he knows he has injured or killed some person. even if the law requires, as the majority of the panel of the Court of Appeals held in this case and as the majority of this Court now holds, that the driver must know not only of his involvement in an accident but also that a person has been injured or killed, the jury charge in this case sufficiently presented such requirement. I therefore vote to uphold the conviction of Malcolm Keith Fearing, III upon the charge of accessory after the fact to a felony hit-and-run causing the death of Cloise H. Creef. To that end, the decision of the Court of Appeals ordering a new trial for Malcolm Keith Fearing, III should be reversed.

I further dissent from Part VI of the majority opinion in this case which holds that Judge Brown had no authority to entertain and act upon the State's renewed motion on 4 December 1979 for a special venire because Judge Browning had previously denied a similar motion on 7 June 1979. The majority inferentially holds that Judge Brown "acted without judicial right" in subjecting defendant to trial by jurors from outside his home county and that defendant is entitled to a new trial by Dare County jurors. It

is my view that Judge Brown was not bound by the interlocutory order of Judge Browning and had authority, in his sound discretion as the trial judge, to order a special venire of jurors from another county if he determined such action was necessary to protect and promote the proper administration of justice.

The additional evidence before Judge Brown, *i.e.*, the affidavits of three state highway patrolmen, one SBI agent, three members of the Kill Devil Hills Police Department and the Chief of Police in Manteo, strengthens the evidentiary showing before Judge Browning and fully justified the action taken by Judge Brown. *See* G.S. 15A-958; G.S. 9-12; *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976); *Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972). The decisions of this Court uniformly hold that a motion for change of venue or a special venire is interlocutory in nature, addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. The majority opinion goes too far and digs up more snakes than it kills. *See* G.S. 15A-958; *State v. Boykin*, supra; *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1976); *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Ray*, 274 N.C. 556, 164 S.E. 2d 457 (1968); *State v. Brown*, 271 N.C. 250, 156 S.E. 2d 272 (1967); *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10 (1967); *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453 (1967); *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341 (1967).

For the reasons stated, I vote to reverse the decision of the Court of Appeals.

I am authorized to say that Justice MEYER joins in this dissent.

Chief Justice BRANCH joins in that portion of this dissent relating to the judge's instructions on hit-and-run under G.S. § 20-166.

Justice CARLTON joins in that portion of this dissent relating to the authority of Judge Brown to order a special venire.

STATE OF NORTH CAROLINA v. DOUG GERALD

No. 33

(Filed 1 December 1981)

1. Constitutional Law § 45— indication of problem with counsel— no requirement of formal hearing

It was not error for the trial judge to fail to conduct a hearing in accordance with G.S. 15A-1242 to determine whether defendant wished to represent himself after defendant stated to the court that he did not want a lawyer. Defendant's exchange with the trial judge indicated that he was confused by the technicalities of the jury voir dire and that he simply wanted to have the court go ahead and get it over with. There was no intimation that he was considering waiving his constitutional right to counsel in conducting his own defense. Had defendant clearly indicated a desire to have counsel removed and proceed *pro se*, then the trial judge should have made further inquiry pursuant to G.S. 15A-1242.

2. Criminal Law § 112.7— insanity defense—instructions proper

Defendant's contention that the trial court's references to the defense of insanity during the instructions to the jury on the elements of second degree murder and voluntary manslaughter were prejudicially complicated was without merit. The court properly charged the jury on the defense of insanity as a separate issue for their consideration and correctly charged as to the defendant's burden in proving the affirmative defense of insanity and the State's burden of proof concerning the offenses charged.

3. Homicide § 30.3— failure to instruct on involuntary manslaughter proper

Defendant's statement that he thought the victim was reaching under the seat of a truck for a gun and "then the gun went off," when taken in context with his other testimony, including a statement that "when I pulled the trigger on the shotgun, he went down," and when taken in context with a written statement to the police on the night of the shooting in which defendant admitted that he pulled the trigger and shot the victim in the head, was insufficient evidence to raise an inference that the shooting was unintentional. Therefore, it was not error for the trial court to fail to instruct the jury on the offense of involuntary manslaughter.

4. Criminal Law § 6— failure to charge on defense of voluntary intoxication proper

In a prosecution for second degree murder, defendant's evidence that on the evening of the shooting he drank a cup of rum and two cups of wine, that he usually did not drink because his doctor had told him, after an operation on his head, not to drink any liquor because it affects his mind, that one witness testified his mind was "coming and going," and that he heard "all kinds of things, noise" and "flipped out" was insufficient evidence of intoxication to require the trial judge to instruct the jury on the defense of voluntary intoxication.

State v. Gerald

APPEAL by defendant from judgments of *Battle, J.*, entered at the 1 December 1980 Criminal Session of ROBESON Superior Court.

Upon pleas of not guilty, defendant was tried on bills of indictment charging him with first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury. At trial, the state announced that in the murder case it would seek no greater verdict than second-degree murder.

The state presented evidence tending to show:

On the afternoon of 20 June 1980, a number of persons were gathered at the home of Mary Magdalen McLean, located in the Barker-Ten Mile area near Lumberton, for the purpose of socializing and drinking beer. Among the friends and relatives present were defendant, Doug Gerald, and his girlfriend, Billy Jean Locklear. During the course of that afternoon and evening defendant quarrelled with several persons, and scuffled with Ms. McLean's cousin, a soldier from New Jersey; someone intervened, however, and no blows were exchanged. After this, defendant decided to go home but Billy Jean refused to return with him. Defendant began "fussing" at her and Marvin Snow told him to leave her alone. Defendant told Snow to mind his own business, then announced that he was going home to get his gun and would be back.

Defendant had been drinking that afternoon. His own testimony disclosed that he had drunk some rum and two cupfuls of wine and sweet soda. However, there was no evidence that defendant was drunk and several persons testified to that effect.

After defendant left to get his gun, the rest of the group, sensing trouble, decided to leave and go to Ernest McLean's house. They all, except Snow, left in one car and he was to follow in his pickup truck.

As Snow was climbing into his truck, Pam Bennett drove up and walked over to chat with him. At this point defendant returned carrying a shotgun. Defendant approached Snow, who was sitting in the truck, and said "Didn't I tell you to leave earlier?" Snow said nothing. As he spoke defendant raised the shotgun. He shot Snow with the barrel of the gun only a foot and half from Snow's head. The deceased's brains were literally blown

out and he died instantly. Pam Bennett, who had been standing on the other side of the truck, was the only eyewitness. When defendant shot Snow, she ran across the street to a neighboring house for help. Defendant followed. As Ms. Bennett reached the porch and began knocking on the door, she turned and saw defendant coming toward her. She begged him not to shoot her. When he was about eight feet away, she turned and started to run toward a tobacco field. Defendant fired the shotgun, hitting her in her back and arm. Ms. Bennett was hospitalized for almost two weeks as a result of her injuries.

After shooting Ms. Bennett, defendant left the scene. He was arrested three hours later walking down a road with the shotgun over his shoulder.

At the scene of the arrest, after being advised of his *Miranda* rights, defendant told police that he figured Snow was dead because he meant to blow his brains out, but that he really didn't know why he shot the girl. Shortly thereafter, in a written statement taken at the sheriff's department, defendant stated: "I am not drunk . . . I knew what I was doing then and I know what I'm doing now. I'm not sorry for killing Marvin Snow. I'm sorry I shot the girl. I hate I missed getting Elizah and I hate I missed getting the soldier dude for pushing me."

Defendant presented evidence tending to show:

In 1969 defendant received a head injury in an automobile accident and had suffered with mental illness since then. Both his sister and mother testified with respect to his mental problems. They stated he had been hospitalized because of them several times, and that sometimes he would act strange and "talk frenzies."

On the night of 20 June 1980 he had quarrelled with several persons at the party and had a fight with a soldier. His mind at that time was "coming and going." Defendant also disputed the written statement he had given the police.

The jury returned guilty verdicts on both charges. Defendant was sentenced to life imprisonment on the second-degree murder conviction and 15 to 20 years on the assault conviction, sentences to run concurrently.

Defendant appealed from both judgments. Pursuant to G.S. 7A-31(a) we allowed defendant's motion to bypass the Court of Appeals in the assault with intent to kill case.

Attorney General Rufus L. Edmisten, by Associate Attorney Elaine J. Guth, for the state.

Adam Stein, Appellate Defender, and Marc D. Towler, Assistant Appellate Defender, for the defendant.

BRITT, Justice.

[1] By his first assignment of error, defendant contends that the trial judge erred in failing to conduct a hearing to determine whether defendant wished to represent himself after defendant stated to the court that he did not want a lawyer.

This alleged error arose out of an incident that occurred during jury selection in which defendant spontaneously began to address the court. The trial judge immediately dismissed the prospective jurors from the courtroom and proceeded to inquire as to what was troubling defendant. The following exchange ensued.

> DEFENDANT GERALD: Your Honor, sir, excuse me, sir. I don't mean no harm. I try to give respect to everyone in the Courthouse.
>
> Judge, Your Honor, sir, I don't know what's happening, but I would like to say this much, Judge, Your Honor—
>
> THE COURT: Well, this is not the time for that. I will listen to what you want to say in just a little while.
>
> MR. WEBSTER: Could Mr. Chavis and I approach the Bench, Your Honor?
>
> THE COURT: Yes, Just sit down a little while.
>
> (Discussion at Bench between Court and Counsel.)
>
> THE COURT: All right. Members of the Jury, I'm going to ask you to step back in to the jury room for just a moment, please. Right back here.
>
> And, Members of the Jury, out in the audience, I'm going to have to ask you to step out in the hall for just a moment, please. The Sheriff will let you know when to come back in.

(The following was had outside the presence of all jurors.)

THE COURT: All right. Mr. Gerald, what is it you wanted to say?

DEFENDANT GERALD: Sir, I don't mean no harm, sir.

THE COURT: Right.

DEFENDANT GERALD: Lots of times, I don't even know what I'm doing or saying, but, sir, I don't even want no more lawyer. I don't want no lawyer. I don't need no lawyer. I just rather for it to be like it is. I rather it be like it is. The Jury come on in and whatever, or whatever, and then in the jailhouse, it's running me crazy, sir. I don't know, but I rather for it to be like it is. I don't want no lawyer.

THE COURT: Well, you understand that right now we are just in the process of picking a jury, and your lawyer is doing the best he can.

DEFENDANT GERALD: Sir, it's running me crazy in here, sir. It's running me crazy, making me dizzy and drunk in the head.

THE COURT: What is?

DEFENDANT GERALD: Sitting in here waiting and worrying.

THE COURT: Well, I can appreciate the waiting and worrying, but we are now getting started in the trial, and it will be over pretty soon, now.

Any particular reason why you say you don't want a lawyer?

DEFENDANT GERALD: Sir, I have all kind hallucinations in my head.

THE COURT: What kind of —

DEFENDANT GERALD: My mind all fill up with Jesus Christ and all of the hallucinations in my mind. I don't want no lawyer. I just rather do what you going to do, and do whatever —

THE COURT: Well, Mr. Chavis has been appointed to represent you, and has been representing you for some time, and I'm sure he'll do a good job for you, and certainly, I believe you would be much better off having a lawyer, so don't you think we ought to just go ahead and proceed with the trial as we are?

DEFENDANT GERALD: Sir, I don't know what to think. I don't understand. I'm trying to understand the lawyer and what he's saying, but I don't even understand what he's talking about. All the people over there, while ago, all that, then he took them down. Might as well get it over with.

THE COURT: Well, we are just about to do that. See, he has a right to excuse as many as six jurors, just as the lawyer for the State does, so he's just trying to get a jury that he thinks would be the best for you. He's trying to look after you.

You understand that, don't you?

DEFENDANT GERALD: I believe I do, sir.

THE COURT: All right. You ready to go ahead? You want us to go ahead, now, with the trial?

DEFENDANT GERALD: Yes, sir. Yes, sir.

THE COURT: All right. Bring the jury back in.

DEFENDANT'S EXCEPTION NO. 1

A criminal defendant has a constitutional right to the assistance of competent counsel in his defense. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Implicit in defendant's constitutional right to counsel is the right to refuse the assistance of counsel and conduct his own defense. *Faretta v. California*, 422 U.S. 806 (1975). In its decisions both prior to and after *Faretta*, this court has held that counsel may not be forced on an unwilling defendant. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980); *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965).

Defendant asserts that the statements he made to the trial court constituted an unequivocal assertion that he wished to represent himself; and that in order to safeguard his constitu-

tional right to proceed *pro se* it was mandatory that the trial court advise him that he had the right to represent himself and to ascertain whether he desired to do so by following the procedures outlined in G.S. 15A-1242.

G.S. 15A-1242[1] sets forth the prerequisites necessary before a defendant may waive his right to counsel and elect to represent himself at trial. Defendant insists that decisions of this court support his arguments for a mandatory formal inquiry. We do not agree.

In *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976), defendant sought to have his appointed counsel dismissed and two black attorneys appointed to replace him. He never requested that he be allowed to represent himself. Defendant's motion was denied. We found no error but stated that "It would have been the better practice to have excused the jury and allowed the defendant to state his reasons for desiring other counsel. If no good reason was shown requiring the removal of counsel, then the court should have determined whether defendant actually desired to conduct his own defense." 291 N.C. at 372. In *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977), defendant assigned as error the trial court's denial of his motion to dismiss his court appointed attorney. Referring to Sweezy, *supra*, the court said: "Since there was no intimation that defendant Sweezy wished to represent himself, but only that he wanted 'two black lawyers,' and since '[d]efendant's courtroom behavior gave the trial judge every right "to suspect the bona fides of the defendant",' *Id.* at 373, 230 S.E. 2d at 529, there was no reversible error in the court's failure to follow the recommended procedure." 292 N.C. at 280. The court in *Gray* found no error, and commented that there was "not a scintilla of evidence" that defendant wished to represent himself. 292 N.C. at 281.

1. *Defendant's election to represent himself at trial.* — A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision, and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

In *State v. Cole*, 293 N.C. 328, 237 S.E. 2d 814 (1977), defendant's motion to dismiss court appointed counsel was denied and the trial judge consequently refused to replace defendant's counsel. Defendant contended that the trial court erred in failing to advise him of his right to conduct his own defense before denying the motion. The court found that at no time had the defendant indicated a desire to represent himself, therefore, there was no merit to his assignment of error. The court did reiterate, however, that it is the better practice for the court to inquire of defendant whether he wishes to conduct his own defense.

These holdings clearly indicate that although the better practice when a defendant indicates problems with his counsel is for the court to inquire whether defendant wishes to conduct his own defense, it is not reversible error for the court not to do so when there has been no intimation that defendant desired to represent himself. Each case, therefore, must be considered on its own merits.

In the present case the record shows that defendant was 26 years old with the equivalent of a third grade reading and comprehension level and an I.Q. of 65; that he functions within a range of mild mental retardation; and that he has a history of mental illness which includes auditory hallucinations. The reasonable interpretation of defendant's exchange with the trial judge is that he was confused by the technicalities of the jury voir dire, that he knew he was being tried for murder and the waiting in the jail and courtroom was making him dizzy with worry. It appears that he simply wanted to have the court go ahead and get it over with. There was no intimation, and it is beyond reasonable belief, that this defendant was in any way considering waiving his constitutional right to counsel and conducting his own defense.

It is true that the issue is not whether the defendant has the skill and training to represent himself adequately but whether the defendant is able to understand the consequences of waiving court appointed counsel and representing himself. *Faretta v. California, supra; State v. Brooks*, 49 N.C. App. 14, 270 S.E. 2d 592 (1980). "[T]he waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he

understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will. (Citation omitted.)" 301 N.C. at 354.

It is overwhelmingly apparent on the facts of this case that defendant could not have been allowed to take over his own defense, nor had he knowingly and intelligently indicated a desire to do so. Nevertheless, defendant would have us adopt the requirement of a formal hearing in accordance with G.S. 15A-1242 whenever a defendant indicates to the trial court a problem with his counsel. We decline to adopt such a stringent standard. When defendant expresses to the trial court that there is a problem with his counsel, the trial court should conduct an inquiry out of the presence of the jury to determine the nature of the problem. The extent of the inquiry should be as necessitated by the circumstances. If defendant clearly indicates a desire to have counsel removed and proceed *pro se*, then the trial judge should make further inquiry; he should advise defendant of his right to represent himself, and determine whether defendant understands the consequences of his decision and voluntarily and intelligently wishes to waive his rights. We have held and reaffirm that an inquiry conducted pursuant to G.S. 15A-1242 fully satisfies the constitutional requirement that waiver of counsel must be knowing and voluntary. *State v. Thacker, supra.*

In the case at bar the trial judge did make an inquiry, out of the presence of the jury, to determine the nature of defendant's problem. He then proceeded to assuage defendant's anxiety and reassure him that his counsel was representing him well. On the facts of this case, no further inquiry was necessary. None of the factors that would trigger a hearing in accord with G.S. 15A-1242 were present. Defendant's assignment, therefore, is without merit.

[2] Defendant's second assignment of error concerns the trial court's references to the defense of insanity during the instructions to the jury on the elements of second-degree murder and voluntary manslaughter. He contends that such references prejudicially complicated the instructions and confused the jury as to the state's burden of proof on the elements, in violation of defendant's due process rights. This assignment has no merit.

The rule in North Carolina is that insanity is an affirmative defense and, therefore, the burden of proving insanity is on the defendant. The burden of proof on a defendant is that he must establish his insanity at the time of the alleged crime to the satisfaction of the jury. *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976).

In the case at bar, the court in its general instructions properly charged the jury on the defense of insanity as a separate issue for jury consideration. The court correctly charged that insanity was a complete defense and that defendant had the burden of proving to the jury's satisfaction that he was insane at the time of the shootings. The court also firmly impressed on the jurors that the state's burden of proof was to prove every element of the offense charged beyond a reasonable doubt. The court made clear the distinction between the state's burden of proof on the elements and defendant's burden of proof on the affirmative defense of insanity.

[3] By his next assignment of error, defendant contends that the trial court erred by failing to instruct the jury on the lesser included offense of involuntary manslaughter.[2] This assignment has no merit.

It is well-established that a trial court must instruct on a lesser included offense of the crime charged where there is evidence from which the jury could infer that the defendant had committed the lesser offense. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). However, when all the evidence tends to show that defendant committed the crime charged and did not commit a lesser included offense, the court is correct in refusing to charge on the lesser included offense. *State v. Redfern, supra; State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971).

Involuntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation and without the intent to kill or inflict bodily injury. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971).

2. The court submitted the murder charge on second-degree murder, voluntary manslaughter or not guilty.

The evidence which defendant contends supports an inference of involuntary manslaughter is his own in-court testimony that he thought Snow was reaching under the seat of the truck for a gun and "then the gun went off." Nowhere else in the record is there any evidence that would suggest that the shooting was accidental. In fact, later in his testimony, defendant made several statements which totally negate any inference that the shooting was unintentional. One of these statements was, "When I pulled the trigger on the shotgun, he went down . . . ." Defendant also gave a written statement to police on the night of the shooting, that was duly admitted into evidence, in which defendant admitted that he pulled the trigger and shot Snow in the head, and that he was not sorry for killing him.

We find that defendant's statement "then the gun went off" was insufficient evidence to raise an inference that the shooting was unintentional, especially when taken in context with the rest of his testimony. Defendant's assignment of error is therefore overruled.

[4] By his last assignment of error defendant contends that the trial court failed to instruct the jury on the defense of voluntary intoxication as a defense to the charge of assault with a deadly weapon with intent to kill inflicting serious bodily injury. This assignment is without merit.

Voluntary intoxication is not a legal excuse for a criminal act; however, it may be sufficient in degree to prevent and therefore disprove the existence of a specific intent such as an intent to kill. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). 4 Strong's N.C. Index, § 6. To make the defense of voluntary intoxication available to defendant, the evidence must show that at the time of the shooting the defendant's mind and reason were so completely intoxicated and overthrown that he could not form a specific intent to kill. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Cureton*, 218 N.C. 491, 11 S.E. 2d 469 (1940). In the absence of evidence of intoxication to a degree precluding the ability to form a specific intent to kill, the court is not required to charge the jury thereon. *State v. McLaughlin, supra.*

In the case at bar there was ample evidence that defendant had been drinking, but not to an extent that he was intoxicated or unable to reason. Ernest McLean, Jr. testified:

"We all drank a little beer and a little vodka. Douglas was drinking at the time but he hadn't had that much. He wasn't drunk."

Mary Magdalen McLean testified:

"I saw Doug Gerald drinking a little liquor but not much and some beer. He was drinking from a little cup."

Deputy Sheriff Sanderson testified:

"I could smell an odor of alcohol about Mr. Gerald's person. He was coherent and understood me. I asked him if he understood what I was saying. We also asked him how much he had had to drink, to which he responded that he had had two or three beers. He did not appear to be intoxicated at the time."

Detective Maynor testified:

"I could detect an odor of alcohol about the person of Lawrence Gerald. He walked and talked in a normal manner and in my opinion was definitely not drunk. He did not stagger and when he spoke his words were clear and sharp."

Defendant testified that on the evening of the shootings he drank a cup of rum and two cups of wine and sweet soda. He stated that he usually did not drink because his doctor had told him, after an operation on his head, not to drink any liquor because it affects his mind.

Defendant contends that this evidence, combined with evidence that on the evening in question after his arguments at Mary McLean's his mind was "coming and going", and that when he was leaving to go home he heard "all kinds of things, noise" and "flipped out", was sufficient evidence of intoxication to require the trial judge to instruct the jury on the defense of voluntary intoxication.

We do not agree. Defendant's evidence on his mental state was more appropriately relevant to the defense of insanity, on which the trial judge cautiously and thoroughly instructed the jury. The evidence in this case does not support a finding that defendant was intoxicated and the trial court did not err in failing to charge on the defense of voluntary intoxication.

We conclude that defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOHN RAY MURVIN

No. 13

(Filed 1 December 1981)

1. Criminal Law § 46.1— evidence of defendant's flight—competent

Evidence of flight of an accused may be admitted as some evidence of guilt. Therefore, where the evidence showed defendant told a witness of his participation in the crimes and requested that she lie for him, and that defendant's brother drove defendant to Richmond, Virginia where defendant directed a witness to purchase a ticket for him to Montreal, Canada, this evidence was sufficient to support an inference that defendant was fleeing to escape arrest and was competent on the issue of defendant's guilt. Further, the trial court did not err in allowing a witness to testify as to the reason for defendant's departure as the trial court instructed the witness to answer only if she knew, and her answer was positive and unequivocal.

2. Criminal Law § 73.4— hearsay statement—part of the res gestae

In a prosecution for first degree murder, the trial court did not err in allowing the witness to testify as part of the *res gestae* on direct examination that his son returned to the car and told him that defendant "had the guard on the floor." The statement was made immediately after the victim, the guard, was forced to lie on the floor, was clearly spontaneous, was relevant to the fact and issue, and was admissible despite its hearsay character as a spontaneous utterance.

3. Criminal Law § 82.1— witness's affidavit—no attorney-client privilege—error in failing to admit not prejudicial

The court erred in concluding that an affidavit which a witness executed was within the scope of the attorney-client privilege as an aunt and a friend were present when she made the statement to her attorney and the affidavit did not relate to a matter for which she was professionally consulting her attorney. However, the burden was on the defendant to show that he was prejudiced by the court's error, and he failed to show prejudice resulting from the exclusion of this testimony.

4. Criminal Law § 26; Homicide § 31— armed robbery not basis for felony-murder—punishment for armed robbery and murder

Imposition of punishment for an armed robbery conviction was entirely proper where the first degree murder conviction under the felony murder rule

was premised on the underlying felony of breaking or entering and felonious larceny, and the armed robbery conviction, because it was not submitted as an underlying felony, was neither an essential nor an indispensable element of the State's proof of murder and was not a lesser included offense of murder.

BEFORE *Stevens, Judge,* at the 1 December 1980 Criminal Session of Superior Court, NEW HANOVER County.

Defendant was tried by a jury and convicted of first degree murder, felonious breaking or entering, felonious larceny, and armed robbery. He was sentenced to life imprisonment for the first degree murder conviction and thirty years for the armed robbery conviction, to run consecutively with the life sentence. Defendant appealed his life sentence to this Court as a matter of right. We allowed his motion to bypass the Court of Appeals on the armed robbery conviction on 18 June 1981.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

John Richard Newton for the defendant.

CARLTON, Justice.

I.

Evidence for the State tended to show that the body of Walter J. Powers, the night guard, was found in the shop area of Almont Shipping Company in Wilmington several minutes before 7:00 a.m. on 5 January 1976. His body was lying facedown on the floor in a pool of blood. He had been shot several times in the head and back with a small caliber weapon. An inspection of the area revealed that a large window in the rear of the shop had been broken, apparently from the outside. A large bay door on the south side of the building had been pried open from the inside. Powers' body was located not far from the bay door. Several tool boxes were broken open, and some of the drawers were empty. The missing tools were owned by employees of Almont, and the value of the tools stolen from two of Almont's employees exceeded $1,000. None of the tools or pieces of equipment owned by Almont were missing.

Powers, the deceased, always carried a .38 revolver with what appeared to be pearl grips with him while on duty at Al-

mont, and he usually carried a wallet. Neither the revolver nor a wallet were found on his body. Although the time of his death could not be pinpointed, the time clock tape showed that the deceased had completed his first round between midnight and 1:00 a.m. on 5 January 1976. The cause of death was determined to be multiple small caliber bullet wounds to the left temple.

Linda Sue Albertson testified that she was living with defendant at the time of the Almont break-in. She heard defendant discuss with James H. Brown, Sr., and James H. Brown, Jr., around 6:00 or 7:00 p.m. in December or January of 1975 or 1976 "how to get tools out of big tool boxes" at Almont Shipping Company. This conversation took place before the guard was killed at Almont. The Browns did some of the talking. Brown, Jr., described where Almont was and how they could get in, and, having previously worked as a guard at Almont, he described how the guard made his rounds.

According to Ms. Albertson, defendant was at home with her on 4 January 1975 until early in the evening. He left by himself and did not say where he was going. He returned to their trailer at approximately 5:00 or 6:00 a.m. on 5 January 1976. With him he had two guns: a small brown pistol, which Ms. Albertson guessed was a .22 caliber, and a larger caliber silver- or chrome-plated pistol with tan or white handles. At that time, defendant had been carrying a pistol in his car for about two months. Defendant told Ms. Albertson "that it was better for her not to know" where he had obtained the silver gun. Defendant stayed at the trailer until the early afternoon.

That evening, on the news, Ms. Albertson heard about the incident at the Almont Shipping Company. She told defendant's brother that she had overheard the break-in being planned. When defendant returned home, Ms. Albertson asked him why he had left the guard in a puddle of blood. Defendant replied, "What did you expect me to do, clean the damn mess up?" Later that evening defendant told her that he had been in a little stall which was the storage compartment in the Almont maintenance shop with his back to the door when he heard footsteps. He turned, and the guard was behind him. The guard had his gun drawn on defendant and defendant had his gun drawn on the guard. At that moment, the younger Brown walked up behind the guard and

stuck his gun in the guard's back. Defendant made the guard lie down on the floor, and he shot him twice in the head and four times in the body.

Four days later, on 9 January 1976, Ms. Albertson and defendant went to Richmond, Virginia, where she purchased a plane ticket to Montreal, Canada, in his name. Ms. Albertson saw defendant go through the boarding gate. She testified that he was leaving North Carolina so he wouldn't get caught. He told her that if the police came looking for him, she should say that he had been at home when the guard was killed.

James H. Brown, Sr., a co-defendant in the case, testified under a grant of immunity from the State. According to this witness, he, defendant, and James H. Brown, Jr., his son, went to Almont Shipping Company on 5 January 1976. He parked the car close by. Defendant and his son went into the Almont building while he waited in the car. His son returned about twenty to thirty minutes later with a bag of tools. Shortly thereafter, defendant returned to the car carrying his own pistol, a .22, and a .38 caliber nickel-plated pistol with pearl or ivory handles. Defendant stated to him, "I had to shoot him, to shoot the guard. He could identify me." Later, defendant and the elder Brown disposed of the tools by throwing them into the ocean.

Defendant took the stand in his own behalf and denied any participation in the crimes or any knowledge of the location of Almont Shipping Company. The defendant also presented the testimony of two alibi witnesses who stated that defendant was with them during the early morning hours of 5 January 1976.

The trial court submitted the case to the jury on the charges of felony murder, felonious breaking or entering, felonious larceny and armed robbery. The jury was instructed that in order to find defendant guilty of first degree murder, it must first find him guilty of felonious breaking or entering and felonious larceny. The jury returned verdicts of guilty as charged. The trial judge arrested judgment for breaking or entering and larceny and sentenced defendant to life imprisonment for murder and thirty years for armed robbery. The armed robbery sentence was to run consecutively with the life sentence. From those sentences defendant appeals.

II.

[1] Defendant first contends that the trial court erred in allowing Linda Sue Albertson to testify about his trip to Montreal, Canada, four days after the incident at the Almont Shipping Company and to state why he left North Carolina for Canada. He contends that Ms. Albertson's own testimony shows that she did not know his reason for leaving and, absent that, the evidence merely raises a conjecture of flight.

It is well established in this State that evidence of flight of an accused may be admitted as some evidence of guilt. Justice (now Chief Justice) Branch stated the rule in *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E. 2d 697, 698 (1973):

> The rule in North Carolina is that flight of an accused may be admitted as some evidence of guilt. However, such evidence does not create a presumption of guilt, but may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt. Proof of flight, standing alone, is not sufficient to amount to an admission of guilt. An accused may explain admitted evidence of flight by showing other reasons for his departure or that there, in fact, had been no departure.

Moreover, that a defendant does not flee for several days after the commission of the crime goes only to the weight of the evidence and not its admissibility. *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972).

These rules fully support the trial judge's action in allowing testimony concerning defendant's flight from Wilmington. Defendant told Ms. Albertson of his participation in the crimes and requested that she lie for him if questioned by the police. Four days after the crimes were committed, defendant's brother drove defendant to Richmond, Virginia, where defendant directed Ms. Albertson to purchase a ticket for him to Montreal, Canada. Clearly this evidence is sufficient to support an inference that defendant was fleeing to escape arrest and is competent on the issue of defendant's guilt. The trial court did not err in allowing the testimony of defendant's flight to be considered along with other circumstances by the jury in deciding defendant's guilt or innocence.

Defendant further contends, however, that the trial court erred in allowing Ms. Albertson to testify as to the reason for defendant's departure. At one point, when asked if she knew why he was going to Canada, Ms. Albertson stated, "I sort of guessed it." She then testified that defendant left North Carolina so he would not be caught. Defendant contends that the record shows that Ms. Albertson's testimony was based on mere conjecture and was improperly admitted. We disagree. Upon being asked again why defendant went to Canada, the trial court instructed that Ms. Albertson could answer only if she knew. Her answer was positive and unequivocal, "To leave North Carolina so he couldn't be caught." Moreover, in response to the question whether defendant had ever told her why he wanted to leave North Carolina, Ms. Albertson testified without objection, "Just other than he shot the guard." Finally, defendant was allowed to testify that his leaving North Carolina had no connection with the charge against him and that he was leaving to get away from Ms. Albertson because she had been "running around on him." The jury, therefore, had before it his testimony giving reason for his departure from the state and could decide whether defendant's trip to Canada was, in fact, taken to avoid arrest.

Clearly, this evidence, taken as a whole, tends to show that defendant fled the State following commission of the crimes charged in order to avoid arrest and prosecution and, as such, was competent on the issue of his guilt. The challenged testimony was properly admitted, and these assignments are without merit.

III.

[2] Defendant next contends that the trial court erred in allowing James H. Brown, Sr., to testify on direct examination that his son returned to the car and told him that defendant "had the guard on the floor." The trial court overruled defendant's objection, stating that the testimony was part of the *res gestae*. Defendant contends that the testimony was hearsay which does not fall within any exception to the hearsay rule. We agree with the trial court and find that the statement was properly admitted.

Evidence is hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness who is testifying. 1 Stansbury, *North Carolina Evidence* § 138, at 458 (Brandis rev. 1973). "The

inherent vice of hearsay testimony consists in the fact that it derives its value not from the credibility of the witness himself, but depends upon the veracity and credibility of some other person from whom the witness got his information." *State v. Lassiter*, 191 N.C. 210, 212, 131 S.E. 577, 579 (1926). Hearsay evidence is inadmissible unless it falls within one of the recognized exceptions to the hearsay rule. 1 Stansbury, *supra* at § 138.

Here, the witness's testimony was clearly hearsay. Its probative value depended on the competency and credibility of a person other than the witness testifying. Indeed, the person to whom the statement was attributed was not present at trial. The propriety of the trial court's ruling, therefore, depends upon whether the testimony in question falls within one of the recognized exceptions to the hearsay rule. In our opinion, the hearsay testimony was a part of the *res gestae* and therefore was properly admitted.

While difficult to define, the so-called *res gestae* principle generally applies to those situations in which "words accompany and are connected with non-verbal conduct or external events and carries the general idea of something said while something is happening or is being done." 1 Stansbury, *supra* at § 158; *accord, State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1976). One component of the theory generally referred to as *res gestae* is the spontaneous utterance. A spontaneous utterance is a statement or exclamation of a participant or an observer concerning an unusual or startling event made in response to the stimulus of the event and without time for reflection or fabrication. 1 Stansbury, *supra* at § 164. The rationale for the admissibility of such a statement is that its trustworthiness is guaranteed by the immediacy of the response to an unusual event. When a statement is made under those circumstances, it is unlikely that the declarant fabricated its substance. The trustworthiness of such a statement lies in the excitement of the event and the immediacy of the response.

This Court has long recognized the spontaneous or excited utterance exception to the hearsay rule under the generic term *res gestae* and has established criteria for admission of such statements: (1) the declaration must be of such spontaneous character as to preclude the likelihood of reflection or fabrication, (2) it must be made contemporaneously with the transaction or so closely connected with the event as to be practically inseparable,

and (3) it must have some relevance to the facts sought to be proved. *Hargett v. Jefferson Standard Insurance Co.*, 258 N.C. 10, 128 S.E. 2d 26 (1962); *Little v. Power Brake Co.*, 255 N.C. 451, 121 S.E. 2d 889 (1961); *Coley v. Phillips*, 224 N.C. 618, 31 S.E. 2d 757 (1944); 1 Stansbury, *supra* at § 164.

In the case *sub judice* the statement sought to be introduced, that defendant had the guard on the floor, was made by a participant in the robbery as he was carrying the stolen tools to the getaway vehicle to his accomplice. This statement was made immediately after the guard was forced to lie on the floor, was clearly spontaneous, and is relevant to the facts in issue. As such, it is a spontaneous utterance and is admissible despite its hearsay character, and the trial court properly admitted it into evidence. This assignment of error is overruled.

IV.

[3] On cross-examination of State witness Linda Sue Albertson, counsel for defendant asked about statements contained in an affidavit which Ms. Albertson had executed before her attorney. The State objected and the trial judge conducted a *voir dire*. He concluded that the affidavit was a communication which came within the scope of the attorney-client privilege and sustained the State's objection. Judge Stevens also ruled that the attorney before whom Ms. Albertson made the statement would not be allowed to testify about the affidavit. Defendant contends that the affidavit was not a privileged communication and that the trial judge erred in refusing to allow defense counsel to question Ms. Albertson about statements contained therein.

Ms. Albertson executed the affidavit on 13 May 1980 in her attorney's office. At the time of its making, she had employed the attorney to represent her in a criminal matter unrelated to the present case, and an attorney-client relationship existed. The statements contained in the affidavit were made in the presence of Ms. Albertson's attorney, her aunt and a friend. Essentially, the affidavit states that Ms. Albertson had been questioned by law enforcement officers during February of 1980 about the Almont incident and that she told them that all she knew about the incident was what she had heard on the news. She also stated that she had asked "one Mr. Murvin why he had left the man in a

pool of blood and he stated jokingly that she would not have expected him to clean it up."

It is a well-established rule in this jurisdiction that when the relationship of attorney and client exists, all confidential communications made by the latter to his attorney on the faith of such relationship are privileged and may not be disclosed. *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973). A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege. 1 Stansbury, *supra* at § 62. An examination of the circumstances surrounding the execution of the affidavit reveal that it was not a privileged communication. The challenged communication was not private and confidential as between Ms. Albertson and her attorney. Communications between attorney and client generally are not privileged when made in the presence of a third person who is not an agent of either party. *See* McCormick, *Evidence* § 91 (1972). Here, an aunt and a friend of Ms. Albertson were present when she made the statement to her attorney. Although the cases discussing whether the privilege exists when relatives or friends of the client are present during the communication are in conflict, *compare State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973) (presence of client's wife destroys privilege) *with Bowers v. State*, 29 Ohio St. 542 (1876) (mother's presence during daughter-client's conference with attorney concerning bastardy proceedings does not destroy privilege), we think the presence here of persons other than the attorney and client destroyed the privilege. The presence of neither the aunt nor the friend was necessary for the protection of Ms. Albertson's interests. *See* McCormick, *supra* at § 91, at 189.

Additionally, the communication did not relate to a matter concerning which Ms. Albertson had employed her attorney or for which she was professionally consulting him. The record discloses that Ms. Albertson was arrested on the evening of giving the affidavit to her attorney for receiving stolen goods. Ms. Albertson apparently was consulting with counsel with respect to that

charge. When asked if the affidavit had anything to do with "what the law was trying to find you for," Ms. Albertson responded negatively.

Because we find that the affidavit is not a privileged communication to which the attorney-client privilege attaches, we do not consider whether the privilege may be asserted by the State on behalf of its witness.

Defendant is not, however, entitled to a new trial by virtue of the trial court's error in this respect.

> Not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered. When the reviewing court is convinced that justice has been done and that evidence which was excluded would not, if admitted, have changed the result of the trial, a new trial will not be granted. So also where evidence has been improperly admitted.

1 Stansbury, *supra* at § 9, at 20. The burden is on the appellant not only to show error but to show that he was prejudiced or that the verdict of the jury was probably influenced thereby. G.S. § 15A-1443(a) (1978); *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973).

Here, defendant has shown no prejudice resulting from the exclusion of this testimony and we perceive none. The evidence of his guilt was otherwise overwhelming. In addition to the testimony of Ms. Albertson, James H. Brown, Sr., testified without objection that defendant stated to him, "I had told him, I had to shoot him, to shoot the guard. He could identify me." Other testimony from Ms. Albertson, not inconsistent with anything contained in the affidavit in question, included defendant's statement to her that while in the storage compartment of the maintenance shop, he shot the guard twice in the head and four times through the body. We hold, therefore, that the trial court's exclusion of the witness's prior inconsistent statement was not prejudicial since there is no reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial.

V.

[4] Defendant next contends that the trial court erred in failing to arrest judgment on his conviction of armed robbery. Defendant, relying on *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972), argues that the armed robbery was a lesser included offense of the felony murder and that the separate sentence of thirty years imposed for that crime should have been arrested. Defendant's reliance of *Thompson* is misplaced.

Defendant correctly notes that this Court held in *Thompson* that where conviction of a defendant for felony murder is based on a finding that murder was committed in the perpetration of a felony, the underlying felony is a lesser included offense of the felony murder and, therefore, separate punishment may not be imposed for the underlying felony. *See also State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980). In *Thompson*, Chief Justice Bobbitt stated:

> The conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, was based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering. In this sense, the felonious breaking and entering was a lesser included offense of the felony-murder. Hence, the separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. If defendant had been acquitted in a prior trial of the separate charge of felonious breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution on the theory of felony-murder.

Id. at 216, 185 S.E. 2d at 675. The armed robbery was not the underlying felony which allowed the jury to convict defendant of first degree murder. The trial court's instructions reveal that the only felonies upon which defendant's first degree murder conviction could be based were breaking or entering and larceny. Thus, the first degree murder conviction under the felony murder rule was premised on the underlying felonies of breaking or entering and felonious larceny. The trial court properly arrested judgment on those charges. The armed robbery conviction, because it was not submitted as an underlying felony, is neither an essential nor an indispensable element of the State's proof of murder and was

not a lesser included offense of murder. Thus, imposition of punishment for the armed robbery conviction was entirely proper. *See State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976).

We conclude that defendant had a fair trial, free from prejudicial error. In the proceedings below, we find

No error.

STATE OF NORTH CAROLINA v. CARL GLENN LOCKLEAR (ALIAS SAMMY LOCKLEAR) AND LEON GALBREATH

No. 32

(Filed 1 December 1981)

Crime Against Nature § 3— first degree sexual offense—evidence sufficient

The evidence was sufficient to convict defendants of a first degree sexual offense under G.S. 14-27.4 where the evidence tended to show that the prosecuting witness was placed in a small jail cell with the defendants, Galbreath and Locklear; that Galbreath threatened him with a violent death if he did not perform fellatio upon him; that Locklear, at Galbreath's direction, struck him with a belt buckle and grabbed him in a dangerous, life threatening "sleeper" hold; and that the prosecuting witness performed the acts of fellatio on both Galbreath and Locklear because "they threatened to kill me." The described evidence was sufficient to prove that (1) the defendants engaged in a "sexual act" as defined by G.S. 14-27.1(4), (2) "by force and against the will" of the victim, and (3) each defendant was aided and abetted by one or more other persons.

BEFORE *Judge Coy E. Brewer, Jr.*, presiding at the 6 January 1981 Session of ROBESON Superior Court, and a jury, defendants were tried on indictments proper in form[1] and were found guilty of first degree sexual offenses. Each defendant received the mandatory sentence of life imprisonment and appeals of right pursuant to G.S. 7A-27(a).

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1. The indictments were drawn pursuant to and were sufficient under the terms of G.S. 15-144.2.

Rufus L. Edmisten, Attorney General, by W. A. Raney, Jr., Special Deputy Attorney General, and G. Criston Windham, Associate Attorney, for the State.

H. Mitchell Baker III, Attorney for defendant appellant Leon Galbreath.

Robert D. Jacobson, Attorney for defendant appellant Carl Glenn Locklear.

EXUM, Justice.

Both defendants in this consolidated appeal challenge the sufficiency of the state's evidence on each element of a first degree sexual offense. We conclude the evidence was sufficient and the trial court properly denied defendants' motions to dismiss for evidentiary insufficiency.

At trial, the victim and the state's principal witness, John Oliver, a 17-year-old resident of Florida, testified as follows:

He was arrested for the larceny of gasoline on I-95 in Robeson County on Tuesday, 16 September 1980. He was placed in a small cell at the Robeson County jail with three other young offenders—defendant Galbreath, defendant Locklear, and Curtis Malloy. The cell was locked for the night at 9:00 p.m. Galbreath told Oliver to perform fallatio on Galbreath. Oliver refused, and Galbreath yelled to Locklear to "get him." Locklear hit Oliver on the foot with a belt and buckle. Oliver again refused, so Locklear grabbed him around the neck in a "sleeper" hold so that he could not breathe momentarily. Then Locklear released Oliver and asked, "Are you going to do it now?" Oliver replied, "Yes, I guess I have to now, or you're going to kill me." Galbreath had earlier told him, "If you don't do it, I'm going to throw you off this top bunk and make you bust your head in the toilet and everybody will think you died as a result of rolling off the top bunk and busting your neck on the toilet that night."

After Locklear released him, Oliver climbed back on the bunk where he was joined by Galbreath. Oliver performed fellatio on Galbreath. When Galbreath jumped down from the bunk Malloy followed him and Oliver performed fellatio on Malloy. When Locklear jumped on the bunk Oliver refused, and Locklear struck

him with a shoe across his leg. Oliver then performed fellatio on Locklear. Thereafter all three cellmates required Oliver to perform fellatio on them a second time that night.

The following day, Wednesday, 17 September 1980, a fifth person, Christopher McCallum, was added to the cell. Galbreath and Locklear again required Oliver to perform fellatio on them, but Malloy and McCallum did not participate.

On Thursday, 18 September 1980, Oliver was forced to fight with another inmate, "Stoney," for thirty to forty-five minutes. He suffered swelling and abrasions of his face, nose, left eye, and lips. Then he was compelled to wash the clothes of other inmates. Subsequently, while showering after the fight he was attacked by Locklear who pushed him in the corner and turned on the hot water all the way. When Oliver pushed him out of the shower Locklear responded by hitting him in the face five times causing Oliver's eye to swell.

Although trustees were present and jailers came through the cell block three or four times during the days he was in jail, Oliver said nothing to them of the various assaults because he was afraid and because he did not believe the jailer would move him out of the cell. His only contact with the jailers was in the presence of other inmates. He performed the acts of fellatio because "they threatened to kill me."

Oliver was taken from the jail on Friday, 19 September 1980, to go to court. After arriving at the courthouse he called to Kenneth Sealy, an officer with the Robeson County Sheriff's Department, who had him taken out of the jail box. Oliver told Sealy and Deputy Sheriff Lum Edwards about the sexual and other assaults.

Sealy testified that he noted Oliver's swollen nose, black eye, scratched and bruised chest and back. The mark on his chest was "reddish looking." Sealy contacted Chief Jailer Austin George who in turn contacted the Sheriff.

Oliver returned from court and was taken to the cell block by the Sheriff and jailer to identify those who had assaulted him. He identified Galbreath, Locklear, and Malloy.

Oliver's testimony was corroborated by the testimony of Curtis Malloy and Christopher McCallum. Their testimony generally

tended to show that Oliver was unwilling to perform fellatio on either Locklear or Galbreath, but that he did so because of fear engendered by the assaults and threats of the two defendants acting together.

Oliver clearly identified Galbreath and Malloy at trial. He was unable to recognize Locklear; however, Malloy, Sealy, George, and Edwards all testified that Locklear's appearance at trial was different from his appearance in September 1980 because he had grown his hair longer and was wearing it differently. A photograph of Locklear which reflected his appearance in September 1980 was used to illustrate these differences for the jury. Furthermore, Oliver had not seen Locklear from September 1980 to the time of trial.

Each defendant testified in his own defense, but neither offered other witnesses. Defendant Galbreath denied participating in any act of fellatio with Oliver and said that Oliver willingly performed fellatio on McCallum and Malloy. Locklear also denied having fellatio with Oliver. He said that Malloy made Oliver perform fellatio on Malloy. Locklear claimed the Sheriff put Oliver, Malloy, and McCallum up to their testimony because the Sheriff bore a grudge against him.

In rebuttal the state offered pre-trial statements of Galbreath and Locklear which contradicted in some respects their testimony at trial.

Defendants assert the state has failed to present sufficient evidence of all elements of a first degree sexual offense. They challenged the sufficiency of the evidence at trial by various motions for dismissal, directed verdicts, and nonsuit. We conclude the trial court properly denied all such motions.

The test of the sufficiency of the evidence in a criminal action is the same whether the motion raising that issue is one for dismissal, directed verdict or judgment of nonsuit. *See, e.g., State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980); *State v. Hunt*, 289 N.C. 403, 407, 222 S.E. 2d 234, *death sentence vacated*, 429 U.S. 809 (1976). That test has been articulated by the United States Supreme Court as whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond

a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). (Emphasis original.) This Court has held that its traditional formulation of the test is the same in substance as that given in *Jackson*. *State v. Jones*, 303 N.C. 500, 504-05, 279 S.E. 2d 835, 838 (1981). Although our cases may have occasionally employed different language, in substance our test is that "there must be substantial evidence of all material elements of the offense" in order to create a jury question on defendant's guilt or innocence. *Id.* In ruling on this question, "[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion." *State v. Powell, supra*, 299 N.C. at 99, 261 S.E. 2d at 117.

There are several legal theories by which a defendant may be convicted of a first degree sexual offense under G.S. 14-27.4. The state may prove that "(1) the defendant engaged in a 'sexual act,' (2) the victim was at the time of the act twelve years old or less, and (3) the defendant was at that time four or more years older than the victim." *State v. Ludlum*, 303 N.C. 666, 667, 281 S.E. 2d 159, 159-60 (1981). In the alternative the state may prove that (1) the defendant engaged in a "sexual act," (2) "by force and against the will" of the victim, and (3) in the language of the statute, either

> "a. Employ[ed] or display[ed] a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> "b. Inflict[ed] serious personal injury upon the victim or another person; or
>
> "c. [Was] aided and abetted by one or more other persons."

General Statute 14-27.1(4) defines "sexual act" to mean, among other things, "cunnilingus, fellatio, analingus, or anal intercourse, but . . . not . . . vaginal intercourse." "Once the victim of one of

these acts has been forced against his or her will to submit, the degradation to his or her person, the real evil against which the statutes speak, has been accomplished." *State v. Ludlum, supra,* --- N.C. at ---, 281 S.E. 2d at 163.

In the instant case the victim, Oliver, was over twelve years of age. There is no evidence that a deadly weapon was employed at all or that the personal injuries Oliver suffered were inflicted during the commission of the sexual acts. There is no evidence that any sexual act other than fellatio was committed.

There is, however, in the case against Locklear substantial evidence that he induced Oliver to perform fellatio by force and against Oliver's will, and that Locklear was aided and abetted by Galbreath. Likewise in the case against Galbreath there is substantial evidence that Galbreath induced Oliver to perform fellatio by force and against Oliver's will and that Galbreath was aided and abetted by Locklear.

Rape, at common law, was the carnal knowledge of, or sexual intercourse with, a female person "by force and against her will." *State v. Hines,* 286 N.C. 377, 380, 211 S.E. 2d 201, 203 (1975); *accord, State v. Burns,* 287 N.C. 102, 116, 214 S.E. 2d 56, 65, *cert. denied,* 423 U.S. 933 (1975). When by Act of Apr. 8, 1974, ch. 1201, 1973 N.C. Session Laws (2nd Sess. 1974) (originally codified as G.S. 14-21), the legislature divided the crime into two degrees, the statute codified the common law requirements that the sexual act of vaginal intercourse be forcible and without the consent of the woman by using the language "by force and against her will." This legislative act did not change this aspect of the common law definition of rape. *State v. Perry,* 291 N.C. 586, 231 S.E. 2d 262 (1977). The legislature continued to use the phrase, "by force and against the will," when it provided for new distinctions between first and second degree rape in what is now codified as G.S. 14-27.2 and 14-27.3. The legislature used this same phrase in the statutes defining first and second degree sexual offenses, G.S. 14-27.4 and 14-27.5. This phrase as used in all these statutes means the same as it did at common law when it was used to describe some of the elements of rape.

At common law, furthermore, "[t]he force necessary to constitute rape need not be physical force. Fear, fright, or coercion may take the place of force." *State v. Hines, supra,* 286 N.C. at

380, 211 S.E. 2d at 203. "A threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force and negates consent." *State v. Burns, supra*, 287 N.C. at 116, 214 S.E. 2d at 56.

Likewise under our sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the sexual act be committed "by force and against the will" of the victim. Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent.

Here the state's evidence shows that before Oliver performed fellatio on either Galbreath or Locklear, he was first placed in a small jail cell with them who were strangers to him and from which he could not escape. Galbreath threatened him with a violent death if he did not perform the act. Locklear, at Galbreath's direction, struck him with a belt buckle and grabbed him in a dangerous, life threatening "sleeper" hold. Oliver testified that he thought Locklear was going to kill him and that he performed the acts of fellatio on both Galbreath and Locklear because "they threatened to kill me." From this evidence a rational jury could find beyond a reasonable doubt that Oliver performed the sexual acts in question out of fear of death or serious bodily harm reasonably engendered by the threats of Galbreath and the actions of Locklear. As to both defendants then, the state's evidence is sufficient to be considered by the jury on the statutory requirement that the sexual act be committed "by force and against the will" of the victim.

This evidence is likewise sufficient to permit the jury to find that each defendant was being aided and abetted by the other at the time Oliver performed fellatio on each. "An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates, or encourages another to commit the offense." *State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981). The state's evidence is sufficient to permit a rational jury to find that each defendant was present when the act of fellatio was committed on the other and that each defendant had actively encouraged and aided the other immediately before these acts were committed on both. Indeed the

jury could reasonably infer that the cause of Oliver's fear which induced him to perform the acts was the very fact that the two defendants had decided to combine their efforts to force him to comply with their wishes. The defendants, according to the state's evidence, acted together, each aiding and abetting the other to induce the fear in Oliver that caused him to acquiesce in their desires and to perform the acts of fellatio first on one defendant and then on the other. There is, therefore, substantial evidence from which a rational jury could find beyond a reasonable doubt that each defendant immediately before the sexual act was committed on him was aided and abetted by the other in forcing the victim, Oliver, to commit the act. The state's evidence, therefore, was enough to permit the jury to determine that the aiding and abetting element, required by the statute, was present.

Defendants next assign as error the failure of the trial judge to allow their motions to set aside the verdict and order a new trial. We find no cause to upset this ruling which was well within the prerogative of the trial judge.

No error.

ROBERT N. ROSENSTEIN v. MECHANICS AND FARMERS BANK

WILMA C. ROSENSTEIN v. MECHANICS AND FARMERS BANK

No. 45

(Filed 1 December 1981)

Banks and Banking § 3— assignment of saving accounts—lack of consent by bank

A rule under the heading "Bankbooks" in a savings account passbook providing that "No assignment or transfer of the Bank Book need be recognized by the Bank unless it consents thereto, and a memorandum thereof entered in said Book" restricted only the assignment of the passbooks and not the accounts. Therefore, savings accounts in defendant bank were validly assigned by the depositors to plaintiffs although the bank did not consent to the assignments.

Justice MEYER concurring in the result.

Justice CARLTON dissenting.

Justice EXUM joins in the dissenting opinion.

PLAINTIFFS appeal as a matter of right under G.S. 7A-30(2) from a split decision of the North Carolina Court of Appeals, 51 N.C. App. 437, 276 S.E. 2d 710 (1981).

In the spring of 1975, C. Paul Roberts and wife, Becky M. Roberts, had on deposit with defendant Mechanics and Farmers Bank the sum of $138,339.84 in two savings accounts of $88,620.83 and $49,719.01, respectively. The accounts were comprised of funds deposited by Mr. and Mrs. Roberts as additional security for forty-five home mortgage loans made by the bank. The funds were not subject to immediate withdrawal. The deposits would be released by the bank and could be withdrawn when the principal balances of the mortgage loans were reduced to certain levels. In the event of foreclosure of any mortgage loan prior to the principal's reduction to the requisite level, the cash collateral deposited in the accounts for that specific loan would be applied to any deficiency.

On 22 May 1975, Mr. and Mrs. Roberts assigned the savings account with a balance of $49,719.01 to plaintiffs Wilma C. Rosenstein and her son, Dr. Robert N. Rosenstein, for the sum of $29,476.80. Mr. and Mrs. Roberts assigned the account containing $88,620.83 to Mrs. Rosenstein for $47,800.00 on 18 June 1975. These transactions were effected through written instruments under seal.

The defendant bank received a copy of both assignments in early July 1975. On 7 July 1975, John H. Wheeler, president of defendant bank, notified counsel for the plaintiffs that the bank refused to accept the assignments because, in defendant's opinion, the accounts were not "negotiable."

Defendant bank uses a standard passbook for its savings accounts. Throughout the passbook appears the printed language: "IT IS AGREED THAT THIS ACCOUNT IS OPENED SUBJECT TO THE RULES AND REGULATIONS OF THE BANK." The rules and regulations enumerated in the passbook are divided into six categories: "GENERAL," "DEPOSITS," "BANKBOOKS," "WITHDRAWALS," "INTEREST" and "TRANSFERS." Rule 11 under "BANKBOOKS" provides

that: "No assignment or transfer of the Bank Book need be recognized by the Bank unless it consents thereto, and a memorandum thereof entered in said Book."

After refusing to accept the assignment, defendant permitted Mr. and Mrs. Roberts and various third persons to withdraw funds from the accounts over a period of two and a half years, until the accounts were almost totally depleted. Three disbursements, totaling $10,700, were made to cover deficiencies resulting from foreclosure of three of the home mortgage loans.

Plaintiffs brought this action for recovery of the funds in the two savings accounts, less setoffs for foreclosure deficiencies. The trial court, sitting without a jury, made findings of fact and conclusions of law and awarded judgments to plaintiffs for the original amount of the accounts, plus accrued interest and less offsets paid out on the foreclosed notes and mortgages.

The Court of Appeals, with Judge Hedrick dissenting, reversed on grounds that the accounts were never validly assigned to the Rosensteins. Plaintiffs appealed under G.S. 7A-30(2).

Nye, Mitchell, Jarvis & Bugg by Charles B. Nye; and Mount, White, King, Hutson, Walker & Carden, by Richard M. Hutson, II, for plaintiff appellants.

James B. Craven, III, for defendant appellee.

HUSKINS, Justice.

The dispositive question posed by this appeal is whether the savings accounts were validly assigned to plaintiffs.

Bank deposits are assignable. *Lipe v. Bank*, 236 N.C. 328, 72 S.E. 2d 759 (1952). When an individual deposits money in a bank account, a debtor-creditor relationship is established between the bank and the depositor. "The debt thus created is subject to the rule that ordinary business contracts for money due or to become due are assignable." Id. at 331, 72 S.E. 2d at 761.

Defendant contends that this principle of assignability is subject to contrary agreement by the bank and the original depositor. The Court of Appeals agreed that a depositor cannot assign a bank account when his contract with the bank forbids transfer without the bank's consent. The court further held that

the contract between defendant bank and Mr. and Mrs. Roberts did in fact bar assignment without the bank's consent.

The contention that the accounts in this case were not assignable is based upon Rule 11 of defendant's passbook, which provides that: "No assignment or transfer of the Bank Book need be recognized by the Bank unless it consents thereto, and a memorandum thereof entered in said Book." The rule makes no mention of assignability of accounts. Rule 11 is listed in defendant's rules and regulations under the heading "BANKBOOKS." Defendant's rules and regulations have a separate category entitled "DEPOSITS." None of the rules listed under "DEPOSITS" restricts the assignability of deposits or accounts.

A straightforward reading of defendant's rules and regulations impels the conclusion that defendant has restricted the assignment of passbooks, but not accounts. Had defendant wished to restrict assignability of accounts, it could have done so in the same manner it reserved the right to refuse deposits. Rule 7 under "DEPOSITS" states: "The Bank may refuse any deposits and require any depositor to withdraw the whole, or any part of the same, upon 30 days' written notice mailed to the depositor at his or their address as same appears on the signature card; interest to be allowed only to the time of the expiration of such notice." Defendant need only to have included a rule, properly adopted by the board of directors, making assignment of accounts contingent upon the bank's consent. Defendant failed to do so.

The rule restricting the assignment of passbooks does not restrict the assignment of the underlying accounts themselves. The Court of Appeals found the distinction between accounts and passbooks to be "illusory" on grounds that a passbook is worthless other than as a record of the contract between the bank and the depositor. Apparently, no one would want a passbook by itself.

Such reasoning mischaracterizes the transaction at hand. Instead of the assignment of a passbook without an account, this situation involves the assignment of an account without necessarily delivering a passbook. This latter form of transaction, perhaps unlike the former, is not meaningless. A deposit may be validly assigned without the delivery of a passbook. *McCabe v. Union Dime Sav. Bank*, 150 Misc. 157, 268 N.Y.S. 449 (1934). Mr.

and Mrs. Roberts validly assigned their accounts to plaintiffs. The rule restricting assignment of passbooks was immaterial.

The question why parties would agree to the assignment of a passbook without assigning the underlying account is not before this Court. Neither is the question why a bank would wish to prevent such a transfer. Defendant in this case restricted such apparently meaningless transactions. "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit." *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 719, 127 S.E. 2d 539, 541 (1962). Defendant bank itself drafted this contract to become binding upon depositors without negotiation or bargaining on their part. The provisions of such a contract must be construed against the drawer. We will not interpret the purported restriction of assignment of passbooks to apply to assignment of accounts. "Courts do not make contracts. . . . [T]he law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish." *Knutton v. Cofield*, 273 N.C. 355, 363, 160 S.E. 2d 29, 36 (1968).

We hold, as did the trial court, that plaintiffs are entitled to the funds in the two savings accounts at the time of the assignment plus interest as specified in the judgment of the trial court, less the $10,700 offset to cover deficiencies resulting from foreclosure of three home mortgage loans.

The decision of the Court of Appeals is reversed and the case remanded to that court for further remand to Durham Superior Court for reinstatement of the judgment of the trial court.

Reversed and remanded.

Justice MEYER concurring in result.

I concur in the result reached by the majority but for reasons different than those expressed by the majority. G.S. § 53-66 provides as follows:

> Any bank conducting a savings department may receive deposits on such terms as are *authorized by its board of directors* and agreed to by its depositors. *The board of direc-*

tors shall prescribe the terms upon which such deposits shall be received and paid out, and a passbook or other evidence of deposit shall be issued to each depositor containing the rules and regulations *adopted by the board of directors* governing such deposits. By accepting such book or such other evidence of deposit the depositor assents and agrees to the rules and regulations therein contained. (Emphasis added.)

It is clear beyond question that the terms governing deposits, in order to be valid, must be "authorized," "prescribed," and "adopted" by the board of directors. There is not a scintilla of evidence in the record before us that the rules contained in the passbook in question were ever authorized, prescribed or adopted by the board of directors. Two officers or employees of the bank testified that the rules had been in effect for years—one testifying that they had been in existence since 1948 or 1949. Such evidence in my view is evidence of the long-standing use of such rules and constitutes no showing whatever that the rules were authorized, prescribed or adopted by the board of directors. The Rosensteins demanded that the original books of the board of directors in which the rules and regulations were adopted be produced. They were not offered into evidence and there is no explanation in the record of why the bank could not have produced them, if they in fact existed. Contrary to the opinion of the Court of Appeals, I do not believe that failure to prove the vital fact of the authorization or adoption of the passbook rules by the board of directors was harmless.

Unless the passbook provisions prohibiting the transfer of the accounts without the bank's consent were valid, the transfer of those accounts by the Roberts to the Rosensteins was valid and enforceable against the bank. The bank received notice of the assignment and could have, at that time, taken appropriate action to freeze the accounts until the validity of the disputed assignments was determined. Although the bank notified the Roberts' attorney of its refusal to accept the assignments, it continued to make disbursements from the account to third parties. I believe that the bank acted at its peril in so doing, except for amounts deducted by the bank for collateral on foreclosures that produced deficiences.

The provisions of G.S. § 53-66 specify in part that by acceptance of the passbook the depositor assents and agrees to the

rules and regulations contained therein. I would prefer not to forecast in this opinion that the bank "need only to have included a rule making assignment of accounts contingent upon the bank's consent." The question of the validity of such a provision, properly authorized by the board of directors and properly receipted for by the depositor, when it is but one of many small-print items in a passbook and is not discussed with or brought to the attention of the depositor and not within the contemplation of the parties, should await another day when it is before this Court on fully developed facts and briefed by the parties.

I agree with Judge Hedrick of the Court of Appeals that the evidence supports the critical findings and conclusions made by the trial judge and that his judgment should be affirmed.

Justice Carlton dissenting.

I respectfully dissent from the majority opinion. Unlike the majority, I cannot accept the argument that the Bank restricted the assignment of passbooks only and did not thereby restrict the assignment of the corresponding accounts. I agree with the Court of Appeals that the distinction between the passbook and the underlying account, with regard to the issue of assignability, is illusory.

The majority makes much of the use of the term "Bank Book" instead of "account" or "deposits" in the Bank regulation restricting assignability and in the placement of that regulation under the heading of "BANK BOOKS." In my opinion, the other rules and regulations printed under "BANK BOOKS" show beyond question that the "Bank Book" is tied to the account and is severable therefrom only in the event the Book is lost or stolen. For example, the Book "must be presented when money is deposited or withdrawn," and the Bank may refuse to enter into any transaction relating to that account if the Book is not presented. Additionally, Rule 12 provides that:

> A duplicate pass book will be given the depositor for the amount to his or her credit as appears from the records of the Bank, if said book is lost, destroyed or stolen or mislaid, provided satisfactory indemnity is furnished the Bank to protect it against any claim which may, at any time, be made against it by any person coming into possession of the book

first issued. The Bank shall not be responsible for payment to any person producing the Bank Book, if the book be lost or stolen, unless and until written notice thereof shall have been given it.

These rules make clear that the sole function of the Bank Book is to represent the underlying account and that the Book has no inherent value or meaning in and of itself.

I would further argue that the headings used in the RULES AND REGULATIONS are merely illustrative and were not intended to have substantive effect. The Rules are listed consecutively from 1 to 17; each new heading does not begin with Rule 1. This shows that the headings were inserted as a convenient aid to locate rules on a particular subject and not as substantive limitations on the rules themselves. Thus, the *placement* of the rule restricting assignment under the heading "BANK BOOKS" is of no substantive significance.

A straightforward reading of the rules and regulations leads me to conclude that Rule 11 restricts the assignment of Bank Books *and the corresponding accounts.* To interpret this Rule as applying only to the Bank Book divorced from the funds in the underlying account is absurd. The Bank Book, in and of itself, has no inherent value to assign. Although the majority is correct in stating that an account may be validly assigned without the delivery of a passbook, citing *McCabe v. Union Dime Savings Bank*, 150 Misc. 157, 268 N.Y.S. 499 (1934), that case goes on to say that validity of the assignment must be determined by considering whether the failure to produce the passbook is excusable. This question is not the same as the one confronting us here. The question here is whether a provision restricting assignment of the passbook extends to the funds represented by the book. In my opinion, it does. The function of a passbook is to act as a memorandum of the account. As such, it represents the underlying funds. A provision restricting the transfer of the item which represents the funds, in my opinion, extends to the funds represented.

Justice EXUM joins in the dissenting opinion.

IN RE: ANNEXATION ORDINANCE NO. 300-X; CHARLES J. WHITTLE AND WIFE, ANN WRIGHT WHITTLE, PETITIONERS

No. 18

(Filed 1 December 1981)

Municipal Corporations § 2.1— annexation plan—compliance with statute

A city annexation plan met the requirements of G.S. 160A-47(3) where it contained (1) information on the level of services available in the city, (2) a commitment by the city to provide the same level of services in the annexed area within the statutory period, and (3) the method by which the city will finance the extension of the services. The additional personnel and equipment needed to extend services need not be estimated in order to determine whether the city has provided the services it promised.

APPEAL by petitioners pursuant to G.S. 160A-50(h) from judgment of *Johnson, J.*, presiding at 12 December 1980 non-jury mixed term MECKLENBURG Superior Court. Judgment was entered 22 December 1980.

On 14 January 1980 the Charlotte City Council adopted a resolution embodying its intent to annex the subject area, and on 25 February 1980 it adopted a report containing plans for serving the annexation area. A public hearing was held after proper notice, and the Council thereafter amended the report by reducing the size of the annexation area. On 24 March the City Council adopted the annexation ordinance setting the effective date to be 30 June 1980. Petitioners sought judicial review, and on 5 August 1980 a consent order remanded the ordinance to the City Council "for amendment of the boundaries of said Area to conform to the provisions of G.S. 160A-48(c)(1), it being found by the Court . . . that there are not two (2) persons per acre within the present boundaries of said Area." The conforming resolution was duly adopted by the City Council on 11 August 1980. Petitioners, who own land in the annexation area filed a new petition for full review on the ground that the Charlotte City Council failed to comply with the provisions of G.S. 160A-45 through G.S. 160A-55, alleging that petitioners would suffer material injury by reason of the Council's failure to comply with those statutes. After receiving evidence and hearing the arguments of counsel, the trial judge found facts, made conclusions of law, and thereupon affirmed Annexation Ordinance 300-X as amended. Petitioners gave

notice of appeal and applied for stay of the ordinance pending decision of the appeal. The stay was granted.

Jeffrey L. Bishop and Hugh G. Casey, Jr., for petitioner appellants.

Henry W. Underhill, Jr., and H. Michael Boyd for respondent appellee.

BRANCH, Chief Justice.

Petitioners first argue that the City's annexation plan fails to meet the requirements of G.S. 160A-47(3) in that it lacks sufficient detail and specificity.

G.S. 160A-47(3) requires a municipality's annexation report to contain:

> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> a. Provide for extending police protection, fire protection, garbage collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines.
>
> b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.
>
> c. If extension of major trunk water mains and sewer outfall lines into the area to be annexed is necessary, set

forth a proposed timetable for construction of such mains and outfalls as soon as possible following the effective date of annexation. In any event, the plans shall call for contracts to be let and construction to begin within 12 months following the effective date of annexation.

d. Set forth the method under which the municipality plans to finance extension of services into the area to be annexed.

The burden is on petitioner to establish by competent and substantial evidence the City's noncompliance with G.S. 160A-47(3).

> As a general rule it is presumed that a public official in the performance of his official duties "acts fairly, impartially, and in good faith and in the exercise of sound judgment or discretion, for the purpose of promoting the public good and protecting the public interest. [Citation omitted.] The presumption of regularity of official acts is rebuttable by affirmative evidence of irregularity or failure to perform duty, but the burden of producing such evidence rests on him who asserts unlawful or irregular conduct. The presumption, however, prevails until it is overcome by . . . evidence to the contrary. . . . Every reasonable intendment will be made in support of the presumption. . . ." *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961); *accord, Styers v. Phillips*, 277 N.C. 460, 178 S.E. 2d 583 (1971). Hence the burden is on the petitioner to overcome the presumption by competent and substantial evidence. 6 N.C. Index 2d, Public Officers, § 8 (1968).

In re Annexation Ordinance, 284 N.C. 442, 452, 202 S.E. 2d 143, 149 (1974). *See also In re Annexation Ordinance*, 296 N.C. 1, 10-11, 249 S.E. 2d 698, 703-704 (1978); *In re Annexation Ordinance*, 255 N.C. 633, 642, 122 S.E. 2d 690, 697 (1961).

The City's written report contains plans for providing the major municipal services enumerated in G.S. 160A-47(3), the first of which we quote in full:

POLICE PROTECTION

The City of Charlotte has a well-trained, efficient Police Department whose function is the protection of life and property. Police protection is provided on a continuous 24 hour a day basis and is ready for immediate response to calls for protection service. The department performs a variety of services ranging from traffic control to crime investigation and uses the most modern police equipment available.

Many police services and divisions such as: central services, crime prevention, record-keeping, youth section, vice section and helicopter service are already being executed throughout the annexation area under the City-County consolidation of services program. Additional personnel and equipment required to provide police protection to this area will be secured prior to the effective date of annexation. Service will commence on the effective date.

In order to provide police protection on substantially the same basis and in the same manner as provided in the City, approximately $113,900 of general revenues will be appropriated in the annual budget to reflect the additional cost of services to this area. They do not anticipate any new capital improvements as a result of this annexation. The degree of service and the number of new officers and the amount of equipment needed to provide adequate protection is based on the adjacent areas currently inside the city limits.

The remaining provisions for major municipal services may be summarized as follows:

(a) Fire protection will be provided by constructing a two-bay fire station in the general vicinity of Carmel Road and Highway 51. This site will replace the previously determined temporary site. The costs of constructing and outfitting this station have been previously budgeted. During construction, fire protection will be provided from existing Station 16 at 6623 Park Road.

(b) Street maintenance services will be provided according to current policies in effect within the City which require maintenance of all streets constructed in accordance with City standards. In addition, streets currently maintained by the State

will be maintained by the City, except for those streets which form a part of the permanent State highway system. The additional personnel and equipment required to provide these services are to be obtained prior to the date of annexation so that services can commence immediately upon annexation. Approximately $116,600 of General Revenues will be appropriated in the budget to reflect these increased costs.

(c) Garbage collection or sanitation services will be provided in the form of garbage and trash collection, street cleaning, and seasonal leaf collection. Additional personnel and equipment needed to provide the services are to be secured prior to the effective date of annexation so that services can commence immediately upon annexation. Approximately $216,300 of General Revenues will be appropriated in the budget to reflect these increased costs.

(d) The basic water and sewer system in the Area will be provided by extensions of the City's water and sewer systems in accordance with the City's Water/Sewer Extension Policy as adopted on 19 May 1975. These extensions will be under contract and construction within one year following the effective date of annexation, if not earlier. The cost of the basic sewer trunk system is estimated to be $525,000. The cost of the basic water system is estimated to be $622,000. The City plans to finance construction of the systems by sale of municipal bonds and to operate the systems on revenues generated by sale of the services to municipal residents.

We have examined these plans and find them remarkably similar to others approved by this Court. We approved, for example, the following plan for extension of police protection contained in an annexation report filed by the City of Jacksonville:

> *Police Protection.* The Jacksonville Police Department has jurisdiction for one mile beyond the present City Limits and presently provides protection for residential areas within the City Limits on a regular patrol basis. The patrol coverage enables the department to respond to calls for aid in an average time of 5.5 minutes.
>
> If annexed into the City, the routine patrol through the Northwoods Area will be extended into the Forest Hills Area

providing coverage to the new area on substantially the same basis as presently provided in the existing City.

The minor additional expense in lengthening the present patrol route will be provided for in subsequent fiscal year budgets following annexation.

In re Annexation Ordinance, 255 N.C. 633, 635, 122 S.E. 2d 690, 692-93 (1961). We held this plan for extension of services to be in "full and substantial compliance with the Act." *Id.* at 647, 122 S.E. 2d at 701. We see no fundamental difference between these two plans. The Charlotte plan does lack the average response time and the name of the patrol route that would be involved in extending the services. On the other hand, the plan assures 24 hour service and immediate response to calls. We believe that this plan is sufficiently detailed to satisfy the requirements of G.S. 160A-47(3), particularly in light of the additional detail provided on the scope of services available through the Charlotte Police Department.

Petitioners strongly contend that any plan is deficient unless it specifies the number of additional personnel and the amount of additional equipment which will be required to extend services to the annexed area. We disagree. The central purpose behind our annexation procedure is to assure that, in return for the added financial burden of municipal taxation, the residents receive the benefits of all the major services available to municipal residents. *See* 2 E. McQuillan, *The Law of Municipal Corporation*, § 7.46 (3d ed., 1979 rev.). *See also Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980). The minimum requirements of the statute are that the City provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services. If such services are not provided, the residents of the annexed area would be entitled to a Writ of Mandamus requiring the municipality to live up to its commitments. G.S. 160A-49(h); *Safrit v. Costlow*, 270 N.C. 680, 155 S.E. 2d 252 (1967).

The satisfaction of this purpose does not require the degree of specificity petitioners demand. The additional personnel and equipment needed to extend services need not be estimated in

order to determine whether the City has provided the services it promised. *See In re Annexation Ordinance*, 300 N.C. 337, 266 S.E. 2d 661 (1980) (plan approved in which garbage collection portion of report failed to specify how many additional personnel would be hired to serve annexed area and fire protection portion of report stated only that the city would "acquire the necessary fire-fighting apparatus" to protect the annexed area). We believe that the report need contain only the following: (1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services. *See Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980). With this minimal information, both the City Council and the public can make an informed decision of the costs and benefits of the proposed annexation, a reviewing court can determine whether the City has committed itself to a nondiscriminating level of services, and the residents and the courts have a benchmark against which to measure the level of services which the residents receive within the statutory period.

An attack on the specificity of a municipality's plan with respect to providing major municipal services to an annexation area was considered by this Court in the recent case of *Moody v. Town of Carrboro, supra.* Rejecting petitioners' contention that the plan was not sufficiently specific as to police and garbage collections, this Court speaking through Huskins, J., stated:

> Petitioner also contends the plan is insufficient with respect to extension of street maintenance service as required by G.S. 160A-47(3)a. The plan details what services are provided in the Town and states that all such services will be provided in the annexed area. Providing a nondiscriminating level of services within the statutory time is all that is required.

301 N.C. at 328, 271 S.E. 2d at 271-72.

So it is here. The municipality has shown *prima facie* complete and substantial compliance with the provisions of G.S. 160A-47(3), and petitioners have failed to carry their burden of showing by competent evidence failure on the part of the municipality to comply with statutory requirements. Our conclu-

sion is strongly buttressed by the marked similarity between the reports of plans to extend services approved in *In re Annexation Ordinance*, 255 N.C. 633, 122 S.E. 2d 690 (1961), and the plans under attack in instant case.

With regard to financing the improvements, we see no problem with the general statement by the City that services with the exception of water and sewer services would be paid for out of general revenues. G.S. 160A-47(3)(d) requires only that the *method* of financing be disclosed, not that the precise source of each dollar be pinpointed. By its statement, the City has disclosed that the method used to finance these services will be by budgeting funds for the services out of the City's general revenues. Had the City intended to finance services by issuance of municipal bonds, by grant, or by assessment, disclosure of this too would have been required under the statute. The City plans to finance the extension of water and sewer service by an issuance of bonds and to finance the continued operation of the service by revenues derived from sale of the service to users. Again, this statement adequately discloses the intended method of financing the services and must be approved.

This assignment of error is overruled.

Petitioners' second assignment of error relates to the City's plan to extend fire protection to the annexed area. The plan above summarized provides for the building of a new fire station in the annexed area and service from an existing station nearby until the new station is completed. Petitioners argue that the temporary service from the existing station would not provide fire protection on substantially the same basis and in the same manner as provided elsewhere in the City. In this connection, we note that the City has no obligation to provide any fire protection until the effective date of annexation, which was stayed at petitioners' request pending this appeal. The effective date of the annexation will not occur until the final judgment of this Court is certified to the Clerk of Superior Court of Mecklenburg County. *Moody v. Town of Carrboro*, 301 N.C. at 330, 271 S.E. 2d at 272-73. Meanwhile, it was admitted at oral argument that during the pendency of this appeal the new fire station proposed in the City's plan has already been completed and is fully operational. The question of whether the proposed interim service would have

been adequate is rendered moot by the completion of the new fire station.

We, therefore, need not further consider petitioners' second assignment of error.

The judgment of the Superior Court affirming the annexation order is

Affirmed.

STATE OF NORTH CAROLINA v. CLAUDIE CLARA DUVALL

No. 29

(Filed 1 December 1981)

1. **Automobiles § 131.2— hit and run driving—instructions on knowledge**

In this prosecution for accessory after the fact to felonious hit and run driving, the trial court erred in failing to instruct the jury that the State had to show that the driver knew that a person had been injured or killed in an accident to establish his guilt of felony hit and run.

2. **Courts § 9.1— modification of another judge's interlocutory order**

The power of a superior court judge to modify an interlocutory order previously entered by another judge can be exercised only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter.

3. **Courts § 9.1; Jury § 2.1— motion for special venire denied—renewed motion allowed by another judge**

The trial judge erred in granting the State's renewed motion for a special jury venire from another county after another superior court judge had denied a special venire motion nearly six months earlier where affidavits presented in support of the renewed motion contained no new evidence showing that the State could not receive a fair trial with jurors from the county of trial but merely restated the identical information given to the judge at the hearing on the original motion.

Justice HUSKINS dissenting.

Justice MEYER joins in the dissenting opinion.

Chief Justice BRANCH joins in one portion of the dissenting opinion, and Justice CARLTON joins in another portion of the dissenting opinion.

ON defendant's petition for discretionary review, pursuant to G.S. 7A-31, of the decision of the Court of Appeals (*Judge Harry C. Martin*, with *Judges Webb* and *Whichard* concurring), reported at 50 N.C. App. 684, 275 S.E. 2d 842 (1981), affirming the judgment of conviction entered by *Brown, Judge*, at the 25 February 1980 Criminal Session of Superior Court, DARE County.

Defendant was charged in an indictment, proper in form, as an accessory after the fact to a hit-and-run offense and for wilfully failing to discharge his official duties as a deputy sheriff in connection with that incident. He was convicted as an accessory after the fact to a felony. The trial court entered judgment imposing an active prison sentence of three years. The Court of Appeals found no prejudicial error in defendant's trial and thereby upheld his judgment of conviction.

A complete statement of the facts are set forth in the Court of Appeals' opinion reported at 50 N.C. App. 684, 275 S.E. 2d 842 (1981). In our order granting defendant's petition for discretionary review on 8 April 1981, we specifically limited our review in this appeal to a consideration of the questions concerning the jury instructions and special jury venire. We shall therefore incorporate into the opinion below only those facts essential to our resolution of these two issues.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

James, Hite, Cavendish & Blount, by Marvin Blount, Jr., and Aldridge, Seawell & Khoury, by G. Irvin Aldridge, for defendant-appellant.

COPELAND, Justice.

[1] This is another of the three cases, arising out of the same hit-and-run accident in Dare County, which our Court decides today. *See State v. Charles Fearing*, 304 N.C. 471, 284 S.E. 2d 487 (1981); *State v. Malcolm Fearing*, 304 N.C. 499, 284 S.E. 2d 479 (1981). In pertinent part, we have already determined that the defendants in the *Fearing* cases, *supra*, must be tried again for error in the instructions on the essential elements of the hit-and-run offense

under G.S. 20-166 because the judges did not correctly explain the element of the driver's guilty knowledge. The Court of Appeals held that the particular instructions given in the instant case, when read in context, adequately informed the jury that the State had to show that the driver knew that a person had been injured or killed in an accident to establish his guilt of felony hit-and-run.[1] We do not agree. Rather, we find that Justice Britt's holding upon this point in *State v. Charles Fearing, supra,* is equally applicable upon this record. That being so, the Court of Appeals erred in not sustaining defendant's assignment of error to the instructions, and this defendant must also be given a new trial.

The occasion of defendant's re-trial impels us to consider his additional assignment of error regarding Judge Brown's order for a special jury venire. The pertinent facts are summarized as follows.

On 16 May 1979, the State moved for a special jury venire in defendant's case to insure a fair and impartial trial in Dare County. In support of its motion, the State alleged, among other things, that: (1) defendant was a well-known, lifelong resident of Dare County, related by blood and marriage to a large number of citizens in the county, who had served as a deputy sheriff for more than fifteen years; (2) Charles Fearing and Malcolm Keith Fearing (cousins), who were charged in connection with the same hit-and-run accident, were also well-known, lifelong residents of Dare County with extensive familial and business ties therein; (3) defendant and the Fearings had been active in county politics, as members of the Democratic Party,[2] and that the jury list was compiled in part from voter registration lists which demonstrated an overwhelming affiliation to the Democratic Party in Dare County; (4) Charles Fearing had moved for, and been granted, a

1. The guilt of the principal (the driver in the accident) constitutes a necessary element of the charge against defendant, that of being an accessory after the fact to a hit-and-run under G.S. 14-7. *See State v. Malcolm Fearing,* 304 N.C. 499, 284 S.E. 2d 479 (1981).

2. Charles Fearing had formerly served as Chairman of the Dare County Democratic Party. Malcolm Keith Fearing was a member of the Manteo Town Council.

change in venue to Chowan County on the grounds that he could not receive a fair trial in his home county and that his motion therefor had been supported by the affidavit of C. E. Bray, Chief of the Kill Devil Hills Police Department; and (5) there had been substantial pre-trial discussion and publicity of the charges against defendant and the Fearings. In further support of its venire motion, the State submitted seventeen affidavits, fifteen from county residents and two from non-residents, in which each affiant stated an opinion, in identical language, that "a fair and impartial administration of justice" required the drawing of a special jury venire from outside Dare County. The affidavits were taken from eight relatives of the victim killed in the hit-and-run accident, two public officials, seven operators of local businesses and an employee of a local radio station.

In response to the State's motion and proof, defendant filed the opposing affidavits of thirty-nine citizens of Dare County stating, in identical language, their opinion that, despite defendant's familial, political and public connections and the publicity surrounding his case, both defendant and the State of North Carolina "could receive a fair and impartial trial in Dare County by a Dare County jury." Of these affiants, nine were public officials, four of which were members of the Dare County Sheriff's Department, including Sheriff Frank Cahoon.

Upon this evidence, Judge Browning entered an order denying the venire motion on 7 June 1979. In his order, he specifically found: "that the news media coverage, as presented to the court . . . is factual and non-inflammatory, and has not prejudiced the rights of either the State of North Carolina or the defendants . . . that while it [the court] does not tend to disbelieve the affidavits and the testimony of the State that there is substantial reason . . . to believe [from defendants' affidavits] that the defendants can in fact, and the State can in fact, obtain a fair trial in Dare County." Judge Browning therefore concluded that the State had not met its burden upon the motion for a special jury venire from another county.

On 3 December 1979, nearly six months later, the State verbally renewed its pre-trial motion for special jury venire in the cases before another superior court judge, Judge Brown. The State alleged essentially the same supporting grounds it had previously presented upon its original motion, see *supra*. After

some argument by both sides upon the oral motion, the court ordered a short recess. Apparently, during that respite, the prosecutor, with the court's permission, removed from the court file one of the affidavits filed in June to use as a model for drafting the "rather hurried affidavits" of eight law enforcement officials[3] and a newspaper reporter residing in Dare County.

Upon this additional evidence, Judge Brown granted the State's renewed venire motion on 4 December 1979 and ordered the selection of one hundred special veniremen from Perquimans County for defendant's trial on 25 February 1980. [Incidentally, another one hundred veniremen from Perquimans County had also been summoned to serve at the trial of Malcolm Fearing set for 11 February 1980. The population of Perquimans County according to the 1970 census was about 8900.]

Defendant contended in the Court of Appeals that Judge Brown erred in granting the State's motion for the special venire because he thereby impermissibly overruled Judge Browning's prior order denying the same motion on 7 June 1979. The Court of Appeals disagreed for the following reasons:

> It is true that one superior court judge ordinarily may not overrule a prior judgment of another superior court judge in the same case on the same issue. *Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972); *State v. McClure*, 280 N.C. 288, 185 S.E. 2d 693 (1972). . . . However, this rule is inapplicable to interlocutory orders, which do not determine the issue, but rather direct some proceeding preliminary to a final decree. . . . A motion for a special venire is a pretrial order, the granting or denial of which is within the trial court's sound discretion. N.C. Gen. Stat. 15A-958. *See also State v. Yoes* and *Hale v. State*, 271 N.C. 616, 157 S.E. 2d 386 (1967). "Interlocutory orders are subject to change 'at any time to meet justice and equity of the case upon sufficient grounds shown for the same.'" *Calloway, supra* at 502, 189 S.E. 2d at 488. Therefore, when the circumstances have

3. These were three State Highway Patrol troopers, one agent from the State Bureau of Investigation, three members of the Kill Devil Hills Police Department and the Chief of Police in Manteo. We note that the SBI agent and two of the troopers testified as witnesses for the State at defendant's subsequent trial.

changed during the time between the original denied motion and the subsequent renewed motion, a trial judge may, in his discretion, grant the renewed motion in the interest of justice.

More than five months elapsed between the two motions for a special venire. The state presented additional and current evidence that defendant would not be able to receive a fair and impartial trial before a jury comprised of residents of Dare County, where he was a prominent citizen and where considerable publicity had occurred. We hold that Judge Brown did not abuse his discretion by hearing and granting the renewed motion.

50 N.C. App. 684, 691-92, 275 S.E. 2d 842, 850 (Citations omitted).

[2] At the outset, we find that the Court of Appeals correctly stated the applicable law, *supra*, concerning the general impropriety of a superior court judge's rectification of what he might perceive to be legal error in the prior ruling of another superior court judge in the same case. *See Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E. 2d 423 (1981); *State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971). Indeed, if the rule were otherwise, the normal reviewing function of appellate courts would be usurped, and, in some instances, the orderly trial process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge. It is thus clear that the power of a superior court judge to modify an interlocutory order, previously entered by another judge, can be exercised only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter. *See Neighbors v. Neighbors*, 236 N.C. 531, 73 S.E. 2d 153 (1952). Our examination of this record does not, however, disclose such a convincing showing by the State, and we consequently find fault in the Court of Appeals' conclusions, *supra*, upholding Judge Brown's action.

[3] First, the mere passage of time between the date one superior court judge disposes of a motion and the date the same motion is subsequently renewed before another judge has no tendency whatsoever, in and of itself, to show that the cir-

cumstances underlying the former motion are no longer the same in certain significant and material respects. Second, the presentation of "additional and current evidence" upon a renewed motion is only pertinent if such evidence consists of new and different facts which, in substance, were not before the first judge originally ruling upon the motion. Here, the State supported its renewed motion before Judge Brown with several additional affidavits of Dare County residents. However, these affidavits did not contain *new* evidence showing that the State could not presently receive a fair trial with Dare County jurors; rather, they merely re-stated the identical information given to Judge Browning at the first hearing on the venire motion. In sum, we find that the State did not directly demonstrate a specific and significant shift in the case's present posture sufficient to authorize Judge Brown's subsequent action upon the same motion.[4] As a consequence, the Court of Appeals erred in failing to sustain defendant's assignment of error to Judge Brown's entry of the 4 December 1979 order, and its decision must also be reversed upon this additional ground.

In conclusion, we note that our holding here also necessarily decides the venire issue raised in the companion case of *State v. Malcolm Fearing*, 304 N.C. 499, 284 S.E. 2d 479 (1981). The State twice requested the special jury venire by filing identical motions on the same day, supported by the very same proof, in its cases against defendants Duvall and Malcolm Fearing. On each occasion, the sitting trial judge relied upon essentially the same findings and conclusions, regarding both defendants, in ruling upon the State's motion.

4. The Court of Appeals suggested that defendant had no legitimate cause to complain about Judge Brown's action on the State's renewed venire motion since, in that very same order, Judge Brown also granted defendant's motion for a separate trial apart from codefendant Malcolm Fearing despite Judge Barefoot's prior order of 5 November 1979 for a joint trial of these defendants. *See* 50 N.C. App. at 692, 275 S.E. 2d at 850. It was, however, incumbent upon the State, not defendant, to take exception, if it so desired, to that portion of Judge Brown's order granting severance. The State did not do so. Quite simply then, the Court of Appeals should not have considered the event of severance as affecting in any way defendant's duly assigned error to the order for the special venire. *See* Rule 10(a), North Carolina Rules of Appellate Procedure. In any event, whether intervening circumstances subsequently rendered the trial consolidation unjust as of 4 December 1979 would constitute a distinct question for review, based upon other facts.

The decision of the Court of Appeals is reversed. Defendant is entitled to a new trial by a jury of his peers from Dare County, pursuant to Judge Browning's 7 June 1979 order, unless by proper motion a substantial change of circumstances is shown.

Reversed.

Justice HUSKINS dissenting.

For the reasons stated in my dissent in *State v. Charles Fearing* (Case No. 28, filed this date), I respectfully dissent from the portion of the majority opinion which orders a new trial for error in the judge's instructions upon the elements of a hit-and-run offense under G.S. 20-166.

I also dissent from that portion of the majority opinion which holds that Judge Brown was without authority to order a special venire in this case. My reasons are fully set forth in my dissent in *State v. Charles Fearing* (Case No. 28, filed this date) and *State v. Malcolm Fearing* (Case No. 27, filed this date).

I am authorized to say that Justice MEYER joins in this dissent.

Chief Justice BRANCH joins in that portion of this dissent relating to the judge's instructions on hit-and-run under G.S. § 20-166.

Justice CARLTON joins in that portion of this dissent relating to the authority of Judge Brown to order a special venire.

In re Annexation Ordinance

IN RE: ANNEXATION ORDINANCE 301-X; FREDERICK WILSON RANDALL AND WIFE, FRANCES M. RANDALL, CLETUS WAYNE GOODWIN AND WIFE, BOBBY JEAN GOODWIN, CHARLES E. HORNE, AND WIFE DOROTHY C. HORNE, PETITIONERS

No. 17

(Filed 1 December 1981)

Municipal Corporations § 2.1— annexation—compliance with statutory requirements

In an annexation action in which petitioners alleged the city overestimated the total acreage composed of lots and tracts of five acres or less, any alleged error could not have prejudiced petitioners as the city complied with the requirements of G.S. 160A-48(c). The city's estimate of the total area to be annexed and of the subdivided acreage were within the limits prescribed by G.S. 160A-48(c)(2), and under G.S. 160A-54, the trial court was required under the facts to accept the city's estimates as any errors in the total acreage estimates were less than 5%.

APPEAL by petitioners from the 10 September 1980 judgment of *Thornburg, J.*, affirming the annexation of an area known as "Coulwood" by the City of Charlotte pursuant to the provisions of G.S. 160A-45 *et seq.*

On 14 January 1980 the Charlotte City Council adopted a resolution expressing its intent to annex the Coulwood area. A Plan for serving the area was approved by the Council on 25 February 1980. A public hearing was held on 12 March 1980, and on 24 March the Council adopted an ordinance annexing Coulwood into the City as of 30 June 1980.

Petition for review of the City's action under G.S. 160A-50 was filed on 22 April 1980. The petition alleged that the population density of the area was less than the two persons per acre required by G.S. 160A-48(c)(1).

A hearing was held on 16 June 1980, at which time petitioners apparently subpoenaed and were prepared to call a witness from each of the eight hundred households in the area to testify to the number of occupants in that witness's household in order to determine the total population of the Coulwood area. Petitioners moved for a reference on the question of population. The court granted the motion, appointing a referee "to determine the total resident population of the Coulwood Area as of March

24, 1980, for the purpose of assisting the court in determining whether the Coulwood Area qualifies for annexation," and the petitioners' population witnesses were excused by the court with petitioners' consent. The referee submitted his report on 6 August 1980. On the 12th of August petitioners moved to amend their petition to allege that less than 60 percent of the area was in lots of five acres or less in size. G.S. 160A-48(c)(2). On 14 August the City filed objection to the Referee's report. Petitioners moved to remand the report for a more complete finding. The court granted neither motion. The Referee's report indicated that based on preliminary 1980 census data the population of Coulwood could be estimated at 2364, and that based upon his own sample survey the population of the area could be estimated at 2424. The report made no specific conclusions on the issue of Coulwood's population but suggested the population might vary between 2303 and 2545.

The court proceeded to hear evidence and rendered judgment on 10 September 1980 finding that the Coulwood area satisfied both the requirement of G.S. 160A-48(c)(1) that the annexed area contain two persons per acre, and the requirement of G.S. 160A-48(c)(2) that at least 60 percent of the acreage of the annexed area consist of lots of five acres or less. The court affirmed the annexation but stayed the effective date pending this appeal.

Jeffrey L. Bishop and Hugh G. Casey, Jr., for petitioner appellants.

Henry W. Underhill, Jr., and H. Michael Boyd for respondent appellee.

BRANCH, Chief Justice.

Petitioners argue first that the annexation plan of 25 February 1980 lacks sufficient detail and specificity to comply with the requirements of G.S. 160A-47, which establishes the essential requisites of such a plan. The City argues that the only allegation in the petition which even refers to G.S. 160A-47 is paragraph 4(a) which states:

> The report prepared at the direction of the Charlotte City Council setting forth plans for furnishing of police protection, fire protection, garbage collection and street maintenance

> services in the proposed annexed area is in error and in violation of G.S. 160-A-47(3)(a) [sic] in that such services will not be provided as described, cannot be provided as described and will be inferior to the services now being rendered, all to the material injury of the petitioners.

The City argues that this allegation failed to raise properly for review the issue of whether the report lacked specificity and detail, an argument which petitioners raise for the first time before this Court.

Although we tend to agree with the City's position, we elect not to reach this question since the question of the degree of specificity and detail required in a plan under G.S. 160A-47(3) has been resolved. *In re Annexation Ordinance 300-X*, 304 N.C. 549, 284 S.E. 2d 470 (1981) (decided this date). We decided adversely to petitioners' contentions in that case on the basis of a plan which was so factually similar to the plan in instant case as to be almost identical. Based upon the reasoning and authorities set forth in that case, we hold that here the City's plans were sufficiently detailed and specific to meet the requirements of G.S. 160A-47(3).

The remainder of petitioners' arguments relate to the City's alleged lack of compliance with the requirements of G.S. 160A-48(c). The statute requires in pertinent part:

> (c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:
>
> (1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries; or
>
> (2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts five acres or less in size and such that at least sixty percent (60%) of the total number of lots and tracts are one acre or less in size . . . .

We note at the outset that the statute's requirement that the area to be annexed "must be developed for urban purposes" is satisfied if *either* the standard of (c)(1) *or* the standard of (c)(2) is met. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 34, 265 S.E. 2d 123, 131 (1980). It is *not* required that both standards be satisfied. Having so stated we turn first to petitioners' single argument relating to the standard set out in G.S. 160A-48(c)(2).

Petitioners do not question the City's compliance with the population density standard of the above section but rather argue that the trial court erred in concluding that the City was correct in its assertion that at least 60 percent of the total acreage of Coulwood consists of lots and tracts of five acres or less. In their brief petitioners review evidence which they argue tended to show that the City had overestimated the total acreage composed of lots and tracts of five acres or less by 32.877 acres. In light of the entire computation under G.S. 160A-48(c)(2), we fail to see how the alleged error could have prejudiced petitioners.

G.S. 160A-48(c)(2) requires that 60 percent of the total acreage consist of lots and tracts of five acres or less. To perform the computations required by this "subdivision test" two figures are needed: the total acreage and the subdivided acreage.

First, the total acreage must be determined. The City estimated the total area of Coulwood at 1198 acres based on county tax maps and records but requested the deduction from this figure of those portions of Coulwood dedicated as street rights-of-way, since the streets were not subject to subdivision. The court allowed the use of this reduced figure, 1015.7 acres, as the "total acreage" to be used in the subdivision test of section (c)(2) of the statute.

The City's estimate of the total area of Coulwood was 1198 acres. Petitioners claim that the City failed to include in its estimate a 41.73 acre tract which lies within the annexed area and included 8.119 acres which actually lie outside the area, thus they claim a total error in the City's estimate of 33.611 acres. G.S. 160A-54 provides in part:

> In determining whether the standards set forth in G.S. 160A-48 have been met on appeal to the superior court under

G.S. 160A-50, the reviewing court shall accept the estimates of the municipality:

* * *

(2) As to total area if the estimate is based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable map used for official purposes by a governmental agency, unless the petitioners on appeal demonstrate that such estimates are in error in the amount of five percent (5%) or more.

Thus the court below was *required* under the facts of this case to accept the City's estimate of the total area of Coulwood since 41.73 is less than 5 percent of 1198, the City having used county tax maps and records in arriving at this estimate as required by the above-quoted statute.

The City did not use 1198 in its computation under G.S. 160A-48(c)(2) but reduced this figure by the 182.3 acres which were subject to street rights-of-way rendering a total acreage capable of subdivision of 1015.7. While the trial court's conclusion that 1015.7 was the proper figure to be used in the subdivision test of G.S. 160A-48(c)(2) was excepted to at trial, it was not made the subject of an assignment of error, nor was the propriety of this figure addressed in the briefs. Under our Rules this exception is deemed abandoned, *see* N.C. Rules App. P., Rule 10(b). Whether it was proper for the trial court to reduce the area of Coulwood to 1015.7 is thus not before this Court for review, and 1015.7 is the figure upon which we must base our review of the computation in this case of the subdivision test of G.S. 160A-48(c)(2).

The second determination is that of the subdivided acreage; that consisting of lots and tracts of five acres or less. Based on county tax maps and records, the City submitted an estimate of 765.6 acres in tracts of five acres or less. Petitioners claim this figure must be reduced by 32.877 acres, the amount of the alleged error. Assuming *arguendo* that the City's estimate should be reduced, rendering the new figure of 732.723 subdivided acres, the outcome of the computation remains unaltered.

The figure 732.723 is 72.14 percent of 1015.7. The statute requires only that the acreage in lots of five or less acres be at

least 60 percent; moreover, G.S. 160A-54 requires acceptance of the City's estimate:

> (3) As to degree of land subdivision, if the estimates are based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable source, unless the petitioners on appeal show that such estimates are in error in the amount of five percent (5%) or more.

The City, using their 765.6 figure, estimated that 75.4 percent of the Coulwood area was subdivided into lots of five acres or less. Petitioners' evidence, even if fully believed, would thus establish an error of no more than 3.26 percent, which under G.S. 160A-54(3) would not be sufficient to allow the trial court to disregard the City's estimate. We note further that even if the trial court had erred in reducing the total area of Coulwood by the area devoted to street rights-of-way, an issue not before this Court and one which we do not herein decide, the area composed of lots of five or less acres would comprise 61.162 percent of Coulwood's total area (732.723 ÷ 1198 = .61162); a figure still in excess of the 60 percent required by G.S. 160A-48(c)(2) and one which would render harmless any error in accepting the City's estimate.

We find this assignment of error to be without merit.

Petitioners present two arguments alleging error in the computation and procedure of the population test of G.S. 160A-48(c)(1). They are: first, that the trial court erred in concluding that the area in question qualifies for annexation under G.S. 160A-48(c)(1); and second, that the trial court erred in refusing to remand the proceeding to the referee for a more complete report on the population of the annexation area. We reach neither of these questions. The area qualifies under G.S. 160A-48(c)(2). The statute requires only that the area to be annexed meet *one* of the standards listed.

The judgment of the trial judge affirming Annexation Ordinance 301-X is

Affirmed.

AVIS HELEN COX v. CHESTER C. HAWORTH, JR., M.D. AND HIGH POINT MEMORIAL HOSPITAL, INC.

No. 99

(Filed 1 December 1981)

1. **Appeal and Error § 67— overruling of prior decision—presumption of retroactivity**

A decision of the Supreme Court overruling a former decision will be given retrospective effect unless compelling reasons exist for limiting the application of the new rule to future cases.

2. **Husband and Wife § 9— action for loss of consortium—retrospective application of decision**

The decision in *Nicholson v. Hospital*, 300 N.C. 295, which overruled prior decisions and recognized a cause of action for loss of a spouse's consortium, will be applied retrospectively to all cases or claims pending and not barred by judgment, settlement or the statute of limitations as of 3 June 1980, the date of such decision.

ON plaintiff's petition for discretionary review prior to determination by the Court of Appeals pursuant to G.S. 7A-31 (1981) of the dismissal of her claim for loss of consortium as against the individual defendant by *Collier, Judge*, at the 16 March 1981 Session of Superior Court, GUILFORD County. The order of dismissal was entered 17 March 1981.

By this appeal, we consider whether this Court's decision in *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E. 2d 818 (filed 3 June 1980), which recognized a cause of action for loss of a spouse's consortium, should be limited to prospective application.

Barefoot & White, by Spencer W. White, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Jodee Sparkman King, for defendant-appellee Chester C. Haworth, Jr., M.D.

CARLTON, Justice.

I.

Plaintiff filed suit on 15 July 1980 alleging that defendants had negligently performed a myelogram procedure on her husband, Alfred W. Cox, on or about 14 July 1978 and had performed the myelogram without his informed consent. She alleged that as a result of the myelogram procedure her husband developed spinal cord arachnoiditis that left him permanently disabled and sexually impotent. Because of his disability she has suffered the loss of her husband's general companionship and conjugal society and affection and has also suffered the loss of sexual gratification in her marriage. She prayed for damages "in excess of $10,000." In her complaint plaintiff requested that her claims be joined with the existing action filed by her husband against the same doctor on 20 May 1980 in Guilford County (number 80CvS3503) for disposition.

Defendant Haworth moved to dismiss plaintiff's complaint for failure to state a claim for which relief may be granted because at the time of the alleged acts of negligence a claim for loss of consortium due to the negligence of third parties was not recognized under the laws of this state.

The motion to dismiss was heard by Judge Collier at the 16 March 1981 Session of Superior Court, Guilford County. He granted defendant Haworth's motion and entered an order dismissing plaintiff's action as to defendant Haworth.

Plaintiff gave immediate notice of appeal, and the appeal was filed and docketed in the Court of Appeals on 11 May 1981. Prior to determination of the appeal by that court, however, plaintiff filed a petition requesting that this Court certify the case for discretionary review prior to the determination of the Court of Appeals. We allowed plaintiff's petition on 17 August 1981.

II.

On 3 June 1980, this Court announced its decision in *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E. 2d 818 (1980), and held that "a spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries." *Id.* at 304, 266 S.E. 2d at

823. In so holding, this Court overruled long-standing case law which held that no action for loss of consortium exists. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E. 2d 611 (1945) (husband has no right of action for loss of wife's consortium); *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925) (wife has no right of action for loss of husband's consortium). Not before us in *Nicholson* was the question whether and to what extent the new rule applied to claims arising prior to the decision. We must now address this question.

A.

Under a long-established North Carolina law, a decision of a court of supreme jurisdiction overruling a former decision is, as a general rule, retrospective in its operation. *Mason v. A. E. Nelson Cotton Co.*, 148 N.C. 492, 62 S.E. 625 (1908); *MacDonald v. University of North Carolina*, 299 N.C. 457, 263 S.E. 2d 578 (1980). This rule is based on the so-called "Blackstonian Doctrine" of judicial decision-making: courts merely discover and announce law; they do not create it; and the act of overruling is a confession that the prior ruling was erroneous and was never the law. *People ex rel. Rice v. Graves*, 242 App. Div. 128, 273 N.Y.S. 582 (1934), *aff'd*, 270 N.Y. 498, 200 N.E. 288, *cert. denied*, 298 U.S. 683 (1936); *Fitzgerald v. Meissner & Hicks, Inc.*, 38 Wis. 2d 571, 157 N.W. 2d 595 (1968); *see* Annot., 10 A.L.R. 3d 1371, § 4 (1966); Annot., 85 A.L.R. 262 (1933). As stated by this Court in *Mason*, "the effect is not that the former decision is bad law, but that it never was the law." 148 N.C. at 510, 62 S.E. at 632. Under more recent decisions, however, courts have recognized that the question of retroactivity is one of judicial policy, and should be determined by a consideration of such factors as reliance on the prior decision, the degree to which the purpose behind the new decision can be achieved solely through prospective application, and the effect of retroactive application on the administration of justice. *See* Annot., 10 A.L.R. 3d 1371, at § 2. This Court has implicitly recognized that the decision on retroactivity involves a balancing of countervailing interests. *E.g., MacDonald v. University of North Carolina*, 299 N.C. 457, 263 S.E. 2d 578 (decision abolishing sovereign tort immunity applied prospectively because of vested contract rights); *Rabon v. Rowan Memorial Hospital, Inc.*, 269 N.C. 1, 152 S.E. 2d 485 (1967) (decision abolishing charitable immunity applied prospectively because of justified reliance on prior

case law); *State v. Bell*, 136 N.C. 674, 49 S.E. 163 (1904) (contractual rights acquired by virtue of the prior construction will not be disturbed by a subsequent overruling decision); *see Wilkinson v. Wallace*, 192 N.C. 156, 134 S.E. 401 (1926) (when contracts have been made and rights acquired in reliance on a prior decision, the contracts will not be invalidated nor vested rights impaired by a subsequent decision).

[1] By overruling a prior decision, a court implicitly recognizes that the old rule has lost its viability and should no longer be the law. Unless compelling reasons, such as those noted above from our prior cases, exist for limiting the application of the new rule to future cases, we think that the overruling decision should be given retrospective effect.

[2] Thus, we begin with the presumption of retroactivity and will apply the rule in *Nicholson* retroactively unless there exists a compelling reason for not doing so. Defendant contends there are three compelling reasons to apply *Nicholson* prospectively only: (1) because he justifiably relied on the prior case law, (2) because the purpose behind the *Nicholson* decision can be fully achieved through prospective application, and (3) because retroactive application of *Nicholson* would be unduly burdensome on the administration of justice.

Defendant first contends that in reliance on our decisions in *Hinnant* and *Helmstetler* he failed to procure insurance to protect against the additional risk of liability for loss of consortium. We find this argument unpersuasive. Justifiable failure to procure insurance has been accepted by this Court as a reason to limit the effect of an overruling decision only when the decision abolishes a common law immunity from tort liability. *Rabon v. Rowan Memorial Hospital, Inc.*, 269 N.C. 1, 152 S.E. 2d 485. Defendant cites to us cases from other jurisdictions accepting such a justifiable reliance argument, but these decisions, too, deal with the abolition of immunity: *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960) (abolition of tort immunity of school districts); *Parker v. Port Huron Hospital*, 361 Mich. 1, 105 N.W. 2d 1 (1960) (abolition of charitable immunity); *Spanel v. Mounds View School District No. 621*, 264 Minn. 279, 118 N.W. 2d 795 (1962) (abolition of school districts' tort immunity). When an immunity is abolish-

ed, the defendant suddenly becomes liable for all torts; when a new claim is recognized, the extent of liability increases. The difference between the fact of liability and the extent of liability is an important one. The former affects the decision whether to purchase insurance at all; the latter is merely one factor, among many, which is considered in deciding how much insurance to purchase. The effect of liability for loss of consortium on the decision of how much insurance to purchase is a matter of speculation and, in our opinion, would be minimal in comparison to other factors. We agree with the Supreme Court of Wisconsin that:

> The degree of reliance a tortfeasor might have placed on a wife's inability to recover consortium damages would be insignificant if existent. Certainly the tort was not committed with this in mind and the degree to which it may have influenced the decision whether or not to purchase liability insurance would be less than minimal. Nor will it effect (sic) the monetary limits of liability of the insurance carrier.

Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d at 578, 157 N.W. 2d at 598.

Neither can we agree with defendant's contention that the purpose behind the decision to allow an action for loss of consortium can be fully achieved through prospective application. The purpose of the *Nicholson* decision was to afford decent compensation to those injured by the wrongful conduct of others when the conduct impairs the service, society, companionship, sexual gratification and affection that is a vital part of the marital relationship. *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. at 300, 302, 266 S.E. 2d at 821, 822. While prospective application will effectuate this policy with regard to future cases, it will not provide compensation for those injured prior to the *Nicholson* decision. The policy behind *Nicholson* is to compensate the loss of a legitimate interest; that policy can best be achieved by retroactive application.

We also reject defendant's contention that retroactive application of *Nicholson* will unduly burden the administration of justice. While we recognize that problems concerning joinder will arise, these questions are no different from those which arise in other civil cases. The guidance provided by our Rules of Civil Pro-

cedure concerning joinder is adequate to prevent an undue burden on the administration of justice. See Rules 13, 19, 20 & 21.

Our research reveals that most courts have chosen to given an overruling decision recognizing an action for loss of consortium retroactive effect. *Ryter v. Brennan*, 291 So. 2d 55 (Fla. Dist. Ct. App.), *cert. denied*, 297 So. 2d 836 (1974); *Deems v. Western Maryland Railway Co.*, 247 Md. 95, 231 A. 2d 514 (1967); *Shepherd v. Consumers Co-operative Assoc.*, 384 S.W. 2d 635 (Mo. 1964); *Fitzgerald v. Meissner & Hicks, Inc.*, 38 Wis. 2d 571, 157 N.W. 2d 595. Our research revealed only one case in which the court refused to apply the new rule retroactively. In *Thill v. Modern Erecting Co.*, 284 Minn. 508, 170 N.W. 2d 865 (1969), the Minnesota Supreme Court limited its recognition of an action for loss of consortium to future cases, citing *Spanel v. Mounds*, 264 Minn. 279, 118 N.W. 2d 795. *Spanel* limited the rule abolishing sovereign immunity to future cases because of justified reliance on prior case law. As discussed above, we reject the argument, as it applies to recognizing a claim for loss of consortium, that justified reliance dictates prospective application.

We conclude that there are no compelling reasons to limit the effect of *Nicholson* to causes of action accruing after the date it was decided. Our decision recognizing a claim for loss of consortium will be applied retrospectively to all cases or claims pending and not barred by judgment, settlement or the statute of limitations as of 3 June 1980.

For the reasons stated above, we hold that plaintiff may pursue her claim for loss of consortium and remand the cause to the Superior Court, Guilford County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JOHN EDGAR RANKIN

No. 58

(Filed 1 December 1981)

1. Criminal Law § 87.1— allowance of leading questions—no abuse of discretion

The trial court did not abuse its discretion in permitting the prosecutor to ask an officer leading questions pertaining to the license number of the car operated by defendant on the night of a burglary and robbery.

2. Criminal Law §§ 34.4, 46.1— evidence of another crime—competency to show flight and connection with weapon

In this prosecution for first degree burglary and armed robbery, an officer's testimony that, two days following the crimes charged, he began looking for defendant after talking with persons at the scene of a shooting, shortly thereafter the officer saw defendant sitting with a woman on the porch of a nearby house, the officer called defendant's name and defendant and the woman ran between two houses, and the officer pursued defendant but gave up the chase when he encountered an altercation with the woman *is held* competent to show flight and to place defendant in close proximity to a gun which police found between two houses and which was used in the crimes charged, notwithstanding the testimony may also have tended to show defendant's involvement in a separate and distinct crime.

APPEAL by defendant from *Rousseau, J.*, 19 January 1981 Criminal Session of Greensboro Division of GUILFORD Superior Court.

Upon pleas of not guilty, defendant was tried on bills of indictment charging him with (1) first-degree burglary of the dwelling house of Janice Marie Ross, and (2) armed robbery of Ms. Ross.

Evidence presented by the state is summarized in pertinent part as follows:

On the night of 14-15 May 1980 Ms. Ross and her two young daughters were residing in and occupying an apartment at 924-B Omaha Street in the City of Greensboro. Ms. Ross retired around 10:00 p.m. but woke up around midnight and turned her television off. She went back to sleep and was awakened around 2:00 a.m. by a noise at the door leading to the outside. Two men then entered the room occupied by Ms. Ross and she turned on a light at the top of her bed. Immediately thereafter one of the men turned the light off but not before Ms. Ross recognized defendant as one of

the intruders. Defendant was wearing a ski mask and had a pistol in his hand. Ms. Ross had known defendant, who lived in a nearby apartment, for several months. She did not recognize the other intruder.

The burglars demanded money but Ms. Ross insisted she had none. They then searched portions of the apartment and left. As they reached the door, one of them fired a gun.

Police were called and went immediately to Ms. Ross' apartment. At the door leading to the apartment, they found a tire tool and damage to the door indicating that it had been pried open. They also dug a .32 caliber pistol bullet from the wall near the door. Ms. Ross gave them a list of items that she had determined were missing from her home.

During the early morning hours of 15 May 1980, Charles Barnard was sitting in an automobile parked on a street near the Ross apartment. He saw a blue Buick LeSabre with a white top occupied by two men drive up and park nearby. The men left the car and a few minutes later Barnard heard a shot. Thereafter, the two men returned to the car and sped away. Sometime later the police stopped a blue and white Buick owned and operated by defendant and also occupied by Alonzo Elliott. While police were talking to Elliott, defendant walked away. The officers saw part of a ski mask protruding from under the car seat. They removed the mask and found that it was wrapped around a watch. Ms. Ross identified the watch as being hers and identified the mask as being the one, or similar to the one, worn by defendant at the time of the burglary.

On the evening of 16 May 1980 police responded to a call to go to 709 Dale Street in Greensboro. Upon their arrival there, they found that one Ralph Rankin had been shot. The officers then intensified their search for defendant. A little later, they saw defendant sitting with a woman on the porch of a house on Ross Street. When the police called defendant, he and the woman left the porch and ran through the space between two houses. One of the officers found a .32 Smith & Wesson pistol under an oil drum between the houses. Expert testimony tended to show that the bullet removed from the Ross apartment could have been fired from the recovered pistol.

Defendant offered no evidence.

The jury found defendant guilty as charged. From judgments imposing a life sentence on the burglary count and a prison sentence of 50 years on the armed robbery count, defendant appealed. We allowed defendant's motion to bypass the Court of Appeals in the armed robbery case.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Daniel C. Oakley, for the state.

Donald L. Murphy for defendant-appellant.

BRITT, Justice.

[1] Defendant contends first that the trial court committed prejudicial error in overruling his objections to two questions asked a witness by the prosecuting attorney. This contention has no merit.

Police Officer A. R. Wood testified with respect to the blue and white Buick allegedly owned and operated by defendant on the night in question. After stating that he observed said automobile on that night, the officer was asked:

> "And did you note the license plate at that time, Officer Wood?"

Defendant's objection was overruled and the witness gave an affirmative answer. The witness was then asked:

> "Would you please look to see if you can find the license number of the vehicle you saw on that date and time and at that location?"

Defendant's objection was overruled and the witness stated that the license number was TEC-598.

Defendant argues that the questions were leading and, therefore, were prejudicial to him. We disagree. It is doubtful that the second question can be classified as "leading". Even so, in the context of this case, we find neither question improper.

In *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974), Justice (now Chief Justice) Branch, speaking for this court, said:

> "The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when . . . (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth. (Citations.)"

285 N.C. at 492-93.

Furthermore, it is firmly entrenched in the law of this state that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal. *State v. Greene, supra; State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5 (1971). We perceive no abuse of discretion here.

[2] Defendant's other contention is that the trial court committed prejudicial error in admitting evidence that was irrelevant. There is no merit to this contention.

Defendant argues that the court improperly permitted Officer Hugh Armstrong to testify that on 16 May 1980 he answered a call to 709 Dale Street; that when he arrived there he found Ralph Rankin, who had been shot, lying on the porch; that following conversations with several people at the scene, he began looking for defendant; that shortly thereafter he saw defendant sitting with a woman on the porch of a house nearby; that he called out to defendant by name; that defendant and the woman left the porch and ran through the open space between two houses; and that the officer pursued defendant but gave up the chase when he encountered an altercation with the woman.

It is well-settled that evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case being tried. 1 Stansbury's North Carolina Evidence (Brandis Rev.) § 77; *State v. Banks,* 295 N.C. 399, 245 S.E. 2d 743 (1978); *State v. Swift,* 290 N.C. 383, 226 S.E. 2d 652 (1976).

In the first place, most of the challenged testimony was relevant to show flight by defendant. The flight of an accused person is admissible as some evidence of guilt. 2 Stansbury's North

Carolina Evidence (Brandis Rev.) § 178; *State v. Jones*, 292 N.C. 513, 234 S.E. 2d 555 (1977); *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973). The evidence showed that defendant had "walked away" from the police and left his car with them early in the morning of 15 May 1980. Considering what Ms. Ross and other witnesses had told them, and what they had found in the car, it is reasonable to assume that the officers were looking for defendant on the evening of 16 May 1980.

In the second place, at least part of the challenged testimony was relevant to place defendant in close proximity to the site where police found the pistol that could have fired the bullet into the wall of the Ross apartment.

Implicit in defendant's argument is the suggestion that the challenged evidence tended to show defendant's involvement in a separate and distinct offense. While a strained interpretation of the record might support this suggestion, the more reasonable interpretation is that while the police were responding to a call relating to the shooting of Ralph Rankin, they learned that defendant was in the area and they began looking for him in connection with the burglary and armed robbery charges. In any event, due to the overwhelming evidence against defendant in the cases now under review, we conclude that he was not prejudiced by any reference to the shooting of Ralph Rankin. "The burden is on defendant not only to show error but also to show that the error complained of affected the result adversely to him . . . ." 4 Strong's N.C. Index 3d, Criminal Law, § 167.

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

No error.

STATE OF NORTH CAROLINA v. HENRY FORD ATKINS

No. 14

(Filed 1 December 1981)

Criminal Law § 33— cross-examination of sheriff as to knowledge of statute—irrelevant

In a prosecution for second degree murder where there was evidence that defendant called the deputy sheriff and complained about threats made by and trouble with five boys, including the deceased, and the deputy sheriff advised defendant that his office could not do anything until the defendant had a warrant issued for communicating a threat, the trial court did not err in failing to allow defendant to cross-examine the deputy sheriff as to his knowledge of G.S. § 15A-401(b), specifying when an officer may arrest a person without a warrant, as such testimony would tend to show only the officer's state of mind, not the defendant's, and would have no bearing on the issues before the court.

APPEAL by defendant as of right, pursuant to G.S. § 7A-27(a), from judgment of *Kivett, J.* entered at the 28 July 1980 Session of Superior Court, ROCKINGHAM County, sentencing him to life imprisonment upon his conviction of second degree murder and to a term of twenty years imprisonment upon his conviction of assault with a deadly weapon with intent to kill inflicting serious injury.

Rufus L. Edmisten, Attorney General by Harry H. Harkins, Jr., Assistant Attorney General, for State of North Carolina.

Benjamin R. Wrenn, Attorney for defendant-appellant, Henry Ford Atkins.

MEYER, Justice.

Defendant was charged in separate bills of indictment, proper in form, with murder in the first degree and assault with a deadly weapon with intent to kill inflicting serious injury. He pled not guilty to each charge and they were consolidated for trial.

The evidence at trial tended to show that during the late afternoon hours of 24 March 1980, as the defendant was returning from a grocery store to his mobile home with Marie Lewis, with whom he lived out of wedlock, Randy Lewis, Marie Lewis's son, attempted to stop the defendant's car. Randy was upset that his mother had moved back in with the defendant after having

separated from him. The defendant continued driving down the road to his trailer, got out of his car and cursed Randy and a group of boys standing with him. Randy, along with his brother Timmy Lewis, followed by Donald Hanks, Dean Hanks, and another person, walked down the road to the defendant's trailer. Donald Hanks, who lived in the same trailer park near Reidsville as did the defendant, owed the defendant $100.00 on a car. That debt had been the subject of an altercation between the defendant and Donald Hanks approximately five days earlier in which the defendant had threatened to kill Donald Hanks.

The Lewis brothers and the defendant exchanged mutual threats. The defendant fired several pistol shots in the group's direction but no one was hit. The boys ran and returned to Donald Hank's trailer. The defendant went inside his trailer, called the sheriff's office and complained to Deputy Sheriff Herman Bolden about the trouble with the five boys. Mr. Bolden advised him that his office could not do anything until the defendant had a warrant issued for communicating a threat, whereupon the defendant responded that he would take care of it himself. Mr. Bolden also talked with the boys and advised them that they could take out a warrant for assault and that they should leave the defendant alone. The defendant called his son, Gary, at a drive-in theater to tell him that he loved him and, according to the defendant's testimony, to tell him to go to live with his mother if anything happened to the defendant; according to the drive-in manager's testimony, to tell him that he was about to do something desperate. Wanda Lewis, the wife of Timmy Lewis, telephoned the defendant a few times. The content of the conversations is in dispute, but it is not in dispute that Henry hung up on her during the last call.

The defendant got into his car and started driving back up the road. Randy approached the car, followed by Dean Hanks. As Randy leaned toward the car, the defendant started firing his gun. Randy was shot twice, first in the neck and then in the abdomen; he died within a matter of minutes. Dean Hanks was also shot twice, in the hip and in the side. He spent seven days and eight nights in a hospital intensive care unit recovering from his wounds.

After the shooting the defendant drove away in his car. The car was later discovered a few miles north of Danville, Virginia.

Inside the vehicle were found a bottle of liquor, three shells in the front seat and two casings in the back seat. The defendant was found by a Virginia State Police trooper on the morning of 25 March 1980 hitchhiking on U.S. Highway #29, north of Danville. When arrested there, he was carrying a .32 caliber semi-automatic pistol in his back pocket.

At his trial defendant contended that he shot both the deceased and Dean Hanks in self-defense. The jury found the defendant guilty of second degree murder in the shooting death of Randy Lewis and guilty of assault with a deadly weapon with intent to kill inflicting serious injury in the shooting of Dean Hanks. He was sentenced to life imprisonment on the second-degree murder conviction, and twenty years on the assault conviction with that sentence to run concurrently with the life sentence.

On appeal the defendant brings forward only one substantive assignment of error—the trial court's refusal to allow him to recall for cross-examination Deputy Sheriff Herman Bolden as to his knowledge of G.S. § 15A-401(b). This statute specifies when an officer may arrest a person without a warrant. Apparently, defendant contends that by questioning the officer about the officer's knowledge of the statute, he could have elicited testimony to the effect that the deceased could have lawfully been arrested without a warrant and thereby buttress his self-defense argument. As pointed out by the trial judge, such testimony would not be relevant to the defendant's state of mind. If anything, it would tend to show only the *officer's* state of mind, not the defendant's, and would have no bearing on any issue before the court. Furthermore, the defendant was given ample opportunity to introduce any relevant evidence concerning his own state of mind or any other matter to support his self-defense contention. In fact, he testified that he feared death or bodily harm, and the trial court properly instructed the jury on self-defense.

The only case cited by the appellant in support of his appeal is *State v. Miller*, 16 N.C. App. 1, 190 S.E. 2d 888 (1972). That case held that the trial court's exclusion of competent evidence on cross-examination which would show bias of the witness against the defendant amounted to prejudicial error. *Miller* is inapposite here. The evidence excluded here was not offered to show bias. It

was irrelevant to any issue in the case. The scope of cross-examination lies largely within the discretion of the trial court, and its rulings should not be disturbed except when prejudicial error is disclosed. *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970); *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969), *cert. denied* 397 U.S. 1050 (1970); 4 N.C. Index 3d, Criminal Law § 88.1 (1976). Here, there is no error.

The defendant's only other assignment of error is the trial court's refusal to grant his motion to dismiss made at the close of the State's evidence and renewed at the close of all the evidence. He states that his review of the entire record fails to reveal any prejudicial error. Nevertheless, he requests that this Court review the evidence for any prejudicial errors which may exist. We have carefully reviewed the entire record in this case and find that there was abundant evidence of each of the elements of the two offenses with which the defendant was charged. The trial court correctly allowed both charges to go to the jury with proper instructions. We find that the defendant received a fair trial, free of prejudicial error.

No error.

PATRICIA L. EDWARDS v. TYRONE AKION AND THE CITY OF RALEIGH, NORTH CAROLINA

No. 94

(Filed 1 December 1981)

APPEAL pursuant to G.S. 7A-30(2) of the decision of the Court of Appeals (*Judge Harry C. Martin*, with *Chief Judge Morris* concurring, and *Judge Hill* dissenting) reported at 52 N.C. App. 688, 279 S.E. 2d 894 (1981), reversing the order of summary judgment entered for the City of Raleigh by *Farmer, Judge*, at the 11 August 1980 Civil Session of Superior Court, WAKE County.

Plaintiff filed this action for compensatory and punitive damages as a result of personal injuries[1] she suffered during an

1. The deposition of Dr. Carroll Mann, a neurological surgeon, disclosed that these injuries were quite severe and extensive and included some permanent brain damage.

affray with defendant City's employee Tyrone Akion, a refuse collector in the Sanitation Department. Plaintiff sought recovery from the City upon two theories: (1) its secondary or vicarious liability for an employee's commission of an intentional tort and (2) its primary liability for negligent supervision of an employee. Upon a hearing of the matter, the trial court granted the City's motion for summary judgment in the cause.

The Court of Appeals, in a 2-1 decision, reversed the entry of summary judgment. In so doing, the Court held that: (1) the City's insurance policy provided coverage for the commission of intentional torts by its employees, if such actions were committed within the scope of employment and (2) upon this record, there were material issues of fact as to whether defendant Akion committed the assault and battery upon plaintiff within the scope of his employment and whether the City had failed to supervise Akion properly on the occasion of this incident. Judge Hill dissented upon the ground that the commission of the assault was not within the scope of employment as a matter of law.

DeMent, Askew & Gaskins, by Johnny S. Gaskins, for plaintiff-appellee.

Teague, Campbell, Conely & Dennis, by R. B. Conely, for defendant-appellant.

PER CURIAM.

We hereby adopt the reasoning of the Court of Appeal's opinion and affirm its decision in all respects.

Affirmed.

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

ANDERSON v. MOORE

No. 339 PC.

Case below: 53 N.C. App. 350.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 December 1981. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 1 December 1981.

CARPENTER v. TONY E. HAWLEY, CONTRACTORS

No. 87 PC.

Case below: 53 N.C. App. 715.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 December 1981. Motion of Vinez Tinsley and defendants to dismiss appeal for lack of substantial constitutional question and lack of significant public interest allowed 1 December 1981.

DOUGLAS v. NATIONWIDE MUTUAL INS. CO.

No. 126 PC.

Case below: 54 N.C. App. 334.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 December 1981.

FURR v. PINOCA VOLUNTEER FIRE DEPT.

No. 40 PC.

Case below: 53 N.C. App. 458.

Petition by plaintiffs and defendants for discretionary review under G.S. 7A-31 denied 1 December 1981.

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

HOUSING, INC. v. WEAVER

No. 326 PC.

No. 161 (Fall Term)

Case below: 52 N.C. App. 662.

Petition by plaintiffs for rehearing allowed, and order dated 3 November 1981 denying petition for discretionary review is rescinded. Petition by plaintiff for discretionary review is now allowed by order of the Court 1 December 1981.

IN RE SAVINGS AND LOAN ASSOC.

No. 10 PC.

Case below: 53 N.C. App. 326.

Petition by several loan associations for discretionary review under G.S. 7A-31 denied 1 December 1981.

QUICK v. QUICK

No. 344 PC.

No. 163 (Fall Term).

Case below: 53 N.C. App. 248.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 1 December 1981.

RHEINBERG-KELLEREI GMBH v. VINEYARD WINE CO.

No. 77 PC.

Case below: 53 N.C. App. 560.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 December 1981.

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

SMITH v. AMERICAN AND EFIRD MILLS

No. 191 PC.

No. 160 (Fall Term)

Case below: 51 N.C. App. 480.

Petition by defendants for rehearing allowed, and orders dated 6 October 1981 denying petition for discretionary review and allowing motion to dismiss rescinded. Petition by defendants for discretionary review is now allowed and the motion to dismiss appeal is denied by order of the Court 1 December 1981.

STATE v. ALSTON

No. 238 PC.

Case below: 44 N.C. App. 72.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 1 December 1981.

STATE v. CHURCH

No. 163 PC.

Case below: 55 N.C. App. 132.

Petition by defendant for discretionary review under G.S. 7A-31 denied 22 December 1981.

STATE v. OLIVER

No. 274 PC.

Case below: 52 N.C. App. 483.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 December 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 December 1981.

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

STATE v. SHAW

No. 79 PC.

Case below: 53 N.C. App. 772.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 December 1981.

STATE v. WALDEN

No. 336 PC.

No. 162 (Fall Term).

Case below: 53 N.C. App. 196.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 1 December 1981.

WHITE v. RASCOE

No. 7 PC.

Case below: 53 N.C. App. 372.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 December 1981.

YORK v. SOUTHERN SCREW

No. 66 PC.

Case below: 53 N.C. App. 631.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 December 1981.

YOUNG v. CHEMICAL CO.

No. 80 PC.

Case below: 53 N.C. App. 806.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 December 1981.

State ex rel. Wallace v. Bone and Barkalow v. Harrington

STATE OF NORTH CAROLINA, EX REL. JAMES C. WALLACE AND DAVID HOWELLS v. ROGER W. BONE AND ROBIE L. NASH

FREDERICK S. BARKALOW AND BRENDA ARMSTRONG v. J. J. HARRINGTON, R. P. THOMAS, ROGER W. BONE AND ROBIE NASH

No. 55

(Filed 12 January 1982)

Constitutional Law § 5— separation of powers—legislators on Environmental Management Commission—legislative act unconstitutional

G.S. 143B-283(d), increasing the membership of the Environmental Management Commission by providing two members of the N.C. House of Representatives, appointed by the Speaker of the House, and two members of the N.C. Senate, appointed by the President of the Senate, shall be members of the EMC, is unconstitutional as it violates the Separation of Powers Clause of the North Carolina Constitution. The principle of separation of powers is a cornerstone of our state and federal governments which can be discerned from early N.C. cases, all three versions of the N.C. Constitution, records with respect to the drafting and adoption of our first N.C. Constitution and of the federal constitution, and from the failure of various constitutional amendments. Decisions of sister states also demonstrate an adherence to the separation of powers principle. Therefore, as the duties of the EMC, G.S. 143B-282 *et seq.*, are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws, the legislature cannot constitutionally, under Section 6 of Article I of the N.C. Constitution, create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality. Section 1, Articles II, III and IV of the N.C. Constitution.

APPEAL by plaintiffs from *Bailey, J.*, 18 March 1981 Session, WAKE Superior Court.

On 18 February 1981, pursuant to leave granted by the Attorney General, plaintiffs Wallace and Howells instituted an action in the nature of *quo warranto* against defendants Bone and Nash, members of the North Carolina House of Representatives, challenging the legality of their serving as members of the North Carolina Environmental Management Commission (EMC). On the same day, plaintiffs Barkalow and Armstrong instituted an action against defendants Bone and Nash, and also defendants Harrington and Thomas, the latter two being members of the North Caro-

lina Senate, challenging the legality of defendants serving on the EMC.

The gist of the complaints is that the service of defendants on the EMC at the same time they are serving as members of the General Assembly violates the Separation of Powers clause of the North Carolina Constitution. Plaintiffs allege that Section 6 of Chapter 1158 of the 1979 Session Laws (Second Session) [codified as G.S. 143B-283(d)] is unconstitutional. This section increases the membership of the EMC by four and provides that two of the additional members shall be members of the House of Representatives appointed by the Speaker of the House, and that the other two shall be members of the Senate appointed by the President of the Senate.

Defendants filed answers in which they admitted most of the allegations of the complaints. However, they denied that the act of the General Assembly complained of is unconstitutional and that their service on the EMC is invalid. They asked that the act be declared constitutional.

By consent of the parties, the actions were consolidated for trial and disposition. On 13 March 1981 the parties agreed to a pre-trial order which contains the following undisputed facts:

a. James C. Wallace is a citizen, resident, and taxpayer of Orange County, North Carolina.

b. David H. Howells is a citizen, resident and taxpayer of Wake County, North Carolina.

c. Frederick S. Barkalow is a citizen and resident of Wake County, North Carolina.

d. Brenda Armstrong is a citizen and resident of Durham County, North Carolina.

e. Wallace, Howells, Barkalow, and Armstrong are members of the Environmental Management Commission appointed by the Governor, pursuant to G.S. 143B-283(a).

f. Roger W. Bone is a citizen and resident of Nash County, North Carolina, and is an elected member of the North Carolina House of Representatives. He is Vice Chairman of the House Committee on Water and Air Resources.

g. Robie Nash is a citizen and resident of Rowan County, North Carolina, and is an elected member of the North Carolina House of Representatives. He serves on both the Water and Air Resources and Energy Committees of the House.

h. J. J. Harrington is a citizen and resident of Bertie County, North Carolina, and is an elected member of the North Carolina Senate. He serves on the Senate Agriculture, Manufacturing, and Public Utilities and Energy Committees.

i. R. P. Thomas is a citizen and resident of Henderson County, North Carolina, and is an elected member of the North Carolina Senate. He serves on both the Senate Local Government & Regional Affairs and Manufacturing Committees.

j. Senators Harrington and Thomas are members of the Environmental Management Commission appointed by the Lieutenant Governor, pursuant to G.S. 143B-283(d)(2).

k. Representatives Bone and Nash are members of the Environmental Management Commission appointed by the Speaker of the House on February 11, 1981, and inducted into office on February 12, 1981, pursuant to G.S. 143B-283(d)(1).

l. The Environmental Management Commission is a quasi-independent regulatory agency of the State with quasi-legislative and quasi-judicial powers and duties as enumerated in G.S. 143B-282.

m. Members of the Environmental Management Commission are public officers.

n. The provision pursuant to which Senators Harrington and Thomas and Representatives Bone and Nash were appointed [G.S. 143B-283(d)] was enacted by the General Assembly in June 1980 as Section 6 of Chapter 1158 of the 1979 Session Laws (2nd Session 1980).

o. Prior to the enactment of G.S. 143B-243(d), the Environmental Management Commission consisted of thirteen (13) members appointed by the Governor. After the enactment of G.S. 143B-243(d), the Environmental Management Commission consists of seventeen (17) members of which thir-

teen (13) are appointed by the Governor, two (2) are appointed by the Speaker of the House from the membership of the House, and two (2) are appointed by the President of the Senate (Lieutenant Governor) from the membership of the Senate.

In the pre-trial order the parties also agreed that the contested issue to be determined by the court is

> Whether the provisions of G.S. 143B-243(d) [1979 S.L., Ch. 1158, § 6 (2nd Session, 1981)], by which two representatives and two senators were appointed to membership on the Environmental Management Commission, violate the separation of powers provision of the Constitution of North Carolina (N.C. Const., Art. I, § 6).

Following a hearing at which Judge Bailey considered the pleadings, the stipulations, briefs filed by all parties, and arguments of counsel, he entered a judgment in which he found facts substantially as stipulated by the parties. He concluded as a matter of law, *inter alia*, the following:

> 5. The legislative members of the Environmental Management Commission (defendants) are in a clear minority position on the Commission. The statutory composition of the Commission does not represent an attempt by the General Assembly to usurp the functions of the executive branch of State government, but represents a cooperative effort between the executive and legislative branches. This court wishes to make it clear that the clear minority position of the legislators on the Commission is a critical factor in the court's decision.
>
> 6. Under the circumstances presented in this case, individual members of the legislature may serve on the Environmental Management Commission, without violating the separation of powers provision in Article I, § 6 of the Constitution of North Carolina, where such service falls in the realm of cooperation on the part of the legislature and there is no evidence of an attempt to usurp functions of the executive branch of our State government.

Judge Bailey also concluded that the challenged statute is constitutional. He further concluded that plaintiffs are not entitled to the relief sought and dismissed the actions.

Plaintiffs appealed and defendants petitioned this court for discretionary review prior to determination in the Court of Appeals. Defendants contended that the appeal has significant public interest and that the legal principle involved in these cases is of major significance to the jurisprudence of the state. Plaintiffs joined in the request that we bypass the Court of Appeals. This court allowed the petition on 2 June 1981.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas F. Moffitt, for defendant-appellees.

Thomas S. Erwin for plaintiff-appellants.

BRITT, Justice.

Section 6 of Article I of our state constitution provides: "*Separation of powers.* The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other." We hold that the challenged enactment of the General Assembly violates this section of the state constitution and that the judgment appealed from must be reversed.

In arriving at this conclusion, we have considered, among other things, the history of the principle of separation of powers in our state and nation, the decisions of other jurisdictions in our nation respecting the principle, and the specific provisions of our constitution and the statutes involved.

I.

Since North Carolina became a state in 1776, three constitutions have been adopted: In 1776, in 1868 and in 1970. The first two documents provided that "[t]he legislative, executive and supreme judicial powers of Government, ought to be forever separate and distinct from each other." The 1970 rewrite contains the language first quoted above, changing "ought to be" to "shall be". Thus each of our constitutions has explicitly embraced the doctrine of separation of powers.[1]

Section 1 of Article II of our present constitution provides that "[t]he legislative power of the State shall be vested in the

1. N.C. Constitution, Sec. 4, Declaration of Rights (1776); N.C. Constitution, Art. I, Sec. 8 (1868); N.C. Constitution, Art. I, Sec. 6 (1970).

General Assembly, which shall consist of a Senate and a House of Representatives." Section 1 of Article III provides that "[t]he executive power of the State shall be vested in the Governor." Section 1 of Article IV provides:

> The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

Previous constitutions contained similar provisions.

Our first state constitution was adopted on 18 December 1776.[2] While records with respect to the drafting and adoption of our first constitution are sparse, history has recorded the instructions given by their constituents to two county delegations participating in the drafting of the first constitution—the delegations from Mecklenburg and Orange Counties. Instructions to the Mecklenburg delegation included the following:

* * *

> 4. That you shall endeavor that the form of Government shall set forth a bill of rights containing the rights of the people and of individuals which shall never be infringed in any future time by the law-making power or other derived powers in the State.
>
> 5. That you shall endeavour that the following maxims be substantially acknowledged in the Bills of Rights (viz):
>
> 1st. Political power is of two kinds, one principal and superior, the other derived and inferior.

2. This constitution was adopted at the Fifth Provincial Congress which met in Halifax, N.C. The constitution was not submitted to a vote of the people. *The History of a Southern State, North Carolina*, Lefler and Newsome, 3rd ed., pg. 221. In commenting on the first constitution, Professors Lefler and Newsome record: "The political theory of the new constitution, stated in Articles 1, 2 and 4, emphasized popular sovereignty, separation of powers, and three separate branches of government." *Id.*

2nd. The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ.

6. That you shall endeavor that the Government shall be so formed that the derived inferior power shall be divided into three branches distinct from each other, viz:

The power of making laws
The power of executing laws and
The power of Judging.

* * *

9. The law making power shall be restrained in all future time from making any alteration in the form of Government.[3]

Instructions to the Orange delegation included the following:

* * *

Fourthly. We require that in framing the civil constitution the derived inferior power shall be divided into three branches, to wit: The power of making laws, the power of executing and the power of judging.

Fifthly. That the power of making laws shall have authority to provide remedies for any evils which may arise in the community, subject to the limitations and restraints provided by the principal supreme power.

* * *

Seventhly. That the executive power shall have authority to apply the remedies provided by the law makers in that manner only which the laws shall direct, and shall be entirely distinct from the power of making laws.

Eighthly: That the judging power shall be entirely distinct from and independent of the law making and executive powers.

Ninthly: *That no person shall be capable of acting in the exercise of any more than one of these branches at the same*

3. *The Colonial Records of North Carolina*, Saunders, Vol. X, 870a, 870b.

time lest they should fail of being the proper checks on each other and by their united influence become dangerous to any individual who might oppose the ambitious designs of the persons who might be employed in such power.[4] (Emphasis added.)

The federal constitution was drafted and adopted in 1787, eleven years after our first state constitution was adopted. While the federal constitution contains no explicit provision regarding separation of powers, the principle is clearly implied. Article I, Section 1, provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a senate and house of representatives." Article II, Section 1, provides that "[t]he executive power shall be vested in a president of the United States of America . . . ." Article III, Section 1, provides that "[t]he judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish . . . ."

There is abundant evidence that the drafters of the federal constitution had the separation of powers principle in mind, and, for the most part, the principle has been championed and adhered to throughout the history of our republic.

Alexander Hamilton, one of the drafters of the federal constitution and keeper of copious notes, wrote:

> In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and the usurpations are guarded against, by a division of the government into *distinct and separate* departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among *distinct and separate* departments. (Emphasis added.) *The Federalist*, No. 51.

4. Id., 870g, 870h. Professors Lefler and Newsome tell us that "it was only the pressure from a few county delegations notably Orange and Mecklenburg, that compelled the Congress to add a Bill of Rights to its constitution." *The History of a Southern State, North Carolina, supra*, pg. 221.

It appears that George Washington, the father of our country, feared the destruction of our form of government by an abuse of the principle of separation of powers. In his Farewell Address, he said:

> It is important, likewise, that the habit of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of the love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position.[5]

There are many indications that North Carolina, for more than 200 years, has strictly adhered to the principle of separation of powers. One indication is that ours is one of the few states, if not the only state, in the Union that does not provide its governor with the power to veto enactments of the legislature. Numerous efforts to change our constitution to give the governor that power have failed. The clear implication is that our people do not want the chief executive to have any direct control over our legislative branch.

Another indication is the absence of cases which have come to this court contending that a branch of our state government violated the separation of powers principle. While the case at hand appears to be one of first impression in our jurisdiction, we have found two instances in which members of the judiciary have expressed themselves on the principle.

In the fifth case reported in our reports, *Bayard v. Singleton*, 1 N.C. 5 (1787), it is recorded that Ashe, J., deviated from the case under consideration to make "a few observations on our Constitution and system of government." Obviously referring to our national government, he said:

5. Quoted by the Supreme Court of Indiana in *Book v. State Office Building Commission*, 238 Ind. 120, 149 N.E. 2d 273 (1958).

> [A]t the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a marooned island—without laws, without magistrates, without government or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system of those fundamental principles comprised in the Constitution, dividing the powers of government into separate and distinct branches, to wit: The legislative, the judicial, and executive, and assigning to each several and distinct powers, and prescribing their several limits and boundaries; . . . .

1 N.C. at 6.

In *State v. Bell*, 184 N.C. 701, 115 S.E. 190 (1922), this court was confronted with the interpretation and application of a criminal statute relating to support of children. A majority of the court gave the statute a liberal interpretation and upheld the conviction of the defendant. Stacy, J., (later C.J.), dissented on the ground that the statute should be strictly construed. The following is from his dissenting opinion:

> We must hew to the line and let the chips fall wherever they may. And though we may think the law ought to be otherwise, this should not blind our judgment to what it really is. The duty of legislation rests with another department of the Government. It is ours only to declare the law, not to make it. *Moore v. Jones*, 76 N.C. 187. The people of North Carolina have ordained in their Constitution (Art. I, sec. 8) that the legislative, executive, and supreme judicial powers of the Government should be and ought to remain forever separate and distinct from each other. Such is their expressed will, and from the earliest period in our history they have endeavored with sedulous care to guard this great principle of the separation of the powers. In this country, those who make the laws determine their expediency and wisdom, but they do not administer them. The chief magistrate who executes them is not allowed to judge them. To another tribunal is given the authority to pass upon their validity and constitutionality, "to the end that it be a government of laws and not of men." From this unique political division results

> our elaborate system of checks and balances—a complication and refinement which repudiates all hereditary tendencies and makes the law supreme. In short, it is one of the distinct American contributions to the science of government; . . . .

184 N.C. at 719.

There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments.

II.

Numerous decisions from sister states show strict adherence to the separation of powers principle and do not tolerate legislative encroachment or control over the function and power of the executive branch. *See Book v. State Office Building Commission, supra; State ex rel. State Building Commission of West Virginia v. Bailey*, 151 W. Va. 79, 150 S.E. 2d 449 (1966); *Greer v. Georgia*, 233 Ga. 667, 212 S.E. 2d 836 (1975); *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912). *See also Bradner v. Hammond*, 553 P. 2d 1 (Alaska 1976); *Ahearn v. Bailey*, 104 Ariz. 250, 451 P. 2d 30 (1969); *In re Advisory Opinion to the Governor*, 276 So. 2d 25 (Fla. 1973); *In re Opinion of the Justices to the Governor*, 369 Mass. 990, 341 N.E. 2d 254 (1976) (This case stated flexibility in allocation of functions may sometimes be permissible, but only if it creates no interference by one department with the power of another.); *Dearborn TP. v. Dail*, 334 Mich. 673, 55 N.W. 2d 201 (1952); and *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 208 N.W. 2d 780 (1973).

A review of a representative number of those decisions is in order.

In *Book v. State Office Building Commission, supra*, the Supreme Court of Indiana declared unconstitutional that part of the State Office Building Act which provided that certain members of the legislature should be members of the State Office Building Commission. The court held that this part of the act violated the division of powers provision of the state constitution because it attempted to confer executive-administrative duties upon members of the legislature. Referring to the separation of powers provision of the Indiana Constitution, the court said:

> Article 3, § 1, supra, is not a law against dual office holding. It is not necessary to constitute a violation of the Article, that a person should hold an office in two departments of Government. It is sufficient if he is an officer in one department and at the same time is performing functions belonging to another. *State ex rel. Black v. Burch*, supra, 1948, 226 Ind. 445, 462, 80 N.E. 2d 294, 560, 81 N.E. 2d 850; *Monaghan v. School District No. 1, Clackamas County*, Or. 1957, 315 P. 2d 797, 802-804.

149 N.E. 2d at 296.

In *State ex rel. State Building Commission of West Virginia v. Bailey, supra*, the Supreme Court of Appeals of West Virginia declared unconstitutional that portion of a statute which named certain members of the legislature to the State Building Commission on the ground that the statute violated the separation of powers provision of the state constitution. We quote from the opinion:

> [I]t is manifest that the powers granted and the duties imposed upon the State Building Commission of West Virginia by the legislative enactment here involved, Chapter 8, Acts of the Legislature, Regular Session, 1966, are executive or administrative and not legislative in character and that the provision of Section 1 of the statute that the president of the senate, the speaker of the house of delegates, the minority leader of the senate and the minority leader of the house of delegates shall be members of the commission is violative of Article V of the Constitution of this State in that it attempts to confer and impose executive or administrative powers and duties upon those members of the Legislature and for that reason is null and void and of no force and effect.

150 S.E. 2d at 456.

In *Greer v. State of Georgia et al., supra*, the Supreme Court of Georgia declared unconstitutional legislation naming certain legislators to serve on the governing body of the World Congress Authority. The legislative act created said agency, a public corporation, to plan, construct, erect, acquire, own, repair, remodel, maintain, add to, extend, improve, equip, operate and manage the Georgia World Congress Center. The act also provided that the

governing body of the authority would consist of 20 members, six of whom would be members of the General Assembly. In holding that the part of the act providing for members of the legislature to serve on the authority violated the separation of powers provision of the state constitution, the Georgia court said:

> The question here is whether the legislature can constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality. Appellants' argument is that there is no constitutional defect in this arrangement. Carried to its logical extreme, this arrangement would permit the General Assembly to appoint an ad hoc committee of its own members to implement specific legislation. The case at bar does not present such a logical extreme, but it evidences the same constitutional infirmity. We have to conclude that a legislator who participates as a member of the governing body of a public corporation such as the World Congress Center Authority is performing executive functions.

212 S.E. 2d at 838.

In *Stockman v. Leddy, supra,* the Supreme Court of Colorado declared unconstitutional an act of the Colorado legislature creating a joint committee of its members to conduct an investigation on which the committee would come to a conclusion and act in prosecuting or defending certain actions for the benefit of the state. In holding that the legislation violated the principle of separation of powers, the Colorado court said:

> [T]he General Assembly not only passed an act—that is, made a law—but it made a joint committee of the Senate and the House as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the General Assembly to confer executive power upon a collection of its own members. This is contrary to article 3 of our Constitution, ...

129 P. at 223.

In *O'Donoghue v. United States,* 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933), the U.S. Supreme Court, after stating that

our federal constitution distributes the power of government between the three branches, said:

> This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Philippine Islands*, 277 U.S. 189, 201, 72 L.Ed. 845, 849, 48 S.Ct. 480, namely, to preclude a commingling of these essentially different powers of government in the same hands.

77 L.Ed. at 1360.

In his judgment, Judge Bailey recited that he found the decision of the Supreme Court of South Carolina in *State ex rel. McLeod v. Edwards*, 269 S.C. 75, 236 S.E. 2d 406 (1977), to be very persuasive. He also cited *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 547 P. 2d 786 (1976). A study of these cases reveals that South Carolina and Kansas have deviated from the separation of powers principle.

In *State ex rel. McLeod v. Edwards, supra*, the constitutionality of two members of the South Carolina General Assembly serving as *ex officio* members of the State Budget and Control Board was challenged. This board is composed of the governor, the state treasurer, the controller general, the chairman of the senate finance committee, and the chairman of the house ways and means committee. All members of the board are *ex officio*. Relying on its previous decisions, the court held that the inclusion of members of the legislature on the board did not violate the separation of powers provisions of the state constitution. In defending its holdings, the court said:

> While the foregoing disposes of the present separation of powers issue, we think that an examination of the principle, as applied to the present facts, reveals the basis for the result reached in our prior decisions. Important in this case is the fact that the General Assembly has been careful to put the legislative members in a minority position on The Board. The statutory composition of The Board does not represent an attempt to usurp the functions of the executive department, but apparently represents a cooperative effort by making available to the executive department the special knowledge and expertise of the chairman of the two finance

> committees in the fiscal affairs of the State and the legislative process in general. We view the ex officio membership of the legislators on The Board as cooperation with the executive in matters which are related to their function as legislators and not usurpation of the functions of the executive department.

236 S.E. 2d 408-09.

In *State ex rel. Schneider v. Bennett, supra,* the question of the constitutionality of members of the legislature serving on the state finance council was presented. This council consists of the governor, the speaker of the house, the president of the sentate, the majority and minority leaders of the house and senate, and the chairmen of the ways and means committees of the house and senate. The council was created as a "legislatively oriented" agency to approve the rules and regulations of the department of administration and thereby to check the power of the governor to coordinate the activities of state agencies. The council was specifically authorized to exercise control and authority over the state department of administration as a whole; to approve any and all rules and regulations with respect to the manner of performance of *any* power or duty of the department and the execution of any business of the department and its relations to and business with other state agencies; to hear and determine appeals by any state agency from final decisions or final actions of the secretary of administration; and to make allocations to, and approve expenditures by a state agency from any appropriations to the state finance council for that purpose, of funds for unanticipated and unbudgeted needs, under conditions and limitations prescribed by the legislature.

In commenting on the separation of powers doctrine, the Kansas court said:

> In our judgment a strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power including legislative, executive, and judicial powers often blended together in the same administrative agency. The courts today have come to recognize that the political philosophers who developed the theory of separation of powers did not have any concept of the complexities of

government as it exists today. Under our system of government the absolute independence of the departments and the complete separation of powers is impracticable. We must maintain in our political system sufficient flexibility to experiment and to seek new methods of improving governmental efficiency. At the same time we must not lose sight of the ever-existing danger of unchecked power and the concentration of power in the hands of a single person or group which the separation of powers doctrine was designed to prevent.

547 P. 2d at 791.

However, the Kansas court also said:

> The separation of powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions created by legislative enactments. Individual members of the legislature may serve on administrative boards or commissions where such wervice falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government. (Citations.)

547 P. 2d at 792.

The Kansas court then proceeded to hold, however, that many, if not most, of the duties assigned to the state finance council were executive in nature and the exercise of those powers by legislators was unconstitutional. We quote again from the opinion:

> All of these powers concern the day-to-day operations of the department of administration and its various divisions. The vesting of such powers in the state finance council in our judgment clearly grants to a legislatively oriented body control over the operation of an executive agency and constitutes a usurpation of executive power by the legislative department.

547 P. 2d at 797.

III.

Having stated the history of the separation of powers principle, and having considered its application by other states, we now

relate the principle to the challenged legislation providing for four members of our General Assembly to serve on the EMC.

The Environmental Management Commission exists pursuant to G.S. 143B-282 *et seq.* Its purpose is stated in G.S. 143B-282 as follows:

> There is hereby created the Environmental Management Commission of the Department of Natural Resources and Community Development with the power and duty to promulgate rules and regulations to be followed in the protection, preservation, and enhancement of the water and air resources of the State.

Within the limitations of G.S. 143-215.9 concerning industrial health and safety, the EMC has the power and duty, among other things, to grant and revoke permits with regard to controlling sources of air and water pollution; to issue special orders pursuant to certain statutes to any person whom the commission finds responsible for causing or contributing to any pollution of water within a watershed or pollution of the air within the area for which standards have been established; to conduct and direct that investigations be conducted pursuant to certain statutes; to conduct public hearings, institute actions in superior court, and agree upon or enter into settlements, all pursuant to G.S. 143-215.3; to direct the investigation of any killing of fish and wildlife pursuant to G.S. 143-215.3; to review and have general oversight and supervision over local air pollution control programs pursuant to certain statutes; to declare an emergency when it finds a generalized dangerous condition of water or air pollution pursuant to certain statutes; to grant permits for water use within capacity use areas pursuant to G.S. 143-215.15; to direct that investigations be conducted when necessary to carry out duties regarding capacity use areas; to approve, disapprove and approve subject to conditions all applications for dam construction pursuant to G.S. 143-215.28; to halt dam construction pursuant to G.S. 143-215.29; to have jurisdiction and supervision over the maintenance and operation of dams pursuant to G.S. 143-215.31; and to have jurisdiction and supervision over all pollution pursuant to Article 21A of Chapter 143. G.S. 143B-282(1).

The EMC is also given the power and duty to establish standards and adopt rules and regulations for air quality standards,

emission control standards, and classifications for air contaminant sources pursuant to G.S. 143-215.107; for water quality standards and classifications pursuant to certain statutes, to implement the issuance of permits for water use within capacity use areas; and for the protection of sand dunes pursuant to certain statutes. G.S. 143B-282(2).

Prior to 1979, the EMC consisted of 13 members, all appointed by the Governor. The statute also sets forth certain vocational qualifications for members of the commission.

It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws. We agree with the Georgia court's holding in *Greer*, that the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality.

We agree with the Kansas and South Carolina courts that there should be cooperation between the legislative and executive branches of government. For many years North Carolina has recognized and benefited from cooperative efforts between the branches of its government. The best examples of this are various study commissions on which legislators and non-legislators, including persons from other branches of government, have served. Many recommendations of these commissions have been enacted into law beneficial to the citizens of our state.

Counsel for defendants have set forth in an exhibit to their brief a list of 49 other boards and commissions on which legislators serve as members pursuant to statutes. We do not find it appropriate to comment on any board or commission except the one which is the subject of this appeal. Suffice it to say, the people of North Carolina on at least three occasions—the last opportunity being as late as 1970—explicitly adopted the principle of separation of powers. It behooves each branch of our government to respect and abide by that principle.

For the reasons stated, we conclude that Section 6 of Chapter 1158 of the 1979 Sessions Laws [codified at §§ (d) of G.S.

143B-283] violates Section 6 of Article I of the North Carolina Constitution. Consequently, the judgment appealed from is

Reversed.

STATE OF NORTH CAROLINA v. JOHN WALL, JR.

No. 22

(Filed 12 January 1982)

1. **Homicide §§ 4.2, 21.6— felony-murder rule—doctrine of merger—felony of discharging firearm into occupied property**

The Supreme Court will not adopt the merger doctrine which would bar a defendant's conviction of first degree felony murder based upon a felony which is an integral part of the homicide and is an offense included in fact within the offense charged. Therefore, defendant's conviction of first degree felony murder could properly be based upon the underlying felony of discharging a firearm into an occupied vehicle in violation of G.S. 14-34.1.

2. **Homicide §§ 4.2, 14.2; Constitutional Law § 28— felony-murder statute—constitutionality**

The felony-murder rule set forth in G.S. 14-17 does not establish a presumption of premeditation and deliberation in violation of due process and equal protection since premeditation and deliberation are not elements of the crime of felony-murder and the statute involves no presumption at all.

3. **Homicide § 4.2— felony-murder rule—discharging firearm into occupied property as underlying felony—intent of legislature**

The 1977 revision of G.S. 14-17 makes it clear that the legislature intended that the discharging of a firearm into occupied property be included as an underlying felony for the purposes of the felony-murder rule.

4. **Arrest and Bail § 1; Homicide § 23— misdemeanor larceny—right to detain thief—firing into fleeing automobile—no justification or excuse**

The defendant in a felony-murder prosecution was not entitled to an instruction on justification or excuse based upon the statute setting forth when a private person may detain another who has committed a crime in his presence, G.S. 15A-404, where the evidence showed that the victim and another took two six packs of beer from the store in which defendant was working without paying for them, and that defendant fired a pistol into the vehicle occupied by the victim as the vehicle was exiting the store parking lot, since (1) defendant could no longer "detain" the victim once the victim was beyond defendant's control, and (2) neither an officer nor a private citizen could employ deadly force to detain a fleeing misdemeanant. G.S. 15-401(d).

5. **Constitutional Law § 80; Criminal Law § 138.2— life sentence for felony-murder—no cruel and unusual punishment**

A sentence of life imprisonment for a felony-murder did not constitute cruel and unusual punishment.

6. **Homicide § 25; Weapons and Firearms § 3— discharging weapon into occupied vehicle—felony-murder—instructions on defendant's contentions**

In a prosecution for felony-murder by discharging a firearm into an occupied vehicle, the trial court's instructions adequately presented to the jury the essential and substantial features of defendant's contention that he did not intentionally shoot into the vehicle. Furthermore, the trial court was not required to charge on defendant's contention that he fired "at" rather than "into" the vehicle, since defendant could not have intentionally fired a shot "at" the vehicle without intending that the bullet go "into" the vehicle.

7. **Criminal Law § 128.2— statement admitted for impeachment—prosecutor's substantive use in jury argument—denial of mistrial not abuse of discretion**

In a prosecution for felony-murder by firing a pistol into a vehicle occupied by two teenagers who had stolen two six packs of beer from the store in which defendant worked, the prosecutor's substantive use in his jury argument of defendant's statement that he started to let the teenagers leave but then said, "The hell with it," when the statement had been admitted for impeachment purposes only, was not so prejudicial to defendant in light of the overwhelming evidence on the issue of intent as to render the denial of his motion for mistrial a manifest abuse of the trial court's discretion.

8. **Homicide §§ 30.2, 32.1— guilt of felony-murder—failure to instruct on voluntary manslaughter—absence of prejudice**

Defendant in a first degree murder trial was not prejudiced by the failure of the trial court to charge on voluntary manslaughter where defendant was found guilty of first degree murder on the theory of felony-murder and was found not guilty on the charge of first degree murder with premeditation and deliberation.

9. **Homicide § 20.1— admissibility of photographs**

In a prosecution for felony-murder by firing a pistol into an occupied vehicle, photographs of the victim's injuries were properly authenticated and admitted into evidence for illustrative purposes. Furthermore, testimony by the victim's father identifying the photographs as depicting his son and the automobile his son was driving on the night he was killed was relevant to establish the identity of the victim and to identify the automobile.

10. **Criminal Law § 128.2— extended jury deliberations—failure to declare mistrial—no abuse of discretion**

The trial court did not abuse its discretion in failing to declare a mistrial on its own motion when the jurors had failed to reach a verdict after four and a half hours where the trial judge brought them back into the courtroom to inquire into their numerical differences; at that time the vote stood at eight to four; the foreman gave no indication that the jury was deadlocked, and the judge asked the jury to continue deliberations; a little over an hour later the

judge again called the jury back into the courtroom and learned that the vote was eleven to one at that point; the foreman informed the judge that further deliberations would result in a unanimous verdict; the jury returned to its deliberations and returned a verdict of guilty a half hour later; and the jury deliberated a total of six hours and ten minutes. G.S. 15A-1063(2).

Justice COPELAND dissenting.

Justices HUSKINS and EXUM join in the dissenting opinion.

APPEAL by defendant from *Griffin, J.*, 17 November 1980 Session of MECKLENBURG Superior Court.

Defendant was charged by bill of indictment, proper in form, with the murder of Steven Shawn Smith.

On the evening of 14 July 1980, the defendant, John Wall, Jr., was working as a cashier at "Mr. T's," a convenience store on Monroe Road in Charlotte. A teenaged girl entered the store and walked out with two six packs of beer. As she was leaving, defendant said he her, "Ma'am you cannot go out the door without paying for the beer." The girl took the beer to a Volkswagen automobile in the parking lot and then returned to the store, this time accompanied by Steven Shawn Smith. Defendant said, "Ma'am, I have to have the money for the beer," to which the girl replied, "Okay. I will go get your money." She then left the store followed by Smith. The two got into the car and began to drive off. As the car was leaving the parking lot, defendant ran out with a .357 magnum pistol and fired three shots. The first shot apparently missed the vehicle. The latter two shots appeared to strike the automobile. The vehicle lurched, and the engine raced as the vehicle slowly rolled to a stop on a side street. Steven Shawn Smith was found slumped over the steering wheel with a fatal head wound.

At trial the State presented testimony by eyewitnesses that defendant shot directly at the fleeing automobile. Defendant testified that he fired all three shots up into the air in an attempt to frighten the fleeing beer thieves into stopping.

Defendant was convicted of first-degree murder and sentenced to life imprisonment. He appealed as a matter of right to this Court pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Assistant Attorney General, for the State.

McConnell, Howard, Pruett & Toth, by Carl W. Howard and Rodney Shelton Toth, for defendant appellant.

BRANCH, Chief Justice.

First-degree murder is defined by statute as follows:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape, or a sex offense, robbery, kidnapping, burglary, *or other felony committed or attempted with the use of a deadly weapon,* shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the state's prison for life as the court shall determine pursuant to G.S. 15A-2000.

G.S. 14-17. (Emphasis added.) Defendant's conviction was pursuant to the felony-murder portion of the above statute and was based upon the emphasized language.

[1] Defendant argues that this Court should adopt the merger doctrine espoused in *People v. Ireland,* 70 Cal. 2d 522, 450 P. 2d 580, 75 Cal. Rptr. 188 (1969), which would bar his conviction of first-degree felony murder based upon the underlying felony of discharging a firearm into an occupied vehicle. The *Ireland* case held that in California "a . . . felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged." (Emphasis in original.) *Id.* at 539, 450 P. 2d at 590, 75 Cal. Rptr. at 198. The felony of discharging a firearm into occupied property, G.S. 14-34.1, appears to be such an integral part of the homicide in instant case as to bar a felony-murder conviction under the California merger doctrine. This Court, however, has expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property. *State v. Swift,* 290 N.C. 383, 226 S.E. 2d

652 (1976); *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Capps*, 134 N.C. 622, 46 S.E. 730 (1904). We elect to follow our own valid precedents.

[2] Defendant maintains that considerations of due process and equal protection of the law prohibit his conviction of first-degree murder based on anything less than a finding of premeditation and deliberation. Defendant relies on the case of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), which prohibits the conclusive presumption of any element of a criminal offense. We met this identical contention in a case involving firing into an occupied building, *State v. Swift, supra*, wherein we stated:

> We do not believe that *Mullaney* applies to this situation because G.S. 14-17 is a rule of law and not a presumption. If G.S. 14-17 is compared with murder in the first degree based on premeditation and deliberation, it might be said that the practical effect of G.S. 14-17 is that premeditation and deliberation are presumed when a murder is committed in the perpetration of a felony described under G.S. 14-17. *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971). However, G.S. 14-17 actually involves no presumption at all. Under G.S. 14-17 premeditation and deliberation are not elements of the crime of felony-murder. Thus, the contention of defendant that the act of firing a firearm into an occupied dwelling has no rational connection with premeditation and deliberation is without merit. The only requirement for purposes of G.S. 14-17 is that the felony involved be one of the specified felonies or an unspecified felony within the purview of G.S. 14-17. We have held in *State v. Williams, supra*, that G.S. 14-34.1 is such a felony because of the reasonable correlation between committing a crime under G.S. 14-34.1 and the possibility of death occurring.
>
> It is a well established rule that when the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it. *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971). Justice Parker (later Chief Justice), speaking

for our Court said in *State v. Maynard*, 247 N.C. 462, 469, 101 S.E. 2d 340, 345 (1958):

> "Where a murder is committed in the perpetration or an attempt to perpetrate a robbery from the person, G.S. 14-17 pronounces it murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. [Citations omitted.]"

Id. at 407-08, 226 S.E. 2d at 668-69.

Based upon the holding and rationale of *State v. Swift*, *supra*, we reject defendant's contentions that our felony-murder statute violates his constitutional rights of due process and equal protection.

[3] Defendant futher contends that the legislature did not intend that the discharging of a firearm into occupied property be included as an underlying felony for the purposes of the felony-murder rule. In 1977 G.S. 14-17 was revised by the General Assembly. The earlier statute had defined felony murder as a killing "committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, *or other felony.*" (Emphasis added.) 1949 N.C. Sess. Laws Ch. 299 § 1. This vague language required judicial interpretation, which this Court provided by interpreting the "other felony" language in G.S.14-17 to refer to any felony which "creates any substantial foreseeable human risk and actually results in the loss of life." *State v. Thompson*, 280 N.C. 202, 211, 185 S.E. 2d 666, 672 (1972). The revised statute expanded the listed felonies and limited the "other felonies" which would support a charge of felony murder to those "committed or attempted with the use of a deadly weapon." 1977 N.C. Sess. Laws Ch. 406 § 1.

Where the language of a statue is clear and unambiguous, there is no room for judicial construction, and the courts must give the statute its plain meaning. *State v. McMillan*, 233 N.C. 630, 65 S.E. 2d 212 (1951). Contrary to defendant's contentions, the unambiguous language of the 1977 revision makes it clear that felonies "committed or attempted with the use of a deadly weapon" will support a conviction of first-degree murder under the felony-murder rule.

Defendant notes in his brief that England, the birthplace of the felony-murder doctrine, abolished the rule by statute in 1957. We believe this approach represents the proper response to dissatisfaction with a statutory rule of law. Our General Assembly remains free to abolish felony murder or, as the Courts did in California, to limit its effect to those other felonies not "included in fact within" or "forming an integral part of" the underlying felony. As recently as 1977, however, our legislature chose to reaffirm and clarify the offense. We do not believe it is the proper role of this Court to abolish or judicially limit a constitutionally valid statutory offense clearly defined by the legislature.

[4] Defendant contends that the court should have charged the jury that they could return a guilty verdict only if they found that defendant fired into the automobile without justification or excuse. Defendant argues that he was within his rights in attempting to detain the victims after they committed a larceny in his presence. G.S. 15A-404 provides:

> (b) When Detention Permitted. — A private person may detain another person when he has probable cause to believe that the person detained has committed in his presence:
>
> (1) A felony,
>
> (2) A breach of the peace,
>
> (3) A crime involving physical injury to another person, or
>
> (4) A crime involving theft or destruction of property.
>
> (c) Manner of Detention.—The detention must be in a reasonable manner considering the offense involved and the circumstances of the detention.

While we agree defendant had the authority to detain the victim, two facts make it impossible for this statute to justify or excuse defendant's actions in instant case.

First, the ordinary meaning of the word "detain," and the meaning we believe our legislature intended when it enacted G.S. 15A-404, is "To hold or keep in or as if in custody." *Webster's*

Third New International Dictionary 616 (1976). By defendant's own testimony, the victim had left the store and was exiting the parking lot when defendant fired the first shot. Once the victim was beyond defendant's control, defendant could no longer "hold or keep" him. Defendant's own statement was that he fired the shots in the hope not that he could prevent the victim from leaving with the beer, but that the victim would bring the beer back.

Second, defendant's actions, even if viewed as attempts to detain the victim, were as a matter of law unreasonable under the circumstances. *Cf.* G.S. 15A-404(c). Even had defendant been a police officer seeking to arrest the victim for the misdemeanor larceny of the two six packs of beer he would have had no authority to use a deadly weapon to effect the arrest. "[A police officer] clearly had no right to use excessive force, and the use of a pistol, which is a deadly weapon, in attempting to arrest one charged only with the commission of a misdemeanor, is excessive force." *Sossamon v. Cruse*, 133 N.C. 470, 475, 45 S.E. 757, 759 (1903). G.S. 15A-401(d) does not permit an officer to employ deadly force to arrest a misdemeanant unless he presents an imminent threat to others or is effecting an escape by use of a deadly weapon. It follows that a private citizen should not be allowed to employ deadly force to detain a fleeing misdemeanant in circumstances under which an officer of the law could not have employed similar force to effect such an arrest. Therefore, defendant was not entitled to a charge upon justification or excuse based on G.S. 15A-404.

[5] Defendant argues that his life sentence constitutes cruel and unusual punishment. We dispose of this argument on the same ground stated in *State v. Dunlap*, 298 N.C. 725, 259 S.E. 2d 893 (1979). "[I]t is the punishment fixed by the applicable statute and . . . the punishment is not disproportionate to the offense for which defendant was convicted." *Id.* at 735, 259 S.E. 2d at 899. *See also State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973) (a sentence is not cruel and unusual punishment when it is within the maximum authorized by law), *cert. denied*, 418 U.S. 905, 41 L.Ed. 2d 1153, 94 S.Ct. 3195 (1974).

[6] The defendant next assigns as error the failure of the trial judge to review in his charge the evidence presented at trial to the effect that the shots were fired "at" or "up over" the victim's

automobile rather than into it and that the force of the weapon's discharge caused the gun to recoil and jerk upwards. Defendant asserts that in order to find him guilty of first-degree felony murder, the jury had to find that he intended to shoot "into" the Volkswagen rather than "at," "up over," or "in the direction" of it.

In his charge, the trial judge noted defendant's evidence to the effect that:

> [H]e took the revolver out and he fired it into the air. . . . [H]e did not intend to do anything but to stop them by scaring them, and he certainly did not intend to hit the vehicle or to hit any person . . . . [H]e further offered evidence tending to show that he did not have the experience with this high caliber gun to fire a shot with such precision, and he did not intend to fire it either into the vehicle or certainly not to hurt anyone.

We believe this charge adequately presented to the jury the essential and substantial features of defendant's contention that he did not shoot into the automobile. We note first that the evidence of the gun's recoil, which was offered to show the difficulty in firing the gun with precision, was adequately stated in the above instruction. Second, the only evidence by the State's witnesses that a shot went "up over" the Volkswagen related to the first of the three shots. The State never contended that the first shot went into the vehicle, nor did the judge charge that there was evidence that any but the second and third shots entered the vehicle. Third, as to defendant's intent, the judge charged the jury that they could find defendant guilty only if they believed from the evidence "that the defendant willfully or wantonly *and intentionally* discharged a . . . handgun *into* the . . . vehicle." (Emphasis added.) Fourth, we note that the distinction defendant attempts to draw between intentionally firing "at" the vehicle and intentionally firing "into" the vehicle is meaningless. A criminal defendant is presumed to intend the natural consequences of his act. *State v. Elliott*, 232 N.C. 377, 61 S.E. 2d 93 (1950). It is an inherently incredible proposition that defendant could have intentionally fired a shot "at" the fleeing Volkswagen without intending that the bullet go "into" the vehicle. The judge was not required to charge on such a feckless contention. Finally, we believe the trial judge was correct in instructing the jury to assign to the preposition "into" its ordinarily accepted meaning.

We have thoroughly examined the trial court's charge and find that it adequately presents the essential and substantial features of the case. These minor discrepancies now raised by defendant should have been called to the trial court's attention. Failure to do so would ordinarily constitute a waiver. *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978). We have, nonetheless, considered each of these discrepancies and find that they do not rise to the level of prejudicial error.

[7] At trial defendant's statement to the effect that he started to let the teenagers leave, but then said, "The hell with it," was admitted for impeachment purposes only. Defendant takes the position that he was prejudiced by the District Attorney's substantive use of this statement in his closing argument. Defendant made no objection to this argument at the time it was made. Neither did he request a correction in the judge's charge. At the end of the charge, the Court inquired whether counsel had any requested corrections or additions. Counsel replied in the negative. Defense counsel's only action with regard to this alleged error was to move for a mistrial at the close of the jury arguments, which motion was denied. The sole question before this Court then is whether the trial court erred in denying defendant's motion for a mistrial.

In order to place this single challenged statement in proper perspective, we quote the pertinent portion of the District Attorney's argument, to wit:

> What happened after the shooting? Well, an independent witness who works as a free lance photographer for The Charlotte News testified that he walked in the store and overheard somebody say to the defendant, "Did you get them?" and heard him say, "Yes, I think so." Does that sound like a man that didn't intend to do anything, and, of course, the defendant says that he didn't know that he had hit anybody or that anything was amiss; but I submit to you, members of the jury, that that just can't be true, because all these other witnesses saw that window fragmented. They heard the engine rev up. They saw the car driving out of control, and other people ran down there to see where the Volkswagen went. There wasn't any question about that something was amiss. There wasn't any doubt, and the de-

fendant had the best view of that departing car of anybody. He had to know something was amiss, and how did he behave? Did he run down there to see? "Oh, my gosh, have I hurt somebody?" Did he go to anybody's aid? He went back inside, and he called the police, but what did he tell them? He told them about a larceny. He didn't even call an ambulance, and he didn't tell them anything about the shooting, and what else? We know conclusively from several witnesses that at a later point somebody came in there and said, "You shot one of these people. He is in bad shape," and what did the defendant do? He called somebody on the phone, according to two independent witnesses. One of them is David Hamilton, the one that Mr. Sentelle liked so much, and the other one is Ernest Lawrence. Those two witnesses heard the defendant pick up the phone and call somebody and ask for a lawyer, not an ambulance, a lawyer; and when he got down to the police station and he talked to Officer Dunn, what did he say? Told Officer Dunn, "I started to let them go, but I said, 'The hell with it.' "

Members of the jury, if those things don't tell you "intent", I don't know what does. When a person takes a firearm and points it at a vehicle and pulls the trigger, the natural and logical consequences of that act are to project a projectile into that car, and a person intends, I submit to you, the natural and logical consequences of their act.

I submit to you that, if the State hasn't proved beyond any reasonable doubt "intent" in this case with six eyewitnesses, with the defendant testifying in a manner which conflicts with the laws of nature, then I submit it can't ever be proved.

A mistrial should be declared "if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to defendant's case." G.S. 15A-1061. In light of the overwhelming evidence on the issue of intent, we fail to see how defendant could have been so substantially and irreparably prejudiced by the District Attorney's argument as to render the denial of his motion for mistrial a manifest abuse of the sound discretion of the trial court. *State v. McGuire*, 297 N.C. 69, 254 S.E. 2d 165, *cert. denied*, 444 U.S. 943, 62 L.Ed. 2d 310,

100 S.Ct. 300 (1979); *State v. Mills*, 39 N.C. App. 47, 249 S.E. 2d 446 (1978).

This assignment of error cannot be sustained.

[8] Defendant contends the trial judge erred in that he failed to submit to the jury the possible verdict of voluntary manslaughter.

Defendant was tried under an indictment drawn pursuant to to the provisions of G.S. 15-144. The trial judge, as is permitted by that statute, submitted to the jury the possible verdicts of first-degree murder on the theory of premeditation and deliberation and first-degree murder on the felony-murder theory. *State v. Thompson*, supra; *State v. Logan*, 161 N.C. 235, 76 S.E. 1 (1912). The jury returned the following verdict:

> We the jury return the unanimous verdict as follows:
>
> No. 1, Guilty of first degree murder
>
> Answer, Guilty.
>
> Sub(a), on the basis of malice, premeditation and deliberation
>
> Answer, No.
>
> Sub(b) under the first degree felony rule
>
> Answer, Yes.

In *State v. Warren*, 292 N.C. 235, 242, 232 S.E. 2d 419, 423 (1977), this Court noted:

> It is a well established rule that when the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it.

See also State v. Miller, 219 N.C. 514, 14 S.E. 2d 522 (1941); *State v. Logan, supra.*

The court might well have omitted any instructions concerning "premeditation and deliberation" for all the evidence discloses that defendant killed the victim "by discharging a firearm into oc-

cupied property," which is denominated a felony by G.S. 14-34.1. Obviously, a violation of this statute entails the use of a deadly weapon.

Since defendant was found guilty of murder in the first degree on the theory of felony murder and was found not guilty on the charge of first-degree murder with premeditation and deliberation, no prejudice resulted from the court's failure to charge on voluntary manslaughter.

[9] Defendant next assigns as error the admission into evidence of photographs of the victim's injuries.

Photographs, however gruesome, which fairly and accurately represent a scene observed by a witness and which can be used to illustrate his testimony may be admitted in evidence for illustrative purposes. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979). The photographs in instant case were properly authenticated and admitted into evidence for illustrative purposes. We find no error in their admission.

Defendant further argues that it was error to allow the victim's father to identify the photographs as depicting his son and the automobile his son was driving on the night he was killed. A plea of not guilty places at issue all of the facts alleged in the indictment. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969). The witness's testimony was relevant to establish the identity of the victim and to identify the automobile.

[10] Defendant, in his final assignment of error, alleges that the trial court erred by failing to declare a mistrial upon learning that the jury was hopelessly deadlocked. The granting or denial of a motion for a mistrial is a matter within the sound discretion of the trial judge. *State v. McGuire, supra; State v. Mills, supra.*

G.S. 15A-1063(2) provides:

> Upon a motion of a party or upon his own motion, a judge may declare a mistrial if:
>
> * * *
>
> (2) It appears there is no reasonable probability of the jury's agreement upon a verdict.

See also G.S. 15A-1235(d).

The record indicates that the jury deliberated for six hours and ten minutes. After the first hour of deliberations, the jury returned to the courtroom for additional instructions. When the jurors had failed to reach a verdict after four and a half hours, the judge brought them back into the courtroom to inquire into their numerical differences. At that time the vote stood at eight to four. The foreman gave no indication that the jury was deadlocked, and the judge asked the jury to continue deliberations. A little over an hour later the judge again called the jury back into the courtroom and learned that the vote was eleven to one at that point. The foreman informed the judge that further deliberations would result in a unanimous verdict. The jury returned to its deliberations and returned a verdict of guilty about a half hour later. We fail to see how these facts disclose any sort of deadlock. We are unable to say that the court's failure to declare a mistrial on its own motion was an abuse of discretion. *See* G.S. 15A-1063(2); *State v. McGuire, supra.* This assignment of error is without merit.

Our careful examination of the entire record discloses that defendant had a fair trial free from prejudicial error.

No error.

Justice COPELAND dissenting.

I must dissent because the majority has overlooked a critical omission in the State's case against defendant, to wit, sufficient evidence to sustain a conviction for murder in the first degree under the felony murder rule.[1] The jury would have been authorized to find defendant guilty of the *felony* murder of the driver-occupant of the vehicle *only if* the State had demonstrated beyond a reasonable doubt that defendant committed the homicide in the perpetration of another felony involving the use of a deadly weapon. *See* G.S. 14-17; *State v. Womble,* 292 N.C.

1. Defendant failed to raise this specific point in his brief, but he did twice move for a dismissal of the murder charge at trial and excepted to the judge's denials of his motions. However, it is plain that a legal error of this magnitude should have been corrected by the Court upon its own motion. *See* G.S. 15A-1441, -1442(3), -1446(d)(5). *See also* Rule 2, North Carolina Rules of Appellate Procedure.

455, 233 S.E. 2d 534 (1977). The State relied on defendant's violation of G.S. 14-34.1, which proscribes the discharge of a firearm into occupied property, to fulfill that requirement. [It was never disputed that defendant fired the fatal shot killing the decedent.] However, the State did not, in my opinion, adduce substantial evidence against defendant upon every essential element of the underlying felony of G.S. 14-34.1.

In pertinent part, G.S. 14-34.1 provides that "[a]ny person who willfully or wantonly discharges or attempts to discharge . . . [a] firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class H felony." Our Court has stated that one violates this statute if he intentionally, without legal justification or excuse, discharges a firearm into what he knows, or what he should reasonably know, is an occupied structure. *State v. Williams*, 284 N.C. 67, 73, 199 S.E. 2d 409, 412 (1973). In my view, therefore, an essential element of G.S. 14-34.1 is the *specific* intent to discharge a firearm *into* something. The mere general intent to fire a weapon, standing alone, will not suffice. Indeed, common sense would surely dictate an interpretation of the statute whereby the act of discharging a firearm becomes criminally culpable as a felony only when that act is simultaneously accompanied by, and accomplished with, the distinct reckless or evil intent to shoot into or inside an occupied structure of some kind.

Moreover, in accordance with my belief that a violation of G.S. 14-34.1 requires the kind of specific intent just described, I do not believe, as does the majority, that it is "an inherently incredible proposition" that one could intentionally shoot "at" a fleeing vehicle without intending to shoot "into" it. The words "at" and "into" are not generally considered to be synonymous. *See* Roget's International Thesaurus 139-40 (4th ed. 1977); Webster's New Dictionary of Synonyms 70-71 (1968). In fact, the two words usually have fundamentally different meanings. For example, "at" indicates a presence near something, the location of something or the general direction of an action or motion. Webster's Third New International Dictionary 136 (1976); The American Heritage Dictionary of the English Language 82 (1969); March's Thesaurus and Dictionary 78 (1968). On the other hand, "into" primarily denotes a motion specifically directed at attain-

ing the position of being *in* something, or a movement to an interior location or to the inside of something. Webster, *supra*, at 1184; The American Heritage Dictionary, *supra*, at 663; March, *supra*, at 555. Thus, it is plain to me that one could actually attempt to shoot "at" something without intending to shoot "into" it, especially when that something is a *mobile object* such as an automotive conveyance capable of quick speed and sudden changes in direction, i.e., a Volkswagen fleeing the scene of a larceny.[2]

In the instant case, the State's eyewitnesses testified that defendant came out of the store (after the girl had left without paying for the beer), hollered at the occupants of the Volkswagen and then fired three shots, in rapid succession, as the vehicle continued to move away from the parking lot to the road. [These events occurred in the nighttime.] Everyone agreed that only the second, and possibly the third, shot actually struck the car. These witnesses said that defendant either fired the weapon *at, over, across* the car, held the gun *up* or aimed it *in the direction of* the car. No one could positively remember whether defendant held the pistol with one or two hands at the time of the first shot or thereafter. Yet all of the witnesses did say that, as defendant fired the shots, his hand (or hands) jumped, jerked, bobbed around or moved due to the weapon's recoil. Officer W. J. Dunn essentially corroborated their observations by stating that a .357 magnum pistol "kicked up" when fired and that its recoil would jerk the shooter's arm. He further said that such jerking was more pronounced if the shooter was inexperienced or held the gun with only one hand. This is the total sum of what the State's evidence tended to show upon the essential element of specific criminal intent under G.S. 14-34.1. To me, the evidence was patently insufficient to prove beyond a reasonable doubt that defendant *intentionally* discharged a firearm *into* an occupied vehicle.

In so saying, I am not inadvertent to the general difficulty in directly proving the existence of a criminal intent in any case, since intent is a subjective state of mind in that of the actor. For that reason, the State must often rely on the nature of the cir-

2. I further perceive that one could discharge a firearm at the tires of a departing vehicle, in order to detain it, without also meaning to shoot into its occupied interior compartment.

cumstances surrounding the commission of an act to infer a defendant's possession of the requisite intent. However, such circumstantial evidence upon an essential element of a crime must still meet the standard of substantiality. Here, the State's evidence of defendant's intent in firing the gun is equivocal at best. It did no more than raise a mere suspicion or conjecture about the existence of this essential element of G.S. 14-34.1, and, as a consequence, the jury was improperly allowed to speculate about the criminal nature of defendant's act of discharging the firearm. *See also State v. Hewitt*, 294 N.C. 316, 319, 239 S.E. 2d 833, 835 (1978). In short, even considering the State's evidence in its most favorable light with the benefit of all reasonable inferences, this case constitutes a "draw" on the question of intent.[3] As it was not proven beyond a reasonable doubt that defendant violated G.S. 14-34.1, it necessarily follows that this felony should not have been submitted to the jury as a basis for finding defendant guilty of murder in the first degree under G.S. 14-17.[4] I therefore vote to reverse defendant's conviction for the more grievous offense upon this ground.

Before concluding, I am compelled to mention another point in the case. The majority rejected defendant's argument that this Court should adopt the merger doctrine which would prevent a conviction for first degree felony murder where, as here, the underlying felony is a factually integral part of the homicide. *See, e.g., People v. Wesley*, 10 Cal. App. 3d 902, 89 Cal. Rptr. 377 (1970). I agree with the majority that this is a matter more wisely left to the discretion of the Legislature, the enactor of G.S. 14-17. Yet I strongly believe that implementation of some form of the merger doctrine in this State would be a sound statutory innovation and thus urge the Legislature to examine this important issue. The facts of this particular case demonstrate the need for such action.

3. Defendant's evidence that the homicide was an accident was equally convincing, if not more so: the pistol belonged to the owner of the store, and defendant was not familiar with it; he had not shot a firearm of any kind in twenty-five years (since his service in the United States Air Force); he fired the shots in the air to frighten the vehicle's occupants so they would stop and bring the beer back; and his armed jerked each time he fired the pistol.

4. Having said that a felony murder conviction was insupportable, I would also note that the record does not disclose an evidentiary justification for a homicide prosecution beyond the levels of manslaughter or second degree murder.

On 14 July 1980, defendant reported for work as usual from 6 p.m. to 2 a.m. at a convenience store. [He had already completed his regular eight-hour shift at another job.] At approximately 10:30 p.m., while three other customers were waiting to pay for their beer, a teenaged girl removed some beer from the store without paying for it, despite defendant's admonishments that she should not do so. The girl got into a car which began to flee the premises. Defendant, in an attempt to retrieve the stolen property, took his employer's pistol and, for the first time in twenty-five years, discharged a firearm three times. One of the shots entered into the vehicle and killed the driver. [An autopsy later disclosed that the driver was legally intoxicated at the time.] Defendant's action was admittedly rash and ill-advised. However, it certainly was not the type of distinctly deliberate and reckless criminal act causing unexpected death which ordinarily justifies the application of the felony murder rule:

> The rationale of the doctrine is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended.

LaFave & Scott, Handbook on Criminal Law § 71, at 560 (1972). *Compare, e.g., State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Capps*, 134 N.C. 622, 46 S.E. 730 (1904).

In any event, it is difficult to assent to a result mandating *life* imprisonment of this man, a hardworking husband and father of five children with a good reputation in the community and no prior significant criminal record, for his action in the incident of 14 July 1980. Surely, justice would be well served by the exercise of some executive clemency in his case.

Justices HUSKINS and EXUM join in this dissent.

THE NORTH CAROLINA STATE BAR v. HARRY DUMONT, ATTORNEY

No. 80

(Filed 12 January 1982)

1. **Attorneys at Law § 11; Constitutional Law § 57— disciplinary or disbarment proceedings—jury trials not guaranteed by the N. C. Constitution**

As the 1970 Constitution was clearly meant to be an editorial revision of the 1868 Constitution and as fundamental changes in the constitution were made only by separate amendment, Article I, § 25 of the N.C. Constitution, which was only editorially revised, preserves intact the right to trial by jury in all cases where the prerogative existed at common law or by statute at the time the 1868 Constitution was adopted. The Legislature in 1969 had no intention of providing a constitutional right to jury trial for attorneys in disciplinary proceedings when it submitted Article I, § 25 to the people. The legislators intended to leave such a specific matter as this for future consideration, and in 1975, the Legislature exercised its authority to deal with changing conditions and eliminated the jury trial of attorneys in disciplinary actions. G.S. 84-28.

2. **Attorneys at Law § 11— disciplinary hearings—appropriate standard for judicial review**

As Chapter 84 of the General Statutes, the chapter which provides for discipline of attorneys, provides for no "adequate procedure for judicial review," Article 4 of G.S. Chapter 150A is the controlling judicial review statute for appeals from decisions of the State Bar Disciplinary Hearing Commission. Therefore, the appropriate standard for review for such decisions is the "whole record" test as set out in the APA. G.S. § 150A-51(5).

ON review of a decision of the Court of Appeals reported at 52 N.C. App. 1, 277 S.E. 2d 827, affirming order of the Disciplinary Hearing Commission suspending defendant from the practice of law for a period of six months.

Defendant gave notice of appeal on the ground of a substantial constitutional question, G.S. § 7A-30(1)(1981), and alternatively petitioned this Court for discretionary review pursuant to G.S. 7A-31 (Cum. Supp. 1979). We allowed his petition on 9 July 1981.

Our primary consideration on this appeal is whether an attorney subject to disciplinary action under Chapter 84 of the North Carolina General Statutes is entitled to trial by jury under Article I, § 25 of the North Carolina Constitution. We also briefly address other matters raised by defendant regarding the conduct of this disciplinary hearing.

Aldert Root Edmonson for The North Carolina State Bar.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Charles T. Hagan, Jr., and John P. Daniel, for defendant.

CARLTON, Justice.

I.

Plaintiff, The North Carolina State Bar (Bar), instituted this disciplinary action before a committee of the Disciplinary Hearing Commission (Commission)[1] by a complaint filed 18 September 1978. It alleged that defendant, an attorney practicing in Asheville since his admission to the Bar in 1947, counseled and procured the false testimony of deponents in a civil action in December of 1974. Such conduct, the complaint alleged, violated certain Disciplinary Rules of the Code of Professional Responsibility.

Defendant filed answer and various motions. He denied that he had suborned perjury and moved to dismiss on the ground that the Disciplinary Hearing Commission had no personal or subject matter jurisdiction since it was not in existence at the time of the alleged misconduct. He also moved to dismiss on other grounds including laches and the assertion that a hearing before the Commission would deny his right to trial by jury as guaranteed by Article I, § 25 of the North Carolina Constitution. The motions were denied by a hearing committee of the Commission on 12 February 1979.

Defendant appealed the denial of his motions to the Court of Appeals and, pursuant to G.S. 7A-31, petitioned this Court to hear his appeal prior to determination by the Court of Appeals. On 5 June 1979 we allowed the petition and issued a writ of certiorari ordering that the record be brought before this Court. However, on 6 November 1979, we dismissed the appeal on the ground that the order denying defendant's motions was interlocutory and the appeal premature and held that the writ of certiorari was improvidently issued. *North Carolina State Bar v. DuMont*, 298 N.C. 564, 259 S.E. 2d 281 (1979).

1. The Disciplinary Hearing Commission was created by the Legislature in 1975. G.S. § 84-28.1 (1981).

A hearing was held before a committee of the Commission (Committee) during the week of 3 March 1980. Other unrelated charges against defendant were dismissed during the hearing, but the Committee also found that plaintiff had established the charge of procuring false testimony by the greater weight of the evidence and held defendant in violation of the disciplinary rules alleged in the complaint.[2] It was ordered that defendant's license to practice law in North Carolina be suspended for six months and that defendant not engage in any law-related employment during the suspension period. Defendant appealed to the Court of Appeals.

The Court of Appeals heard oral arguments on 6 April 1981. That court, with Judge Martin (Harry C.) writing and Chief Judge Morris and Judge Hill concurring, filed its opinion on 16 May 1981 and affirmed the order of the Disciplinary Hearing Committee. We allowed defendant's petition to review the Court of Appeals' decision on 9 July 1981.

The Court of Appeals' opinion is well written and contains a lengthy description of the facts giving rise to plaintiff's complaint against defendant. It is unnecessary to lengthen this opinion by repeating the detailed factual controversy leading to this appeal. For a complete account of the facts, see the Court of Appeals' opinion, 52 N.C. App. at 3-13, 277 S.E. 2d at 829-34.

We summarize below the holdings of the Court of Appeals:

(1) Defendant first contended that the Commission never obtained jurisdiction over his person or over the subject matter of the proceeding. He contended that this proceeding should be controlled by G.S. 84-28 as it existed at the time of his alleged misconduct, prior to the extensive amendments to Chapter 84 of our General Statutes which became effective 1 July 1975. Law of June 13, 1975, ch. 582, s. 5, 1975 N.C. Sess. Laws 656 (1975) (hereinafter "1975 amendments"). The Court of Appeals disagreed and held that the Legislature intended that the 1975 amendments apply to disciplinary hearings commenced on or after 1 July 1975,

2. The Commission concluded that the plaintiff had proven that defendant had engaged in conduct which violated the following Disciplinary Rules: 7-102(A)(4), 7-102(A)(6), 7-102(A)(7), 7-102(A)(8), 1-102(A)(3), 1-102(A)(4). The Disciplinary Rules governing conduct of attorneys were adopted by the State Bar pursuant to the authority granted it by G.S. 84-23.

the effective date. The Court of Appeals also held that application of the procedures included in the 1975 amendments did not constitute an unconstitutional *ex post facto* application of the law and that, while the practice of law is a property right requiring due process of law before it may be impaired, the 1975 amendments themselves in no way interfered with or impaired defendant's right to practice law. We have carefully examined the Court of Appeals' opinion and the briefs and authorities on these points. We find the resolution of these issues and the reasoning and legal principles enunciated by the Court of Appeals to be altogether correct and adopt that portion of its opinion, section I, 52 N.C. App. at 14-16, 277 S.E. 2d at 835-36, as our own.

(2) The Court of Appeals held that defendant was not deprived of due process of law by virtue of the elimination by the 1975 amendments of the right to trial by jury in attorney disciplinary matters. The court reasoned that due process does not require that a jury trial be afforded an attorney for disciplinary or disbarment procedures and held that the procedural safeguards provided by the 1975 amendments were sufficient to satisfy due process requirements.

It appears to us that the result reached on this issue is altogether correct. We approve of the reasoning employed by the Court of Appeals and the legal principles enunciated by it and adopt this portion of the Court of Appeals' opinion, section II, 52 N.C. App. at 16, 277 S.E. 2d at 836.

The Court of Appeals also held that, even if defendant were entitled to a jury trial, he waived it by failing to request a jury trial within the time limits set by Rule 38 of the N.C. Rules of Civil Procedure. In light of our disposition of defendant's claim that he has a constitutional right to be tried by a jury it is unnecessary to address the waiver issue and we express no opinion on this portion of section II of the Court of Appeals' opinion, 52 N.C. App. at 17, 277 S.E. 2d at 836-37.

(3) Defendant contended before the Court of Appeals, as he does here, that he did not receive a fair and impartial hearing. He argued that the disciplinary action was barred by laches, that the several charges against him should not have been consolidated for hearing, that several evidentiary errors were committed at the hearing, and that the Commission erred in limiting the number of

character witnesses he could present. We agree with the Court of Appeals that there was no error on these points and adopt that portion of its opinion, section III, 52 N.C. App. at 17-23, 277 S.E. 2d at 837-40, as our own.

(4) Defendant also challenged the standard of proof employed by the Commission at his hearing. He contended that the Commission erred in using the "greater weight of the evidence" rule and that it should have used the "clear, cogent and convincing" test in determining whether plaintiff had satisfied its burden of proof.

The Court of Appeals rejected this argument. It noted that the State Bar in its rules had adopted the standard of the greater weight of the evidence, State Bar Rules Article IX, sec. 14(18),[3] and concluded that it should not interfere with a standard which the General Assembly empowered the State Bar, by its Council, to adopt. *See* G.S. § 84-23 (1981).

We agree with the Court of Appeals that due process does not require the higher burden and that the courts should not meddle in matters left to the State Bar by our Legislature. As to this question we adopt the Court of Appeals' opinion, section IV, 52 N.C. App. at 23-24, 277 S.E. 2d at 840-41, as our own.

(5) Before the Court of Appeals, the defendant argued that Article 4 of the Administrative Procedure Act (APA), G.S. § 150A-43 to -52 (1978), governs review of his appeal from the Disciplinary Hearing Commission and, accordingly, that the proper standard of review of the Commission's findings was the "whole record" test of G.S. 150A-51(5) and not the "any competent evidence" standard urged by the Bar. The Court of Appeals did not reach the question whether the APA governs judicial review of decisions of the Disciplinary Hearing Commission because it found the evidence supporting the findings of the Commission sufficient under either test. While we agree with the Court of Appeals that the evidence is sufficient under either the "whole record" or "any competent evidence" test, we think it necessary to decide which standard is appropriate for review of this appeal. We address this question below.

3. State Bar Rules Article IX, sec. 14(18) was amended effective 13 November 1980 to provide that the charges must be proved by "clear, cogent and convincing evidence." Amendments to Rules Relating to Discipline and Disbarment of Attorneys, 300 N.C. 753, 754 (1980).

(6) The Bar assigned error to the disciplinary measure imposed by the Commission and argued to the Court of Appeals that it had authority to impose more severe measures. The Court of Appeals rejected this contention, holding that the statute providing for judicial review, G.S. 84-28(h), does not give a reviewing court the authority to modify or change the discipline properly imposed by the Commission. We agree with the reasoning of the Court of Appeals and adopt its discussion of this issue, 52 N.C. App. at 25-26, 277 S.E. 2d at 841-42, as our own.

II.

While holding that due process of law does not require that an attorney is entitled to a jury trial in a statutory disciplinary or disbarment proceeding, the Court of Appeals did not consider whether a jury trial in such a proceeding is guaranteed attorneys by the North Carolina Constitution. We turn to a consideration of that question.

[1] Defendant contends that he had a constitutionally guaranteed right to a jury trial. He bases this argument on Article I, § 25 of the North Carolina Constitution (1970 Constitution), adopted on 3 November 1970, which provides that "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." The predecessor to this provision in the Constitution of 1868 (1868 Constitution), has been interpreted to preserve as a constitutional right the right to trial by jury in civil cases when that prerogative existed at common law or by statute at the time the 1868 Constitution was adopted. *In re Wallace*, 267 N.C. 204, 147 S.E. 2d 922 (1966); *In re Annexation Ordinance*, 253 N.C. 637, 117 S.E. 2d 795 (1961); *Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E. 2d 897 (1943); *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921). As stated in Groves:

> The right to a trial by jury, which is provided in this section, applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted, and not to those where the right and the remedy with it are thereafter created by statute.

182 N.C. at 558, 109 S.E. at 571. Defendant contends that this interpretation should apply with equal force to the 1970 Constitu-

tion so that all rights to jury trial recognized at common law and provided by statute *at the time the 1970 Constitution was adopted* are now of constitutional dimension.

On 3 November 1970, the date the 1970 Constitution was adopted, G.S. 84-28(3)(d)(1)(1975) (amended 1975) granted the attorney charged in a statutory disciplinary action the right to a trial "[i]n the superior court at a regular term for the trial of civil cases by a judge and jury."[4] Some form of this provision providing the right to a jury trial has been in our General Statutes since 1933. Law of April 3, 1933, Ch. 210, s. 11, 1933 N.C. Sess. Laws 313 (1933); Law of February 22, 1937, Ch. 51, s. 3, 1937 N.C. Sess. Laws 98 (1937); Law of June 21, 1961, Ch. 1075, 1961 N.C. Sess. Laws 1482 (1961). However, effective 1 July 1975 the Legislature amended G.S. 84-28 to provide for disciplinary action "under such rules and procedures as the council [of the North Carolina State Bar] shall promulgate." G.S. § 84-28(a)(1981). These rules do not provide for a trial by jury. If defendant is correct in arguing that the adoption of Article I, § 25 in the 1970 Constitution extends the constitutional right to jury trial, then because there existed a statutory right to trial by jury in attorney disciplinary proceedings on 3 November 1970, subsequent legislative action cannot diminish or deprive him of that right and he is constitutionally entitled to a jury trial in these proceedings. Thus, our inquiry is limited to determining whether the principle of law announced in *Groves* is equally applicable to the 1970 Constitution.

Whether the adoption of the 1970 Constitution extended the constitutional right to trial by jury to those rights then existing at common law or by statute is a question of constitutional construction.

This question is, in the main, governed by the same general principles which control the interpretation of all written instruments. *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E. 2d 512, 514 (1953). "[T]he fundamental principle of constitutional construction is that effect must be given to the intent of the framers of the

4. Our discussion of this issue is limited to *statutory* disciplinary proceedings. There has never been in this juridiction a right to jury trial in judicial disciplinary actions. *See In re Northwestern Bonding Co., Inc.*, 16 N.C. App. 272, 192 S.E. 2d 33, *cert. denied*, 282 N.C. 426, 192 S.E. 2d 837 (1972).

organic law and of the people adopting it." 16 Am. Jur. 2d Constitutional Law § 92 (1979). Therefore, courts should keep in mind the object sought to be accomplished by its adoption, and proper recourse should be given to the evils, if any, sought to be prevented or remedied. 16 C.J.S. Constitutional Law § 32 (1956); 16 Am. Jur. 2d, *supra* at § 123. Reference may be had to unofficial contemporaneous discussions and expositions in arriving at a correct interpretation of the fundamental law. *Id.* at § 130.

In *Perry* this Court said:

> Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished. Inquiry should be directed to the old law, the mischief, and the remedy. The court should place itself as nearby as possible in the position of the men who framed the instrument. (Citations omitted.)
>
> A court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided. (Citations omitted.)

Perry v. Stancil, 237 N.C. at 444, 75 S.E. 2d at 514.

In summary, we are to determine (1) the intent of the framers and people adopting the 1970 Constitution, (2) the object and purpose of the 1970 Constitution, and (3) the evils, if any, sought to be remedied by that document. We proceed to do so under the general guidelines noted above.

Our examination into the circumstances of the 1970 constitutional revision leads us to the conclusion that neither its framers nor the citizens voting for it contemplated that Article I, § 25 of the new document would become the new critical point of reference for application of the principle of law now before us. Indeed, we think that the revisions to most of Article I, and most certainly to § 25, represent nothing more than editorial changes designed to modernize the language and arrangement of the Arti-

cle by clarifying obsolete matter and organizing the matter in more logical sequence.

In ascertaining the intent of the framers and adopters, the object and purpose of the revision, and the evils sought to be remedied, we find it helpful to look to the *Report of the North Carolina State Constitution Study Commission* (1968) (hereinafter cited as "Report"). This Report, prepared by a study commission which met throughout 1968 under the sponsorship of the North Carolina State Bar and the North Carolina Bar Association, was transmitted to the Governor and General Assembly and served as the primary source of guidance for the 1969 legislative session. Indeed, a comparison of the recommendations made in the Report with those finally submitted by the General Assembly and adopted by the people in 1970 reveals that our Legislature relied almost exclusively on the Report. Hence, a close study of the Report allows us "to place [ourselves] as nearly as possible in the position of the men who framed the instrument" and allows us to "look to the history [and] general spirit of the times," *Perry v. Stancil*, 237 N.C. at 444, 75 S.E. 2d at 514, in making our determination here.

In discussing its objectives and approach, the State Constitution Study Commission (Study Commission) stated:

> In order to achieve this general objective of an up-to-date constitution, we consider it necessary to eliminate from the constitution obsolete and unconstitutional provisions, *to simplify and make more consistent and uniform the language of the document*, to reorganize its content in some instances for the sake of greater clarity . . . .

Report, at 3 (emphasis added).

Further, the Study Commission noted that the revised document

> effects a general editorial revision of the constitution, which will be referred to here as "the proposed constitution." The deletions, reorganizations, and improvements in the clarity and consistency of language will be found in the proposed constitution. Some of the changes are substantive, *but none is calculated to impair any present right of the individual citizen or to bring about any fundamental change in the*

power of state and local government or the distribution of that power.

Report, at 4 (emphasis added).

The passages quoted above evince a clear intent on the part of the framers of the new document merely to update, modernize and revise editorially the 1868 Constitution. An intent to modernize the language of the existing constitution does not, in our opinion, show that the framers of the 1970 Constitution intended that instrument to enlarge upon the rights granted by the 1868 Constitution. Indeed, we think that such an intent shows that the 1970 framers intended to preserve intact all rights under the 1868 Constitution.

Our view is buttressed by another noted commentator. In his article "A Brief History of the Constitutions of North Carolina," John L. Sanders, Director of the Institute of Government, emphasized the editorial nature of the new document submitted to the people in 1970 vis-a-vis the substantive amendments which appear in our present Constitution which were submitted to the people as entirely *separate amendments*:

> The Commission combined in a revised text of the Constitution all of the *extensive editorial changes* that it thought should be made in the Constitution, together with such substantive changes as the Commission deemed *not to be controversial or fundamental in nature.* These were embodied in the document that came to be known as the Constitution of 1971. Those proposals for change that were deemed to be sufficiently fundamental or potentially controversial in character as to justify it, the Commission set out as independent amendment propositions, to be considered by the General Assembly and the voters of the State on their independent merits.

Sanders, *The Constitutional Development of North Carolina*, in *North Carolina Manual* 87, 93 (1979) (emphases added).

In other words, the new document enacted in 1970, of which Article I, § 25 is a part, was not a fundamentally new constitution. It was an extensive editorial revision of the 1868 document. The evils sought to be remedied were obsolete language, outdated style and illogical arrangement. The intent, object and purpose of

the framers and adopters was to correct those evils. Important and significant substantive changes were not included in the new document submitted in 1970, but were dealt with in amendments separately submitted to the people of North Carolina for their approval.

In addition to the revised constitution, the Study Commission recommended nine separate amendments to our Legislature.[5] Numerous other proposals for amendment were submitted during debate. Six were ultimately approved by the General Assembly and submitted to the voters: the executive reorganization amendment, Article III, §§ 5(10), 11, the state and local finance amendment, Article V, an amendment to the income tax provision of the constitution, Article V, § 2(6), a reassignment of the benefits of escheats, Article IX, § 10, authorization for calling extra legislative sessions on the petition of members of the General Assembly, Article II, § 11(2), and abolition of the literacy test for voting. Of the six separate amendments submitted to the people, only the literacy test repeal was rejected.

5. The amendments to the newly revised constitution recommended by the Study Commission were:

1. Requiring judges and solicitors to be licensed attorneys, and requiring the General Assembly to establish a mandatory retirement age for judges and procedures for the disciplining and removal of judicial officers;

2. Granting the veto power to the Governor;

3. Empowering the voters to elect a Governor and Lieutenant Governor for two successive terms;

4. Providing for a change in the mode of selection of certain state executive officers;

5. Reducing the residence time for voting in state elections to six months;

6. Authorizing trial on information and waiver of jury trial in noncapital cases;

7. Requiring the General Assembly to reduce the administrative departments to 25 and authorizing the Governor to reorganize the administrative departments, subject to legislative disapproval;

8. Revising the income tax provision to make possible joint returns by husband and wife and accommodation of the State to the federal income tax;

9. Reassigning future escheats.

Report, at 4.

That the document submitted to the voters in 1970, and in which Article I, § 25 was included, was intended to effectuate mere editorial changes in the 1868 document is evident in light of the submission of the fundamental and substantive changes in the form of separate amendments. Indeed, the far-reaching finance amendment enacted at the same time as the editorially revised document in 1970 did not take effect until 1 July 1973, two years later than the newly written document. That the drafters and adopters did not intend the 1970 revision to embrace substantive and fundamental changes is indicated by the numerous amendments to the 1970 document adopted by the people. In addition to the amendments adopted at the same time as the 1970 Constitution, five more amendments were submitted by the General Assembly of 1971 and these were adopted by the people on 7 November 1972. These amendments (1) established the constitutionally-specified voting age at eighteen years, Article VI, §§ 1, 6, (2) required the General Assembly to set maximum age limits for service as justices and judges of the state courts, Article IV, § 8, (3) authorized the General Assembly to prescribe procedures for the censure and removal of state judges and justices, Article IV, § 17, (4) added to the Constitution a statement of policy regarding conservation and the protection of natural resources, Article XIV, § 5, and (5) limited the authority of the General Assembly to incorporate cities and towns within close proximity to existing municipalities, Article VII, § 1. The 1973 Session of the General Assembly submitted to the voters in November 1974 an amendment changing the title of solicitor to that of district attorney, Article IV, § 18. Also submitted at that time was an amendment authorizing the use of revenue bonds to construct industrial facilities. The people ratified the amendment changing the title of solicitor, but that concerning revenue bonds for industrial facilities was defeated. Two amendments were also submitted to the people by the 1975 Legislature. Both dealt with the use of revenue bonds to finance construction, the first for health care facilities and the second for industrial facilities, a modification of the amendment rejected in 1974. Both were ratified by the voters on 23 March 1976. N.C. Constitution art. V, §§ 8, 9.

In 1977 the citizens of this state adopted amendments permitting consecutive terms for the Governor and Lieutenant Gover-

nor, Article III, § 2, requiring a balanced state budget, Article III, § 3, permitting joint ownership of generation and transmission facilities, Article V, § 10, enlarging the homestead exemption, Article X, § 2(3), § 2(4), and enlarging the entitlement to the life insurance exemption, Article X, § 5. The voters adopted in 1979 an amendment requiring that all state justices and judges be duly authorized to practice law, Article IV, § 22.

The submission of substantive amendments separate and apart from the new constitution shows clearly that the intent and purpose of the framers of the 1970 Constitution was to revise editorially only the 1868 Constitution. Substantive and fundamental matters were left to separate amendments to be considered individually by the voters.

Clearly, the new provision on civil jury trials, Article I, § 25, represents only a minimal editorial change. The counterpart provision in the 1868 Constitution provided that trial by jury "ought to remain sacred and inviolable." N.C. Const. art. 1, § 19 (1868). Article I, § 25 of the present document mandates that trial by jury "*shall* remain sacred and inviolable." (Emphasis added.) Defendant argues that this slight change in wording supports his position. He contends that use of the word "shall" indicates an intent by the drafters and adopters to place an even higher value on the right to trial by jury. We agree with defendant that the drafters and adopters considered the right to trial by jury to be vitally important. However, we are unable to find that the drafters and adopters singled out this particular right for special treatment and must conclude that the change is an editorial one. As Mr. Sanders stated:

> The Declaration of Rights (Article I), which dates from 1776 with some 1868 additions, was retained with a few additions. The organization of the article was improved and the frequently used subjunctive mood was replaced by the imperative in order to make clear that the provisions of that article are commands and not mere admonitions. (For example, "All elections ought to be free" became "All elections shall be free.")

Sanders, *supra* at 94.

Finally, we note our strong belief that our Legislature in 1969 had absolutely no intention of providing a constitutional

right to jury trial for attorneys in disciplinary proceedings when it submitted Article I, § 25 to the people. We think that the historial treatment of constitutional matter by our Legislature impels the conclusion that our legislators intended to leave such a specific matter as this for future consideration. As Mr. Sanders has stated,

> The fact that we have adopted only three constitutions in two centuries of existence as a state . . . reflects the fact that North Carolina has been less disposed than have many states to write into its state constitution detrailed [sic] provisions with respect to transitory matters better left to legislation. The Constitution has allowed the General Assembly wide latitude for decision on public affairs, and legislators have been willing to accept responsibility for and act on matters within their authority instead of passing the responsibility for difficult decisions on to the voters in the form of constitutional amendments.

Sanders, *supra* at 98.

The Legislature, in submitting the new constitution containing Article I, § 25 to the people of North Carolina, sought to protect basic rights from encroachment by the state and to establish a framework for government. The 1970 Constitution, like its predecessors, dealt not with temporary conditions but with general principles which must remain intact. Response to changing conditions was left for future legislation. In 1975, the Legislature exercised its authority to deal with changing conditions and eliminated the right to jury trial of attorneys in disciplinary actions.

With such clear indications that the 1970 Constitution was meant to be an editorial revision of the 1868 Constitution and that fundamental changes in the constitution were made only by separate amendment we must reject defendant's argument that the adoption of the revised constitution effected a radical change in the constitutional entitlement to jury trial in civil cases. Surely, "if such was the intention, it is reasonable to presume it would have been declared in direct terms, and not be left as a matter of inference." *Perry v. Stancil*, 237 N.C. at 447, 75 S.E. 2d at 516. Absent a clear expression of an intent to make fundamental changes, we cannot assume that such was the intent of the

framers of the 1970 document. Nor can we assume that, whatever the intent of the framers, the citizens intended by their adoption at the polls of the 1970 constitutional changes to effect such a radical change. With no evidence presented that the intent was to do more than editorially revise Article I, § 25, "we cannot read into the voice of the people an intent that in all likelihood had no occasion to be born." *Sneed v. Greensboro City Board of Education*, 299 N.C. 609, 616, 264 S.E. 2d 106, 112 (1980).

Our decision today does not overrule or diminish the principle of law established in *Groves* and its progeny. *Groves* held that the predecessor to our present Article I, § 25 (Article I, § 19 of the 1868 Constitution) preserved the right to trial by jury in those instances in which the right existed at common law or by statute as of the date the 1868 Constitution was adopted. We agree: the relevant date for determining the scope of the constitutional right to jury trial in civil cases is the date of adoption of the 1868 Constitution. Subsequent adoption of an editorially revised constitution, because of the nature of the purpose of such a revision, does not operate to alter the rights granted by the prior constitution.

We hold that Article I, § 25 of the North Carolina Constitution preserves intact the right to trial by jury in all cases where the prerogative existed at common law or by statute at the time the 1868 Constitution was adopted.

III.

[2] Left unresolved by the Court of Appeals' decision was the question concerning the appropriate standard for judicial review of a decision of the Disciplinary Hearing Commission. In light of our adoption of that portion of the Court of Appeals' opinion holding the evidence sufficient to support the conclusions of law stated by the Commission, the resolution of this issue is unnecessary. However, in light of the serious conflict in contentions between the parties to this cause and for the guidance of the Commission in future cases, we briefly answer that contention here.

The State Bar contends that the appropriate standard for review is the "any competent evidence" test stated in *Cogdill v. North Carolina State Highway Commission*, 279 N.C. 313, 182 S.E.

2d 373 (1971). Defendant contends that the appropriate standard for review is the "whole record" test as set out in the APA. G.S. § 150A-51(5). For the reasons stated below we agree with defendant that the APA standard applies.

G.S. 150A-43, a part of the Administrative Procedure Act (APA), provides in pertinent part that, "[a]ny person who is aggrieved by a final agency decision . . . is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute." In determining what is "adequate procedure for judicial review," as those words appeared in our former statute, G.S. 143-307, this Court held that an adequate procedure for judicial review exists "only if the scope of review is equal to that under G.S. Chapter 143, Article 33, 143-306 *et seq.*" *Jarrell v. Board of Adjustment*, 258 N.C. 476, 480, 128 S.E. 2d 879, 883 (1963). Effective 1 February 1976, G.S. 143-307 was replaced by G.S. 150A-43. Law of March 24, 1975, ch. 69, 1975 N.C. Sess. Laws 44 (1975); Law of April 12, 1974, ch. 1331, 1973 N.C. Sess. Laws 691 (1974). In *Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 395, 269 S.E. 2d 547, 559 (1980), we held that " 'adequate procedure for judicial review,' as those words appear in present G.S. 150A-43, exists only if the scope of review is equal to that under present Article 4 of G.S. Chapter 150A."

Our review of Chapter 84 of our General Statutes, the chapter which provides for discipline of attorneys, leads us to conclude that there is no "adequate procedure for judicial review" there. Hence, we now hold that Article 4 of G.S. Chapter 150A is the controlling judicial review statute for appeals from decisions of the State Bar Disciplinary Hearing Commission.

Plaintiff contends that the APA is not applicable to these proceedings because neither the State Bar nor the Disciplinary Hearing Commission is a part of the executive branch of government. We do not attempt to answer that question here but simply find the argument unpersuasive. As indicated above, the clear intent of our Legislature is to make the "whole record" test the principle standard of judicial review of administrative findings in this state. We adopt that test here and indeed have done so before. *See In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979) (ap-

plying the "whole record" test to appeals from decisions of the Board of Law Examiners).

In applying the whole record test to the facts disclosed by the record, a reviewing court must consider the evidence which in and of itself justifies or supports the administrative findings and must also take into account the contradictory evidence or evidence from which conflicting inferences can be drawn. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). Under the whole record test there must be substantial evidence to support the findings, conclusions and result. G.S. § 150A-51(5). The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538. Applying this test to the facts disclosed by the record before us, we find that the findings, inferences, conclusions and decision of the Disciplinary Hearing Commission are supported by substantial evidence in view of the entire record.

Except for the modifications noted above and our refusal to address that portion of the Court of Appeals' holding that respondent waived trial by jury, the decision of the Court of Appeals is affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. STANFORD ANTHONY SHANE AND DEAN LEONARD WILLIAMS

No. 88

(Filed 12 January 1982)

1. **Criminal Law § 86.5— impeachment of defendant—prior misconduct—improper questions**

Although a defendant charged with sexual offenses and robbery could properly be cross-examined for impeachment purposes about his past participation in an act of fellatio with a prostitute while he was a police officer, the prosecutor's questions to defendant as to whether he resigned from the police department because of sexual "improprieties" and as to his prior conversations with another police officer about the incident and his knowledge of the content

of the prostitute's allegations were improper in that they (1) included references to mere allegations of misconduct and (2) failed to identify some specific act by means of a detailed reference to the time, place, victim or circumstances of defendant's alleged prior misconduct.

2. **Criminal Law § 86.1— impeachment of defendant upon a collateral matter**

In a prosecution for sexual offenses, an officer's rebuttal testimony that defendant told him that he had participated in a sexual offense, fellatio, with a prostitute some seven months before the crimes in question was not admissible to contradict defendant's denials of such prior misconduct but constituted improper impeachment of defendant's testimony upon a collateral matter.

3. **Criminal Law § 34; Rape and Allied Offenses § 4.1— evidence of prior sexual offense—remoteness—inadmissibility—new trial for both defendants**

In a prosecution of two defendants for various sexual offenses, an officer's rebuttal testimony that one defendant admitted to him that he had committed a similar sexual offense, fellatio, with a prostitute some seven months prior to the acts in question was not admissible to show a common scheme or plan or for any other purpose, notwithstanding there was a similarity between the occurrences in question and such defendant's alleged earlier encounter with a prostitute in that, on both occasions, such defendant flaunted his authority as a police officer and requested illicit sexual favors in return for his agreement to drop criminal charges against the women, and the women subsequently performed fellatio upon him, either by consent or by force, since the remoteness in time between the prior offense and the crimes charged negated the existence of an ongoing and continuous plan to engage persistently in such deviant activities. Furthermore, the trial court's instruction that the jury should disregard evidence of such defendant's prior misconduct elicited during cross-examination in determining the guilt or innocence of the second defendant did not apply to the rebuttal testimony, and both defendants are therefore entitled to a new trial because of the admission of the rebuttal testimony where the defenses of both defendants were so inextricably interwoven that the jury could only have found both of them equally guilty, or not guilty, of committing the sexual offenses.

APPEAL by defendants from judgments of *Preston, Judge*, entered at the 22 September 1980 Criminal Session, CUMBERLAND Superior Court. Defendant Shane appeals as a matter of right from the judgment imposing life imprisonment for his conviction of a first degree sexual offense. His motion to bypass the Court of Appeals on his additional convictions of attempted first degree sexual offense and common law robbery was allowed on 10 March 1981. Defendant Williams was convicted of three counts of second degree sexual offense, attempted second degree rape and common law robbery. His motion to bypass the Court of Appeals and to consolidate his appeal with that of defendant Shane was allowed on 10 March 1981.

State v. Shane

Defendant Shane, a black male, was charged in an indictment, proper in form, with first degree sexual offense, attempted first degree sexual offense and armed robbery. Defendant Williams, a white male, was charged in an indictment, proper in form, with first degree sexual offense, four counts of attempted first degree rape and armed robbery. All of the charged criminal activities arose out of an incident at the Tahiti Health Club in Cumberland County on 10 February 1980.

In pertinent part, the State's evidence tended to show that defendant Shane, a recently employed detective with the Spring Lake Police Department, and his next door neighbor, defendant Williams, went to the Tahiti Health Club twice during the evening of 10 February 1980. Shane was not on duty that evening, and both he and Williams had been drinking. Jeffrey Ray Johnson, the owner and manager, and Dolores Fugett and Carolyn Marshall, masseuses, were working at the club when defendants arrived. Johnson was alerted by David Bracey, the owner of another health club located across the street, that Shane was a police officer. Nevertheless, the two female employees explained the types of massages offered and their prices to defendants. Defendants then left; however, they returned to the club one hour later.

Shortly after their return to the Tahiti Health Club, Shane displayed a police badge to Johnson and told him that this was a "bust" and that he was under arrest. Shane ordered Johnson and the women to stand up against the wall and frisked them. Shane also searched the office desk and took a pistol which he found therein. His companion Williams already had a gun. Shane explained to Johnson, as the basis for the "arrest," that one of the women had solicited Williams for prostitution. Shane further stated that the was working for the State Bureau of Investigation in a state-wide crackdown on massage parlors. Shane then asked Johnson what he "would be willing to do to get out of this bust" and offered to drop the charge in exchange for "liberties" with the women. Johnson refused, whereupon Shane moved him to the bathroom and handcuffed him to a two by four foot stud. Thereafter, defendants, still brandishing guns, made the women undress and forced them to submit to, and perform, several degrading, illicit sexual acts.

Specifically, Dolores Fugett testified that Shane slapped her in the face until she performed fellatio upon him. Ms. Fugett also testified that Williams felt her breasts, placed in fingers in her vagina and made her perform fellatio upon him (but this sexual act was not consummated). Carolyn Marshall testified that Williams kissed her breasts, put his fingers in her vagina and rectum, attempted to have sexual intercourse with her on the floor, and performed cunnilingus and anilingus upon her. Ms. Marshall also testified that Shane later tried to make her perform fellatio upon him, but she refused. Shane did not have a weapon on that occasion.

When the sexual pillaging was completed, Shane made Ms. Fugett unlock the handcuffs on Johnson and throw all of his clothing outside. Shane tied up the women with telephone cord, which he had cut with a knife, and defendants left the Tahiti Health Club. Shane took Johnson's pistol with him.

Defendants' evidence was as follows. Defendants admitted that they went to the Tahiti Health Club on 10 February 1980. They went there to investigate their "information" that the club was involved in prostitution and drugs. Their specific intent was to catch someone in the act of soliciting for prostitution. During their first visit to the club, Shane went to the restroom, leaving his jacket in the front office, while Williams inquired about the available services and prices from the women. After defendants left the club, Shane discovered that $50.00 was missing from his jacket. Defendants decided to return to the club to get more evidence about the illegal activities there.

On defendants' second visit to the club, Shane confronted Johnson about the stolen money, whereupon Johnson stood up and opened his desk drawer. Shane told Johnson to "freeze" and identified himself as a police officer. [Shane said he did not have his police badge when he went to the club.] Shane observed a gun in the desk drawer. He took the gun and unloaded it. Johnson then told Shane that they could "work it out," but he refused to return the stolen money and warned Shane that he would "never make it out the door alive." Shane put Johnson in the bathroom. Shane kept Johnson's pistol, as a precaution, and told Johnson he could retrieve the weapon at the Law Center the next day. Defendants left.

Both defendants denied engaging in any form of sexual activity with either Dolores Fugett or Carolyn Marshall. In addition, both defendants maintained that they had no weapons in their possession at the club and that the only weapon they observed at the scene was Johnson's own .38 caliber pistol.

William C. Johnson of the Fayetteville Police Department testified as a rebuttal witness for the State. He stated that Shane had previously worked for him for four years but had left the department in the summer of 1979. Officer Johnson said he questioned Shane about an alleged incident involving oral sex with "another individual" and that Shane had admitted the actual occurrence of the event but had denied any use of force in connection therewith.

Daniel Joseph Ford, a detective sergeant with the Cumberland County Sheriff's Department, also testified on rebuttal for the State and read to the jury defendants' formal statements about what happened at the Tahiti Health Club. Officer Ford said that he and Shane had conversed further after his statement was taken. At that time, Shane told him that "he did allow a girl to perform oral sex on him at the Tahiti Health Club on the 10th of February, however . . . it was consensual."

Upon submission of all of the evidence, the jury found defendant Shane guilty of first degree sexual offense, attempted first degree sexual offense and common law robbery. The trial court imposed a life sentence for the first degree sexual offense and entered a consolidated judgment of ten years imprisonment for the other offenses to commence at the expiration of the life sentence. The jury found defendant Williams guilty of three counts of second degree sexual offense, attempted second degree rape and common law robbery. The trial court imposed, respectively, a consolidated prison sentence of forty years, a concurrent ten year term and another ten years imprisonment to commence at the expiration of the other sentences.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Barrington, Jones, Witcover, Carter & Armstrong, by Carl A. Barrington, Jr., for defendant Shane; and Jack E. Carter for defendant Williams.

COPELAND, Justice.

Defendants filed a joint brief in this appeal.[1] Defendant Shane argues six assignments of error, two of which are also properly raised by defendant Williams. We are persuaded, after a careful review of the applicable law and the circumstances of this case, that both defendants are entitled to a new trial upon the charges of sexual crimes. We shall address defendants' mutual assignments of error first.

I.

[1] Defendants contend that the trial court erred in permitting the State to cross-examine Shane about a prostitute's performance of fellatio upon him, seven months prior to the occurrence of the charged events at the Tahiti Health Club, while he was employed as a police officer in Fayetteville. It is well established that a criminal defendant may be cross-examined about prior acts of misconduct, even if he was not convicted therefor, for the purpose of impeachment, provided the questions are asked in good faith. *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980); *State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979). Indeed, all kinds of facts, which are disparaging to a defendant's character, may be elicited upon cross-examination. *See State v. Dawson*, 302 N.C. 581, 584-85, 276 S.E. 2d 348, 351 (1981); 1 Stansbury's North Carolina Evidence § 111, at 341 (Brandis rev. 1973). Thus, as a general matter, defendant Shane could be properly questioned about his past participation in an act of fellatio with a prostitute because such conduct is not only immoral, it is also legally proscribed in North Carolina as a crime against nature, regardless of its consensual character. *See* G.S. 14-177; *State v. Adams*, 299 N.C. 699, 706-07, 264 S.E. 2d 46, 50 (1980). In addition, the record plainly shows that the district attorney asked about this prior affair with the prostitute in good faith based upon sufficient knowledge thereof.[2] Nevertheless, defendants ardently contend,

1. In their brief, defendants only listed the pertinent exceptions in the record under each question presented for review. Rule 28(b)(3) of the North Carolina Rules of Appellate Procedure states that the specific assignments of error, being relied upon in support of the corresponding argument, should also be set out under each question.

2. William C. Johnson, Commander of the Intelligence Division of the Fayetteville Police Department, testified on *voir dire* examination that he had

as they did at trial, that the district attorney's questions were propounded *in an improper form.* In this regard, their assignment of error has merit.

From the outset of his inquiry into this subject, the prosecutor focused upon the circumstances surrounding the termination of Shane's previous employment with the Fayetteville Police Department:

> Q. You resigned from the intelligence unit because of sexual improprieties, didn't you?
>
> . . .
>
> WITNESS: I resigned from the intelligence police department because a prostitute downtown made allegations against me; and for the betterment of the department and myself, I resigned.
>
> . . .
>
> MR. RAND: In resigning, you told Mr. Bill Johnson, did you not, about this incident?
>
> . . .
>
> MR. RAND: You told Mr. Johnson, did you not, about this matter; that you just weren't thinking; that all you were doing was getting a shot of cock, didn't you?
>
> . . .
>
> WITNESS: I did not sir.
>
> MR. RAND: You did not tell him that?
>
> A. I did not, sir.
>
> Q. Mr. Johnson is the head of the intelligence unit, isn't he?
>
> A. Yes, sir, Mr. Bill Johnson.

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turned over the results of an internal investigation of the matter to the district attorney's office for its determination of whether the circumstances warranted a criminal prosecution against Shane. In fact, the State unsuccessfully tried to introduce a copy of that very report at trial.

Q. You talked to Mr. Johnson about this alleged incident with the prostitute, didn't you?

. . .

WITNESS: Yes, sir, I did.

. . .

MR. RAND: It involved oral sex, didn't it?

. . .

WITNESS: It was an allegation that was made —

. . .

MR. RAND: It involved oral sex, didn't it?

. . .

WITNESS: I don't know sir. I know it involved some allegation.

. . .

MR. RAND: You were certainly informed of the allegations by your superiors, weren't you?

. . .

WITNESS: I was informed of — yes, sir, I was.

MR. RAND: And you know it involved oral sex, didn't you, by you when you picked up a girl and asked her what she would do to keep from getting busted?

. . .

MR. RAND: Didn't you?

. . .

WITNESS: No, I did not.

[Defendants' duly entered, but overruled, objections, motions to strike and exceptions to this questioning are omitted.] Defendants attack the method of the foregoing inquisition about Shane's past bad acts upon two bases: (1) its impermissible inclusion of references to mere allegations of misconduct and (2) its failure to identify directly a specific instance of reprehensible behavior.

Though a defendant's former evil exploits or iniquities are "fair game" during cross-examination, as a means of challenging his veracity, the mode of the inquiry is not without limitation. First, the prosecutor may not attempt to impeach a defendant's character by asking about, or referring to, prior arrests, indictments, or any other accusations of misconduct. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); 1 Stansbury's North Carolina Evidence § 112, at 344-45 (Brandis rev. 1973).[3] In the instant case, the prosecutor committed this very transgression by framing his questions to defendant Shane in terms of imputations or allegations of prior misconduct. We are aware, however, that defendant himself mentioned the inappropriate subject of prior allegations of improprieties first, as well as several times thereafter. Yet the general tenor and ambiguity of the prosecutor's questions, see *infra*, practically forced defendant to answer in such terms. In *State v. Purcell*, 296 N.C. 728, 733, 252 S.E. 2d 772, 775 (1979), this Court disapproved of a question which essentially requested the defendant to repeat informal accusations of wrongful conduct formerly made against him. A similar reproof is mandated here, and we decline to hold that defendant's own allusions to the prior allegations, as he attempted to answer the questions posed to him, automatically granted the prosecutor free license to pursue and develop that incorrect focus. Second, it is equally clear that a prosecutor must ask questions designed to determine expressly and directly whether a defendant has actually committed a certain moral or legal infraction in the past. In *State v. Mason*, this Court affirmed the sustension of the State's objection to the question, "Were you involved in what you call street gang operations in New York?" 295 N.C. 584, 592-93, 248 S.E. 2d 241, 247 (1978), *cert. denied*, 440 U.S. 984, 99 S.Ct. 1797, 60 L.Ed. 2d 246 (1979). The prosecutor's opening query here, "you *resigned* from the intelligence unit because of sexual *improprieties*, didn't you?" is certainly no more successful in identifying a particular act of misconduct. (Emphases added.)

A legitimate inference of foul play does not invariably arise from the mere act of resigning from employment. Moreover, the term "improprieties" is overly broad because an improper act

3. If the rule were otherwise, a witness could be placed in the untenable position of having to defend himself against unproved insinuations or rumors of past behavior in order to maintain his testimonial credibility at an unrelated trial.

does not necessarily connote a breach of moral or legal mores, and the plural form of the word suggests the commission of several acts without particularizing a single, specific event for the jury to consider in evaluating credibility. *See State v. Purcell, supra; State v. Mason, supra.* Defendant Shane was never asked outright whether he had engaged in an earlier sexual misdeed with a prostitute. Instead, Shane was interrogated about his prior *conversations* with another police officer about the incident and his *knowledge* of the content of the prostitute's allegations. Thus, we conclude that the prosecutor's cross-examination of Shane was not competently tailored to elicit his affirmance or denial of "some identifiable specific act" by means of a *detailed* reference to "the time or the place or the victim or any of the circumstances of defendant's alleged prior misconduct." *State v. Purcell, supra,* 296 N.C. at 732-33, 252 S.E. 2d at 775; *see State v. Herbin,* 298 N.C. 441, 451, 259 S.E. 2d 263, 270 (1979). We need not determine here, however, whether such error constituted prejudice sufficient to require a new trial because we find that another, more substantial error impels an order of re-trial, see *infra.*

II.

Defendants additionally argue that the trial court erroneously denied their motion to suppress the rebuttal testimony of Officer William C. Johnson, Shane's former supervisor in the intelligence division of the Fayetteville Police Department. Specifically, Officer Johnson testified that he had two conversations with Shane on 10 and 11 July 1979 about allegations by "another individual" involving oral sex. Officer Johnson said Shane told him the following things in the course of their conversations: (1) that the incident had occurred; (2) that no force had been used during the event; and (3) that "he just was not thinking; that he only got a shot of cock." Simply put, the issue is whether this rebuttal evidence was competent under any theory of admissibility. We hold that it was not.

[2] First, Officer Johnson's testimony was certainly not admissible, as the State argues, to impeach defendant Shane's trial testimony about the alleged sexual impropriety of July 1979 with his own prior inconsistent statements. For, the rule is well settled in this jurisdiction that, though a witness's character or propensi-

ty for telling the truth is subject to impeachment through cross-examination about specific instances of misconduct or prior inconsistent statements, the witness's answers to such questions are conclusive, and he may not be further impeached or contradicted through the introduction of *any kind* of extrinsic evidence. *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981); *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971); *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970); *State v. Broom*, 222 N.C. 324, 22 S.E. 2d 926 (1942); *see* 1 Stansbury's North Carolina Evidence § 111 (Brandis rev. 1973); McCormick's Handbook of the Law of Evidence §§ 36, 42 (2d ed. 1972). The rule is a particularized application of the broader evidentiary principle prohibiting impeachment upon a collateral matter. *State v. Dawson*, *supra*; 1 Stansbury, *supra*, § 48.[4]

[3] Second, Officer Johnson's testimony was also not admissible for any other competent purpose in this case. Receipt of extrinsic evidence disputing defendant Shane's testimony would have been permissible *only if* the evidence about his prior misconduct exhibited a distinct materiality or relevancy, beyond its mere capacity for impeachment, and thus could have been properly proven as part of the State's case in chief. *See State v. Taylor*, 250 N.C. 363, 108 S.E. 2d 629 (1959); 1 Stansbury's North Carolina Evidence § 48, at 136-37, and § 111, at 342 (Brandis rev. 1973); McCormick's Handbook of the Law of Evidence § 47 (2d ed. 1972); 3A Wigmore on Evidence § 879 (Chadbourn rev. 1970). The challenged testimony does not meet these requirements for independent admission. In so stating, we expressly reject the State's all-inclusive argument that any evidence about Shane's earlier sexual misbehavior was admissible as evidence of another similar offense.

By virtue of a sound legal axiom, substantive evidence of a defendant's past, and distinctly separate, criminal activities or

4. The general prohibition against double impeachment of a witness upon a matter not directly in issue makes good common-sense. For, the development of a "mini-trial" upon a defendant's guilt of some collateral misconduct or the presentation of "an interminable series of contradictions of a witness's testimony about a point of minor relevancy would confuse the jury and unnecessarily distract its attention from the true issues presently being tried. *See State v. Royal*, 300 N.C. 515, 532, 268 S.E. 2d 517, 528 (1980) (Exum, J., dissenting); *Clark v. Clark*, 65 N.C. 655, 661 (1871). *See also State v. Simpson*, 297 N.C. 399, 407, 255 S.E. 2d 147, 152-53 (1979).

misconduct is generally excluded when its only logical relevancy is to suggest defendant's propensity or predisposition to commit the type of offense with which he is presently charged. *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978); 1 Stansbury's North Carolina Evidence § 91 (Brandis rev. 1973). "Logical relevancy" is capably demonstrated whenever such evidence has some bearing upon genuine questions concerning knowledge, identity, intent, motive, plan or design, connected crimes, or consensual illicit sexual acts between the same parties. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); 1 Stansbury, *supra*, § 92; *see, e.g., State v. Searles*, --- N.C. ---, 282 S.E. 2d 430 (1981) (motive, intent); *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981) (identity).[5] In the instant case, the State relies upon the common scheme or plan exception for admission of its evidence about defendant Shane's commission of a similar sexual offense, fellatio, with a prostitute in Fayetteville. We are not so persuaded.

At the outset, we acknowledge that our courts, as well as those of other jurisdictions, have been "very liberal" in admitting evidence of similar sexual offenses under one or more of the exceptions listed above. *State v. Greene*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978); *see* 1 Stansbury's North Carolina Evidence § 92, at 299 (Brandis rev. 1973); Wharton's Criminal Evidence § 250, at 570 (13th ed. 1972); Annot., 77 A.L.R. 2d 841 (1961). *See also* 2 Wigmore on Evidence § 357 (Chadbourn rev. 1979). Nevertheless, the facts of each case ultimately decide whether a defendant's previous commission of a sexual misdeed is peculiarly pertinent in his prosecution for another independent sexual crime. In addition, it must affirmatively appear that the probative force of such evidence outweighs the specter of undue prejudice to the defendant, and, in close cases, fundamental fairness requires giving defendant the benefit of the doubt and excluding the evidence. [Or, as it is more descriptively said in the game of baseball, the tie must go to the runner.] *State v. Barfield*, 298 N.C. 306,

5. It should be noted that, in this case, there was never any issue about the identity of the alleged sexual assailants. Throughout the criminal investigation, the employees of the Tahiti Health Club positively and consistently identified Shane and Williams as the perpetrators of the charged offenses. In addition, Shane and Williams did not tender an alibi defense—they plainly admitted that they were at the club at the times in question. The sum and substance of the case was simply determining who was telling the truth about whether Shane and Williams had actually committed any sexual crimes while they were at the club.

325-26, 259 S.E. 2d 510, 527-28 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980); *State v. McClain*, 240 N.C. 171, 176-77, 81 S.E. 2d 364, 368 (1954). More particularly, it is evident that the period of time elapsing between the separate sexual events plays an important part in this balancing process, especially when the State offers the evidence of like misconduct to show the existence of a common plan or design for defendant's perpetration of this sort of crime. *See, e.g., State v. Rick*, 304 N.C. 356, 283 S.E. 2d 512 (1981) (attacks upon three women, at different places, within a four-hour period); *State v. Williams*, 303, 507, 279 S.E. 2d 592 (1981) (sexual advances to three minor girls, at different times, on same day); *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980) (defendant related his "recent" crimes to victim prior to raping her); *State v. Greene, supra* (assault with intent to rape of one woman and rape of another within a three-hour period). *See generally* Annot., 88 A.L.R. 3d 8 (1978).

In the case at bar, there is indeed a striking similarity between the alleged factual occurrences at the Tahiti Health Club on 10 February 1980 and defendant Shane's alleged encounter with a prostitute in July 1979. Among other things, the State's evidence tended to show that on both occasions, Shane, flaunting his authority as a police officer, requested illicit sexual favors in return for his agreement to drop criminal charges of prostitution against the women and that the women subsequently performed fellatio upon him, either by consent or force. However, these events occurred at different places, involved different women, were separated by a period of *seven months*, and, in the latter occurrence, included the participation of another partner in the crime. In an analogous case, *State v. Gammons*, the defendant, a preacher, was accused of assault with intent to commit rape upon a female member of his church after he had lured her into a basement bedroom in his house on a religious pretext (to pray). 258 N.C. 522, 128 S.E. 2d 860 (1963), *overruled on other grounds, State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973).[6] Over defendant's objection, the trial court admitted the testimony of a former member of defendant's church who said that, two years earlier, she had permitted defendant to have sexual intercourse with her in his basement bedroom because he had told her that she would

6. The facts are more fully explicated in a subsequent opinion rendered in the case reported at 260 N.C. 753, 133 S.E. 2d 649 (1963).

be "deathly sick" if she did not succumb to his wishes. Despite the remarkable resemblance between the two offenses, our Court held it was error, requiring a new trial, to admit this testimony about the earlier affair because it did not fall within *any* of the well-delineated exceptions to the general rule forbidding admission of evidence of a distinct, disconnected offense to prove the commission of another independent crime. 258 N.C. at 524, 128 S.E. 2d at 862. We are bound to reach that same conclusion here and find that the remoteness in time between defendant Shane's alleged offense in 1979 and the crimes charged against both defendants in 1980 substantially negated the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities. *Accord, Larkins v. State*, 230 Ga. 418, 197 S.E. 2d 367 (1973) (erroneous admission of evidence of rape of another woman by defendant some *seven months* earlier, even though it was accomplished in a manner very similar to that of the charged rape.)

Thus, we hold that the rebuttal testimony of Officer Johnson constituted improper impeachment of defendant Shane's testimony upon a collateral matter and was not admissible as substantive evidence of a similar offense. The prejudicial and inflammatory impact of the incompetent evidence is obvious under the circumstances of this case, and its erroneous admission requires a new trial of *both* defendants.

III.

At this juncture, the State argues that defendant Williams is not equally entitled to a new trial for the foregoing error because the trial court specifically instructed the jury not to consider the challenged rebuttal evidence in determining his guilt or innocence. However, the record plainly refutes the State's contention. We quote the portion of the judge's charge relied upon by the State:

> During *cross examination* of codefendant Stanford Anthony Shane, he was questioned regarding circumstances surrounding his termination as an employee of the . . . Fayetteville Police Department. This testimony was admitted for the sole purpose of impeaching the credibility of said codefendant if, in fact, you find that it does impeach his testimony. Therefore, you are instructed that the questions and answers concerning employment of the codefendant Stanford Anthony Shane are not to be considered as evidence of

> guilt of the defendant Dean L. Williams. Therefore, I instruct you that the questions and answers concerning the employment of the defendant Shane with the Fayetteville Police Department are to be considered for no purpose whatsoever in determining the guilt or innocence of Dean L. Williams.

(Record, p. 106 (emphasis added).)

We find that these instructions adequately and correctly informed the jury to disregard the evidence of Shane's prior misconduct elicited during his *cross-examination* in reaching a verdict upon the charges against defendant Williams. The instructions did not, however, expressly mention Officer Johnson's similar testimony and did not, therefore, clearly admonish the jury to ignore this incompetent evidence in its deliberations against Williams. This being so, and it duly appearing that defendants' defenses were so inextricably interwoven that the jury could only rationally find both of them equally guilty, or not guilty, of committing the sexual offenses at the Tahiti Health Club, we hold that defendant Williams must also receive a new trial in the interests of the fair administration of justice and the policy favoring consistency of verdicts in the same cause. *See May v. Grove*, 195 N.C. 235, 141 S.E. 750 (1928).

IV.

In sum, we hold the following: (1) defendant Shane's prior misconduct with a prostitute was a proper subject of cross-examination to impeach his character and credibility; (2) the prosecutor's questions in that regard were not, however, propounded in a precise and permissible fashion; (3) extrinsic evidence, in the form of Officer Johnson's rebuttal testimony, was not admissible to contradict defendant Shane's denials regarding prior misconduct; (4) Officer Johnson's testimony was also not admissible as substantive evidence of a similar offense; and (5) the erroneous admission of such extrinsic evidence requires a new trial of both defendants.

Our disposition of the case renders consideration of defendant Shane's additional, separate assignments of error unnecessary, as such errors are not likely to recur at the next trial.

In conclusion, we note that the State's evidence, if believed, showed that these defendants travelled the sordid road of Sodom and Gomorrah yet, by the judgments imposed upon them, would have been subjected to a fate far less severe than that which

befell those two cities. Even so, we must reluctantly disturb the jury verdicts, due to the commission of a serious and harmful error at trial, to enforce defendants' fundamental right to an impartial adjudication of their guilt. However, we find that the evidentiary error only presented a reasonable probability of improperly influencing the trial outcome regarding the sexual offenses and thus uphold the verdicts rendered against both defendants on the common law robbery counts. As the trial court consolidated the judgments against defendant Shane for the robbery and an attempted sexual offense, we must remand for separate resentencing upon his robbery conviction alone.

New trial, of both defendants, upon the charged sexual offenses.

No error in defendants' convictions for common law robbery.

Remanded for re-sentencing of defendant Shane upon his robbery conviction.

Justice CARLTON concurs in the result.

STATE OF NORTH CAROLINA v. GEORGE E. ELKERSON

No. 6

(Filed 12 January 1982)

1. **Constitutional Law § 56— jurors in courtroom during arraignment of co-conspirators—right to impartial jury**

The trial judge did not contravene G.S. 15A-943(a) and violate defendant's right to a trial by an impartial jury when he denied defendant's motion for mistrial because of the arraignment of two of his co-conspirators in the presence of prospective jurors from whom the jury for defendant's trial was chosen.

2. **Constitutional Law § 62— arraignment of co-conspirators before prospective jurors—no bearing on challenges for cause**

Defendant's reliance on G.S. 15A-1212(3), permitting challenges for cause where a juror participates "in criminal or civil proceedings involving a transaction which relates to the charge against the defendant," was misplaced in a case in which his co-conspirators were arraigned before prospective jurors. Nothing in the record showed prospective jurors ascertained any connection between defendant and his co-conspirators, and the record did not reveal whether defendant challenged any juror for cause.

3. Constitutional Law § 56— arraignment of co-conspirators before prospective jurors—no reading of pleadings to jury

The arraignment of defendant's co-conspirators in the presence of prospective jurors was not violative of the provision in G.S. 15A-1213 providing that "[t]he judge may not read the pleadings to the jury."

4. Constitutional Law § 60— racial discrimination in selection of jury—failure to rebut regularity

Where defendant failed to rebut the presumption of regularity in the trial judge's ruling that defendant was allowed a reasonable time and opportunity to inquire into and present evidence concerning any racial discrimination in the drawing or selection of the jury, his contention that the court erred in denying his motion to require the clerk to provide him with the racial makeup of the jury panel must fail.

5. Criminal Law § 42; Homicide §§ 20, 21.1— cause of death stipulated—photographs and physical evidence not prejudicial

Defendant's stipulation as to the victim's cause of death did not relieve the State of the burden to prove its entire case beyond a reasonable doubt so long as defendant maintained his plea of not guilty; therefore, admission of photographs, clothing and other physical evidence relating to the victim, the pistol and the bullets was not error.

6. Criminal Law § 89.3— prior consistent statement of co-conspirator—competent for corroborative purposes

The trial court did not err in allowing a deputy sheriff and an S.B.I. agent to testify concerning statements made by a co-conspirator who was a witness for the State after charges against him were disposed of through plea bargaining. It is proper to allow a State investigator or deputy sheriff to testify to corroborating pretrial statements which a State's witness made to him.

7. Criminal Law § 113.3— limiting instruction on corroborative testimony—failure to request

When there is no request for an instruction limiting the evidence for the purpose of corroboration at the time it is offered and the testimony is obviously corroborative rather than substantive, there is no ground for exception that the trial judge failed to instruct the jury in the final charge as to the nature of the evidence, unless his attention is called to the matter by a prayer for instruction.

8. Criminal Law § 149.1— court's refusal to submit aggravating circumstances—no right of appeal by State

Under G.S. 15A-1445, the State has no right to appeal the trial judge's refusal to submit any of the aggravating circumstances under G.S. 15A-2000 to the jury at the sentencing phase of defendant's trial.

APPEAL by defendant from *Brown, J.*, at the 29 September 1980 Special Session of GRANVILLE Superior Court. The State also

appealed assigning as error the trial judge's failure to submit any aggravating circumstances at the sentencing phase of the trial.

Defendant was charged with conspiracy to commit armed robbery, murder in the first degree, and assault with a deadly weapon with intent to kill inflicting serious injury. He entered a plea of not guilty to each charge.

The State offered evidence tending to show that defendant, James Cozart, James Edward Smith, and Thurman Ragland conspired to rob a grocery store and filling station located in rural Granville County known as Providence Grocery which was owned by Mr. and Mrs. Edward H. Parham. Defendant and Thurman Ragland entered the store while Cozart and Smith waited outside in Smith's Pinto automobile. During the course of the robbery, by which the robbers obtained $36, Mr. Robert Thomas was shot in the leg and Mr. Edward Parham, one of the owners of the business, was killed.

James Cozart and James Edward Smith testified for the State after they had entered pleas of guilty in open court before this trial was commenced.

Defendant offered no evidence.

The jury returned verdicts of guilty on each charge, and at the sentencing phase of the trial on the conviction for murder in the first degree, the State requested the trial judge to submit as aggravating circumstances (1) that the murder was committed for pecuniary gain, G.S. 15A-2000(e)(6), and (2) that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. G.S. 15A-2000(e)(10). The trial judge declined to submit any aggravating circumstances and thereupon sentenced defendant to life imprisonment on the charge of first-degree murder. The trial judge also entered judgments imposing consecutive sentences of not less than ten years nor more than ten years for the charge of conspiring to commit armed robbery and a sentence of not less than twenty years nor more than twenty years on the charge of assault with a deadly weapon with intent to kill inflicting serious injury.

Defendant appealed assigning errors solely to the guilt-innocence phase of the trial. The State gave notice of appeal as to

the single question of whether the trial court erred in finding that there was a genuine lack of evidence to support the submission to the jury of any of the aggravating circumstances listed in G.S. 15A-2000 and in refusing to submit such aggravating circumstances.

We allowed a motion to bypass the North Carolina Court of Appeals on the conspiracy to commit armed robbery charge and upon the charge of assault with a deadly weapon with intent to kill inflicting serious injury on 8 May 1981.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

John H. Pike for appellant.

BRANCH, Chief Justice.

[1] Defendant assigns as error the denial of his motion for mistrial because of the arraignment of two of his co-conspirators in the presence of the prospective jurors from whom the jury for defendant's trial was chosen.

In support of this assignment of error, defendant first relies upon the last sentence of G.S. 15A-943(a), which provides that "[n]o cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared."

The North Carolina Court of Appeals considered this portion of G.S. 15A-943(a) in *State v. Brown*, 39 N.C. App. 548, 251 S.E. 2d 706 (1979). There the defendant argued that the trial judge contravened this portion of G.S. 15A-943(a) and violated his right to trial by an impartial jury. The Court of Appeals rejected this contention and concluded that defendant's trial by a jury panel which had the opportunity to hear guilty pleas and the presentation of evidence and sentencing thereon in other cases on the day defendant was tried did not contravene the language and objectives of G.S. 15A-943 nor did such procedure violate defendant's right to be tried by an impartial jury. The Court reasoned that the legislative intent in enacting G.S. 15A-943 was to minimize the imposition on the time of jurors and witnesses, not to insure the impartiality of jurors. We adopt the holding and reasoning set forth in *Brown*.

Defendant nevertheless argues that *Brown* differs because it considered unrelated charges as compared to instant case where two of defendant's co-conspirators were arraigned on the same day and immediately before defendant was tried. We do not think this is a viable distinction.

No inference of prejudice arises from the mere awareness by the jury that a witness has been charged with complicity in the crime for which defendant is being tried. In *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978), the Court permitted a co-defendant to withdraw his not guilty plea, enter a plea of guilty to a lesser offense, and then testify against defendant. Noting that the defendant had full opportunity to cross-examine the former co-defendant, this Court found no prejudicial error. Similarly, in *State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert. denied*, 418 U.S. 905, 41 L.Ed. 2d 1153, 94 S.Ct. 3195 (1974), we found no error in the trial judge's ruling which permitted an accomplice who was not on trial to testify against defendant even though it was brought out on redirect examination that the witness intended to plead guilty to the charge against him.

[2] Defendant next points to G.S. 15A-1212(3) which permits a challenge for cause on the ground that a juror "has been or is a party, a witness, a grand juror, a trial juror, or has otherwise participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant." At the time defendant's co-conspirators were arraigned, the prospective jurors simply did not come within the language of the statute. There is nothing in this record to show whether defendant on voir dire of the prospective jurors ascertained that any juror recognized any connection between defendant and the co-conspirators when they were arraigned or that any one of the jurors finally chosen was even in the courtroom when the arraignments took place. Neither does the record reveal whether defendant challenged any juror for cause pursuant to the statute nor does the record disclose that he exhausted his peremptory challenges. Thus, defendant's reliance on this portion of the statute is misplaced.

[3] By his next argument, defendant avers that the arraignment of defendant's co-conspirators was violative of the provision in G.S. 15A-1213 which, in part, provides that "[t]he judge may not

read the pleadings to the jury." An examination of the entire statute and the application of that statute to the facts of this case require that we reject this argument. We quote the full statute:

> § 15A-1213. *Informing prospective jurors of case.*—Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury.

It has been held, and we think correctly so, that the purpose of this statute when read contextually and considered with the Official Commentary to the statute is to avoid giving jurors a distorted view of a case because of the stilted language of most indictments. *State v. Laughinghouse*, 39 N.C. App. 655, 251 S.E. 2d 667 (1979).

It is presumed that the trial judge obeyed the mandate of G.S. 15A-1213, and there is nothing in the record to the contrary. 1 N.C. Index 3d, *Appeal and Error* § 46 (1976). We therefore presume that the judge, in understandable language, explained the charges against defendant to the jury and did not read the indictments, thus avoiding placing in the minds of the jurors any distorted view of the case that *might* have resulted had they heard the language of the pleadings. The pleas of the co-conspirators, whether heard by the prospective jurors or not, had no relationship to defendant's plea or to his guilt or innocence. Both co-conspirators later testified as witnesses against defendant and were subjected to strenuous cross-examination. The burden of showing prejudicial error or the denial of a fair trial is on the defendant. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). This he has failed to do.

[4] Defendant contends that the court erred in denying his motion to require the clerk to provide him with the racial makeup of the jury panel.

Defendant's position seems to be that because more blacks oppose the death penalty than do whites, a larger number of

blacks should have been included in the venire. He reasons that a disproportionate number of blacks could be expected to be removed from the jury because they generally would not vote to impose the death penalty under any circumstances. This argument, as novel as it is spurious, requires neither application nor prolonged discussion of the well-recognized rules governing motions to quash an indictment or dismiss a jury because of racial discrimination in the drawing or selection of a jury panel. These rules are fully discussed and applied in our cases. *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. denied*, 429 U.S. 1049, 50 L.Ed. 2d 765, 97 S.Ct. 760 (1977); *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972); *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970). However, we briefly note and paraphrase two of the propositions set forth in the above-cited cases, viz: A defendant is not entitled to demand a proportionate number of his race on the jury which tries him, nor on the venire from which petit jurors are drawn. He is entitled to a reasonable time and opportunity to inquire into and present evidence regarding intentional and systematic exclusions from the grand or petit jury on the basis of race.

We glean from the record that defendant was indicted on 9 June 1980. After a determination of indigency, counsel was appointed for defendant on 12 June 1980, and the motion before us was lodged with the court *after the jury was selected* at the 22 September 1980 term of Granville Superior Court. Defendant offered no evidence in support of his motion. We have nothing before us to indicate that defendant took any action prior to making this motion. Neither does the record reveal that he ever asked for a continuance for the purpose of inquiring into or presenting evidence concerning the racial makeup of the jury.

It is common knowledge in the legal profession that the information which defendant sought by this motion is accessible to counsel as soon as it is available to court officials. We therefore take judicial notice of that fact. 1 Stansbury, N.C. Evidence § 14 (Brandis Rev. 1973).

There is a presumption of regularity in the trial below, and the burden is on defendant to show prejudicial error in that trial. *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967).

We must therefore presume from the trial court's ruling that defendant was allowed a reasonable time and opportunity to inquire into and present evidence concerning any racial discrimination in the drawing or selection of the jury.

Defendant has failed to show anything to rebut the presumption of regularity in the trial judge's ruling and therefore the argument presented by this assignment of error must fail.

[5] Defendant assigns as error the admission of certain photographs, clothing, and other physical evidence. He argues that since the cause of death was stipulated by him that the trial judge erred by admitting this evidence.

The trial court admitted photographs showing the position of the victim's body, the location of the shell casings, bullets and bullet fragments, and the entry points of wounds on the victim's body. The shell casings, bullets, bullet fragments, and the pistol which fired them, as well as three items of the victim's clothing showing evidence of bullet entry points, were admitted into evidence.

We have held that a stipulation as to the cause of death does not preclude the State from proving all essential elements of its case. *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975), *modified on other grounds*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *modified on other grounds*, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971). It is also established by our case law that in a homicide prosecution photographs showing the condition of the body when found, its location when found, and the surrounding scene at the time the body was found are not rendered incompetent by the portrayal of the gruesome events which the witness testifies they accurately portray. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824 (1948).

Here the photographs were properly authenticated and were offered for the limited purpose of illustrating witnesses' testimony. Five of the photographs depicted the location of the body when found and the location of the bullet wounds in the victim's body. The photographs of the shell casings, the bullets, and the bullet fragments were relevant in that they shed some light

by way of illustrating and clarifying the testimony of the State's witnesses. *See State v. Cutshall, supra.*

The admission into evidence of certain physical evidence, including items of the victim's clothing showing the points of entry of the bullet wounds, was not prejudicial to defendant.

> It is not error to permit clothing of a victim or other articles to be introduced into evidence which . . . appear corroborative of the theory of the State's case, or which "enable the jury to realize more completely the cogency and force of the testimony of the witness." (Citations omitted.)

Cutshall, 278 N.C. at 348, 180 S.E. 2d at 754.

Defendant's stipulation as to the victim's cause of death would not relieve the State of the burden to prove its entire case beyond a reasonable doubt so long as defendant maintained his plea of not guilty. We therefore hold that under the circumstances of this case the evidence here challenged was properly admitted into evidence.

[6] Defendant next contends that the trial court erred in allowing Deputy Sheriff David Smith and S.B.I. Agent Joe Momier to testify concerning statements made to them by James Smith which tended to corroborate Smith's trial testimony. He argues that Smith was a co-defendant, and therefore his testimony was inadmissible.

James Smith was indicted for the same offenses for which defendant was tried. Prior to defendant's trial, the charges against Smith were disposed of by plea bargaining.

It is well settled that a prior consistent statement of a witness is competent for corroborative purposes. *State v. Medley,* 295 N.C. 75, 243 S.E. 2d 374 (1978); *State v. Hopper,* 292 N.C. 580, 234 S.E. 2d 580 (1977). It is proper to allow a State investigator to testify to corroborating pretrial statements which a State's witness made to him. *State v. Britt,* 291 N.C. 528, 231 S.E. 2d 644 (1977). Further a law enforcement officer may testify to a prior consistent statement made by a defendant's accomplice which tends to corroborate the accomplice's trial testimony. *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971), *modified on other grounds,* 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875 (1972).

Defendant relies on *State v. Cannon*, 273 N.C. 215, 159 S.E. 2d 505 (1968), to support his position. This reliance is misplaced. In *Cannon* a police officer testified as to statements made by a co-defendant who did not testify at trial. Here Smith was not a co-defendant, but to the contrary, he was a witness who testified and was subjected to cross-examination. A co-defendant for purposes of corroborative testimony at trial is a person who is being tried contemporaneously with a defendant. Thus, this assignment of error is controlled by *State v. Medley*, *State v. Doss*, and their progeny.

The trial judge correctly admitted this testimony.

Defendant's assignment of error number 7 states: "The court's charge to the jury taken in its entirety was error and prejudicial to the defendant."

This assignment of error does not specify any portion of the charge which defendant deems to be erroneous or advise the Court what defendant contends should have been charged. The assignment is a broadside attack upon the charge as a whole and is ineffective to bring up any part of the charge for review. *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971); *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). Our examination of the record shows that the exceptions upon which this assignment was based refer to evidentiary rulings of the court rather than the charge. However, because of the gravity of this case, we elect to consider this assignment. Defendant seems to take the position that the trial judge should have on his own motion charged the jury that a plea of guilty of a co-defendant was not evidence of defendant's guilt. The answer to this contention is simply that there were no co-defendants in this trial, and the law applicable to a co-defendant's plea of guilty is not before us pursuant to this assignment of error.

[7] Defendant contends that the trial judge erred by failing to give limiting instructions with respect to corroborative testimony admitted into evidence.

The general rule is that when a defendant does not specifically request a limiting instruction restricting the use of corroborative testimony to that purpose, the admission of the evidence and the failure of the trial judge to give a limiting in-

struction is not error. *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. denied*, 431 U.S. 916, 53 L.Ed. 2d 226, 97 S.Ct. 2178 (1977); *State v. Corl*, 250 N.C. 252, 108 S.E. 2d 608 (1959); *State v. Lee*, 248 N.C. 327, 103 S.E. 2d 295 (1958).

In the case before us, defendant did not request a limiting instruction as to the corroborative evidence at any time during the course of the trial. He nevertheless argues that the trial judge should have, *ex mero motu*, given such instruction in his final charge to the jury. We do not agree.

In *State v. Johnson*, 218 N.C. 604, 12 S.E. 2d 278 (1940), we find the following statement:

> Rules of Practice in the Supreme Court, part of Rule 21 (213 N.C., p. 821): "When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, *and that fact is stated by the court when it is admitted* [emphasis added], it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; *nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of its admission, that its purpose shall be restricted.*" (Italics ours.)

218 N.C. at 613, 12 S.E. 2d at 284.

We are aware that Rule 21 has been superseded. However, we quote and adopt the following language of Dean Brandis: "The new Rules of Appellate Procedure supersede but contain nothing comparable to former Rule 21 . . . but the Court has held that this works no change in the rule." 1 Stansbury, N.C. Evidence § 52 at 152, n. 59 (Brandis Rev. Supp. 1979).

It might be inferred from the language first emphasized above in *Johnson* that the general rule is only applicable when the judge at the time of the offering of the corroborative evidence states that the evidence is admitted solely for the purpose of corroboration or contradiction. We do not believe this to be the law. We think the better rule to be that when there is no request for an instruction limiting the evidence for the purpose of corroboration at the time it is offered and the testimony is obviously

corroborative rather than substantive, there is no ground for exception that the trial judge failed to instruct the jury in the final charge as to the nature of the evidence, unless his attention is called to the matter by a prayer for instruction. We so hold. *See State v. Sawyer*, 283 N.C. 289, 297, 196 S.E. 2d 250, 255 (1973).

[8] At the sentencing phase of the trial, the State announced that it did not intend to produce additional evidence during the sentencing phase but would rely upon evidence already presented during the guilt-innocence phase to support the submission of the two aggravating circumstances to the jury. The trial judge made a finding of fact that there was "a genuine lack of evidence to support the submission to the jury of any of the aggravating circumstances listed in G.S. 15A-2000." The court then sentenced defendant to life imprisonment on the first-degree murder conviction.

The State assigns as error the trial court's refusal to submit to the jury at the sentencing hearing the aggravating circumstances of (1) pecuniary gain [G.S. 15A-2000(e)(6)] and (2) use of a weapon which would normally be hazardous to the lives of more than one person [G.S. 15A-2000(e)(10)]. This assignment of error is not properly before us.

The right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed. *State v. Harrell*, 279 N.C. 464, 183 S.E. 2d 638 (1971); *State v. Reid*, 263 N.C. 825, 140 S.E. 2d 547 (1965); *State v. Ferguson*, 243 N.C. 766, 92 S.E. 2d 197 (1956); *State v. Cox*, 216 N.C. 424, 5 S.E. 2d 125 (1939).

The only statutory authority we find which permits an appeal by the State in a criminal case is contained in G.S. 15A-1445. That statute provides:

> *Appeal by the State.*—(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

(b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979.

Construing G.S. 15A-1445 strictly, as we must, we hold that the State had no right to appeal the trial judge's action in refusing to submit any aggravating circumstances to the jury at the sentencing phase of defendant's trial. If the State's right to appeal is to be enlarged, it must be done by the legislature.

Had the State's assignments of error been properly before us, it is our opinion that the court should have submitted the aggravating circumstance of pecuniary gain [G.S. 15A-2000(e)(6)].

We reemphasize the necessity for the Trial Judges, the District Attorneys, and the Bar of this State to adhere to the mandatory provisions of G.S. 15A-2000 in the trial of death cases.

We find no error warranting that the jury verdicts or the judgments imposed thereon be disturbed.

No error.

CULLEN WALSTON, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 116

(Filed 12 January 1982)

Master and Servant § 68— workers' compensation—insufficient evidence of occupational disease

The evidence supported findings by the Industrial Commission that plaintiff does not have an occupational disease and that his shortness of breath is due to pulmonary emphysema and chronic bronchitis where the expert medical testimony tended to show that plaintiff suffers from chronic bronchitis, pulmonary emphysema, and "possible byssinosis," that plaintiff did not have a classical history of byssinosis, that smoking "was almost certainly the primary etiologic agent," and that there was only a "possibility" that any portion of plaintiff's disability was caused by the inhalation of cotton dust.

ON discretionary review of decision of the Court of Appeals, 49 N.C. App. 301, 271 S.E. 2d 516 (1980), reversing the decision and award of the Industrial Commission denying compensation. This case was docketed and argued as No. 118 at the Spring Term 1981.

On 26 August 1976 plaintiff filed claim with the Industrial Commission alleging that his exposure to cotton dust while working at Burlington Industries caused him to develop an occupational disease, byssinosis, which had resulted in permanent and total disability.

At a hearing before Commissioner Brown in Lillington on 25 July 1977, plaintiff testified that he was born on 7 October 1910, worked continuously for defendant employer from 2 February 1942 until he retired on 17 March 1972 due to breathing problems. He first noticed trouble with his breathing after he had worked for Burlington about eight or ten years. He went to hospitals in Chapel Hill and Durham in 1962 or 1967 for tests and treatment. He was told at Duke Hospital that he had bronchial and asthma trouble and had a severe case of emphysema. During the latter years of his employment he was also treated by Dr. Mabe in Erwin. He said he began smoking cigarettes when he was fourteen or fifteen years of age, averaged about a half a pack a day, stopped for about two years and then resumed the habit. At the time of the hearing in Lillington he was still smoking about a pack a day.

Mrs. Walston testified that her husband developed breathing problems about eight to ten years after he started working for Burlington Industries. He was taken to a clinic at Duke where it was determined that he had bronchial asthma and chronic bronchitis. She said Dr. Mabe admitted Mr. Walston to the hospital the day after he terminated his employment.

Dr. Mabe testified that he treated Mr. Walston for "pulmonary emphysema, chronic pulmonary obstructive disease, or if you wish to call it chronic pulmonary fibrosis." Dr. Mabe said he assisted plaintiff in obtaining retirement and Social Security disability benefits by reason of plaintiff's breathing problems. It was Dr. Mabe's opinion that plaintiff was totally disabled due to his pulmonary disease.

A second hearing was conducted before Chief Deputy Commissioner Shuford in Charlotte on 6 February 1978 at which Dr. Charles D. Williams was the only witness to testify. Dr. Williams is a specialist in pulmonary diseases and is a member of the North Carolina Industrial Commission's panel on byssinosis and pulmonary diseases. He examined plaintiff on 28 January 1977 and diagnosed his difficulties as chronic bronchitis, pulmonary em-

physema, possible byssinosis and mild diabetes. It was the opinion of Dr. Williams that plaintiff could not carry out any type of occupation which required any significant amount of physical exertion. When asked whether plaintiff's respiratory diseases were due to causes and conditions peculiar to his textile employment and to which the general public is not equally exposed, Dr. Williams replied: "I don't think we could exclude the possibility, if it were indeed dusty in the cloth room where this man was employed, that it could have played a role in the etiology of his problems. . . . The cloth room is reputed to be a fairly clean area of the mill as far as dust is concerned. There have been reports of chronic obstructive pulmonary disease occurring in persons working with the preparing of cloth, such as slashers, etc., but the cloth room type of work that's being described here is supposed to be a fairly dust-free environment." When asked whether the lung disease he diagnosed was due to causes and conditions more characteristic of the textile industry than other industrial environments, the doctor replied: "I think that it is." When asked whether plaintiff's exposure to cotton dust for thirty years in his employment could have caused his respiratory disease, Dr. Williams replied: "My opinion is that it could possibly have played a role in the causation of his pulmonary problems. I feel that it would be, if it did, it would be more likely a contributory role rather than a single cause and effect relationship." Dr. Williams said that plaintiff's inability to work was caused by "pulmonary disease."

On cross-examination, Dr. Williams testified that plaintiff's cigarette smoking habit "would *most likely* play a part in his pulmonary disability." Dr. Williams said that plaintiff did not have a "classical history" of byssinosis. By way of explanation, he said:

> For the record, 'classic history' of byssinosis, that of textile workers, is that after having worked for several years, the worker begins to notice symptoms on Monday morning, after being back at work for a short period of time, symptoms of chest tightness, shortness of breath, sometimes coughing, wheezing and sputum production, the symptoms usually being improved on Tuesday and the rest of the week, but after a number of years the symptoms become more persistent throughout the rest of the week, until finally the

symptoms are more or less chronic. This history is part of the diagnosing of byssinosis.

This man did not have a completely classical history. He did give a history that he was bothered by dust and lint in the mill which produced symptoms of chest tightness, shortness of breath, coughing and wheezing, and he noticed symptoms just as soon as he walked back into the mill on Monday morning, but the symptoms persisted and were just as bad the remainder of the week. That history caused me to have some doubts as to whether or not he did have true byssinosis.

Dr. Williams was unable to testify regarding the relative contributions to Mr. Walston's lung disease attributable to (1) his exposure to cotton dust and (2) his cigarette smoking. In that connection, he said:

I find it very difficult to answer the question as to . . . what percentage would the cotton dust exposure represent to the pulmonary condition. On the one hand, we have had the opportunity to treat hundreds of patients with this same type of syndrome and findings, in which case it is almost certain the primary etiological agent was cigarette smoking, and this fellow was a smoker. On the other hand, there are figures beginning to emerge to show that it is possible for workers exposed to cotton dust to develop chronic obstructive lung disease even in some instances in non-smokers even though the incident is definitely greater in smokers which accounts for the reason I said it might be a contributory factor, but this is about as close as I can come. I cannot give a percentage. I don't have an opinion on a specific percentage.

A written report which Dr. Williams had sent to Liberty Mutual Insurance Company was admitted into evidence by stipulation of the parties. In that report, Dr. Williams listed his impressions of plaintiff's difficulties as:

1. Chronic bronchitis.
2. Pulmonary emphysema.
3. Possible byssinosis.
4. Suspected arteriosclerotic heart disease, asymptomatic.

5. Cloudiness of the right sclera with loss of vision, undetermined etiology.

6. Decreased hearing, right, undertermined etiology.

7. Epidermal phytosis toenails.

8. ? mild diabetes mellitus.

9. ? intrinsic asthma.

Dr. Williams explained his impressions as follows:

> Mr. Walston's symptoms of shortness of breath appear to be clearly related to pulmonary emphysema and chronic bronchitis and may be, at least in part, related to cigarette smoking. It is also possible that he has had intrinsic asthma which could be confirmed from old Duke Out-Patient Clinic records. With this syndrome, he could have noticed an aggravation of his symptoms by dust in the mill as described without necessarily invoking the diagnosis of byssinosis. The history for byssinosis is somewhat equivocal in that he did have exacerbation of symptoms on Monday morning but this occurred immediately on exposure to dust and did not seem to improve during the remainder of the week.

With the foregoing evidence before him, Commissioner Brown denied plaintiff's claim after making pertinent findings of fact and conclusions of law as follows:

> 3. About 1952, plaintiff began experiencing difficulty breathing on exertion at work. Due to difficulty of breathing, plaintiff transferred to a less strenuous job in 1958. Since 1962 plaintiff has had respiratory problems severe enough to keep plaintiff regularly under physicians' care, has been hospitalized or treated at various times at Memorial Hospital, Chapel Hill, Duke University Medical Center, and in hospitals in Dunn and in Erwin, North Carolina. He took occasional medical leaves of absence from his work due to breathing problems, stopped working in March 1972 due to difficulty in breathing. While in defendant's employ, plaintiff's shortness of breath began at the start of the work week, continued without respite through the week.

4. During the period beginning about 1962 and continuing until his retirement, plaintiff at various times has been ill due to bronchitis, emphysema, asthma, and chronic pulmonary fibrosis.

5. From the age of about fifteen, with an interruption of two years, plaintiff has smoked starting at about one-half pack per day, working up to one pack per day.

6. Plaintiff was examined in January of 1977 by Charles D. Williams, Jr., M.D., a specialist in the field of pulmonary medicine. From that examination, Dr. Williams gained an impression that plaintiff suffered from chronic bronchitis, pulmonary emphysema, *possible* byssinosis (emphasis added), these among nine impressions based on Dr. Williams' examination. Dr. Williams, in his written report, a part of the evidence in this case, gave the following comment:

> 'Mr. Walston's symptoms of shortness of breath appear to be clearly related to pulmonary emphysema and chronic bronchitis and may be, at least in part, related to cigarette smoking. It is also possible that he has had intrinsic asthma which could be confirmed from old Duke Out-Patient Clinic records. With this syndrome, he could have noticed an aggravation of his symptoms by dust in the mill as described without necessarily invoking the diagnosis of byssinosis. The history for byssinosis is somewhat equivocal in that he did have exacerbation of symptoms on Monday morning but this occurred immediately on exposure to dust and did not seem to improve during the remainder of the week.'

7. Plaintiff's shortness of breath is due to pulmonary emphysema and chronic bronchitis.

8. Plainiff does not have an occupational disease.

* * * *

The foregoing engender additional

CONCLUSIONS OF LAW

1. Plaintiff has failed to carry the burden of proof that he has a disease due to causes and conditions characteristic

of and peculiar to his employment by defendant. G.S. 97-53(13).

2. Plaintiff is not entitled to benefits under G.S. 97.

Plaintiff appealed to the Full Commission. After reviewing the evidence, the Full Commission adopted as its own the findings, conclusions and denial of compensation by Commissioner Brown. In doing so, the Full Commission noted:

> The medical evidence in this case regarding the cause of plaintiff's pulmonary condition came from Dr. Charles D. Williams, Jr., of Charlotte, medical expert specializing in pulmonary diseases. While the doctor expressed the opinion that plaintiff's exposure to cotton dust 'could possibly' have played a role in causing the pulmonary problems, the doctor further was of the opinion that smoking by plaintiff 'most likely' played a part in causing the pulmonary disability.
>
> Based upon such evidence it is the opinion of a majority of the Full Commission that Commissioner Brown was fully justified in concluding that plaintiff failed to carry the burden of proof that he had a disease due to causes and conditions characteristic of and peculiar to his employment by defendant.
>
> A majority of the Full Commission therefore overrules the exceptions and assignments of error as filed by plaintiff and adopts as its own the opinion and award heretofore filed in this case by Commissioner Brown. The results reached by him be, and they are hereby, AFFIRMED.

Plaintiff thereupon appealed to the Court of Appeals, urging the following exceptions as error: (1) the finding of fact that plaintiff's shortness of breath was due to pulmonary emphysema and chronic bronchitis; (2) the finding of fact that plaintiff did not have an occupational disease; (3) the conclusion of law that plaintiff had failed to carry his burden of proof that he had a disease due to causes and conditions characteristic of and peculiar to his employment; and (4) the conclusion of law that plaintiff was not entitled to benefits under the Workers' Compensation Act.

Although the Court of Appeals concluded that the evidence supported the Commission's finding that plaintiff suffered from

pulmonary emphysema and chronic bronchitis, it further concluded that the Commission made its findings and conclusions under a misapprehension of law and, by reason of the misapprehension, failed to find the extent to which plaintiff's occupational exposure to cotton dust contributed to his lung disease. The court thereupon reversed the Commission and remanded the case for further findings on the issue of whether plaintiff's lung disease is compensable as an occupational disease. In that connection, the court said there was sufficient evidence to support findings that plaintiff's occupational exposure was of enough significance in causing the lung disease so as to make the disease occupational.

The Court of Appeals further noted that there was testimony which tended to show "that the diseases responsible for plaintiff's disability satisfy the statutory requirements of compensability. Its clear import is that: (1) the environmental conditions which characterize plaintiff's place of employment *are also substantial factors* in causing the diseases of which plaintiff suffers; and (2) plaintiff by virtue of his employment is exposed to such irritants in greater quantities than persons otherwise employed." See 49 N.C. App. at 309, 271 S.E. 2d at 521. (Emphasis supplied.)

We allowed defendants' petition for discretionary review of the decision of the Court of Appeals.

Hassell & Hudson, by Robin E. Hudson, Attorneys for plaintiff appellee.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague, Richard B. Conely and George W. Dennis III, Attorneys for defendant appellants.

Smith, Moore, Smith, Schell & Hunter, by McNeill Smith and J. Donald Cowan, Jr., Attorneys for defendant appellants.

HUSKINS, Justice.

We said in *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981):

> Except as to questions of jurisdiction, the rule is that the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. This is so even though there is evidence to support a contrary finding

> of fact. *Morrison v. Burlington Industries*, 301 N.C. 226, 271 S.E. 2d 364 (1980); *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977); *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965); *Rice v. Chair Co.*, 238 N.C. 121, 76 S.E. 2d 311 (1953); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950). The appellate court does not retry the facts. It merely determines from the proceedings before the Commission whether sufficient competent evidence exists to support its findings of fact. *Moses v. Bartholomew*, 238 N.C. 714, 78 S.E. 2d 923 (1953).

Id. at ---, 282 S.E. 2d at 463. We first determine whether there is competent evidence to support the findings of the Industrial Commission.

All pertinent portions of the evidence in this case are set out in the statement of facts. The overwhelming thrust of that evidence is to the effect that Mr. Walston suffers from chronic bronchitis, pulmonary emphysema, asthma, "possible byssinosis," and chronic pulmonary fibrosis. When asked whether plaintiff's respiratory diseases and breathing problems were due to causes and conditions peculiar to his employment and to which the general public is not equally exposed, Dr. Williams said:

> I don't think we could exclude the possibility, if it were indeed dusty in the cloth room where this man was employed, that it could have played a role in the etiology of his problems. . . . The cloth room is reputed to be a fairly clean area of the mill as far as dust is concerned. . . . A fairly dust-free environment.

When asked whether plaintiff's exposure to cotton dust for thirty years in his employment could have caused his respiratory disease, Dr. Williams replied:

> My opinion is that it *could possibly* have played a role in the causation of his pulmonary problems. . . . [I]f it did, it would be more likely a contributory role rather than a single cause and effect relationship. [Emphasis supplied.]

Dr. Williams further testified that plaintiff's cigarette smoking would "most likely play a part in his pulmonary disability," adding that plaintiff did not have a classical history of byssinosis which raised doubts in his mind as to whether plaintiff had byssinosis in the first place. The doctor was unable to give per-

centages regarding the relative contributions to plaintiff's lung disease by (1) his exposure to cotton dust and (2) his cigarette smoking.

It thus appears that substantially all of the competent medical evidence tends to show that plaintiff suffers from several ordinary diseases of life to which the general public is equally exposed, none of which have been proven to be due to causes and conditions which are characteristic of and peculiar to any particular trade, occupation or employment and none of which have been aggravated or accelerated by an occupational disease. This is fatal to plaintiff's claim. G.S. 97-53(13); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951).

There is little, if any, evidentiary support for the statement in the decision of the Court of Appeals that

> the diseases responsible for plaintiff's disability satisfy the statutory requirements of compensability. Its [the testimony's] clear import is that: (1) the environmental conditions which characterize plaintiff's place of employment *are also substantial factors* in causing the diseases of which plaintiff suffers; and (2) plaintiff by virtue of his employment is exposed to such irritants in greater quantities than persons otherwise employed.

(Emphasis supplied.) *See* 49 N.C. App at 309, 271 S.E. 2d at 521. The expert medical testimony does not establish that plaintiff has an occupational disease. While smoking "was almost certain[ly] the primary etiologic agent," there was only a "possibility" that any portion of plaintiff's disability was caused by the inhalation of cotton dust. Such evidence supports the findings and conclusions of the Commission that plaintiff failed to meet his burden of proof, *i.e.*, failed to prove that he had an occupational disease defined in G.S. 97-53(13). A mere possibility of causation is neither "substantial" nor sufficient. It must be shown that the disease in question is an occupational disease, *i.e.*, a disease which is due to causes and conditions which are characteristic of and peculiar to claimant's trade, occupation or employment as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment. G.S. 97-53(13); *Duncan v. Charlotte*, 234 N.C. 86, 66 S.E. 2d 22 (1951). Disability caused by and resulting from a disease is compensable when, and only when,

the disease is an occupational disease, or is aggravated or accelerated by an occupational disease, or by an injury by accident arising out of and in the course of the employment. G.S. 97-53(13); *Morrison v. Burlington Industries*, --- N.C. ---, 282 S.E. 2d 458 (1981); *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950). Here, the evidence does not satisfy those requirements because the requisite causal connection between plaintiff's diseases and his employment, as required by G.S. 97-53(13), has not been proven. Rather, it amply supports the Commission's findings that plaintiff does not have an occupational disease and his shortness of breath is due to pulmonary emphysema and chronic bronchitis. The findings are therefore conclusive on appeal.

For the reasons stated the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Industrial Commission for reinstatement of its award denying compensation.

Reversed and remanded.

Justices EXUM and CARLTON concur in the result.

STATE OF NORTH CAROLINA v. JAMES RAY JOHNSON

No. 16

(Filed 12 January 1982)

1. **Criminal Law § 75— confessions—quantum of proof required to establish voluntariness—preponderance of the evidence**

The preponderance of the evidence test, specified in *Lego v. Twomey*, 404 U.S. 477, 30 L.Ed. 2d 618, 92 S.Ct. 619 (1972), is the appropriate standard to be applied by the trial courts in N.C. in determining the voluntariness of a confession under G.S. 15A-977.

2. **Constitutional Law § 46— denial of motion to replace attorney—no error**

The trial court did not err in failing, upon request, to discharge defendant's appointed counsel on grounds that, among others, his attorney refused to plead "not guilty by temporary insanity" rather than "not guilty" and because his attorney would not investigate defendant's contention that a possible dose of nuclear radiation made him commit a rape.

3. Rape § 1— pen as deadly weapon—sufficiency of evidence

From evidence that defendant jabbed the sharp end of a pen into the victim's neck; that the victim submitted to defendant because she was afraid he would injure her neck with the pen; and from its opportunity to examine a similar pen, the jury could legitimately find a pen was a dangerous or deadly weapon.

DEFENDANT appeals from judgment of *Strickland, J.*, 5 January 1981 Criminal Session, NEW HANOVER Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree rape of Erlinda Fields on 6 September 1980 in New Hanover County.

Prior to trial, defendant appeared before the court to request that his appointed attorney be discharged and another appointed to represent him. After examining defendant, his attorney, and allowing the assistant district attorney to be heard, the trial court denied defendant's motion.

A voir dire hearing was conducted regarding the admissibility of defendant's confession. Officer W. B. Prescott testified that he read a constitutional rights waiver form to defendant on 30 September 1980 at the Wilmington Police Department. According to Officer Prescott, defendant acknowledged that he understood his rights and signed the waiver form at 1:10 p.m. Officer W. A. Elledge testified that after defendant signed the form, the officers sent out for a hamburger and a drink for defendant. When defendant finished his meal, Officer Elledge began questioning him. Officer Elledge wrote defendant's replies on the rights waiver form. Defendant signed the statement upon completion of questioning. Both officers stated defendant never asked to see an attorney. Both officers testified that he did not appear to be intoxicated.

Defendant testified at the voir dire hearing that he had drunk a quart of Old English 800 and two tall cans of Strohs on 30 September 1980 before he was arrested. He was intoxicated and confused, having also smoked the "better part of a dime bag of reefer." Defendant stated that when Officer Prescott read him his rights and asked him if he wanted a lawyer, he said "yes." The officer then changed the subject by asking if defendant were hungry. According to defendant, the officers made it seem that if

he would talk, they would help get the charge reduced. This influenced him to make the statement.

The trial court made findings of fact and concluded that the motion to suppress should be denied. The court did not state that the findings were made "beyond a reasonable doubt."

The State's evidence at trial tended to show that Erlinda Fields was working at Malibu Apartments on 6 September 1980. Her duties involved showing apartments and performing secretarial work. At 1:30 in the afternoon of 6 September 1980 she was in the office alone.

While she was working at her desk, defendant came into the office. She asked him what type of apartment he wanted to rent, and he mumbled, "single." She gave him an application and pen, and he sat down on a couch in the office.

Instead of filling out the application, defendant kept staring at Mrs. Fields. She became uneasy and attempted to phone her husband. Her husband was not home, and she talked to her eleven-year-old daughter to stall for time.

When she hung up the phone, defendant locked the door and stepped around the counter toward Mrs. Fields. She told him to get out, that she was calling the police. He grabed her and jabbed the sharp end of a ballpoint pen into her neck. She screamed and he covered her mouth with his hand. He forced her to the floor and she dropped the telephone receiver. Defendant then engaged in sexual intercourse with Mrs. Fields by force and against her will.

Johnny Walker testified that he took defendant to Malibu Apartments on 6 September 1980 and waited in the car while defendant went in to apply for an apartment. Defendant came out of the apartment office twenty minutes later and told Walker that he had snatched his deposit money from the woman in the office. He said he had taken back more than he gave her.

Dr. Stephen Collins testified that he examined Erlinda Fields on 6 September 1980 and obtained a vaginal smear from her. Forensic serologist Jeb Taub stated that he found spermatozoa present in the vaginal smear.

The statement made by defendant to Officers Prescott and Elledge on 30 September 1980 was admitted into evidence. In that statement defendant admitted holding the pen to the victim's throat and having sex with her in the Malibu Apartments office on 6 September 1980.

The jury found defendant guilty of first degree rape, and he was sentenced to life imprisonment.

Rufus L. Edmisten, Attorney General, by W. A. Raney, Jr., Special Deputy Attorney General, for the State.

Adam Stein, Appellate Defender, and Marc D. Towler, Assistant Appellate Defender, of Appellate Defender Project for North Carolina, for defendant appellant.

HUSKINS, Justice.

[1] Defendant first assigns as error the denial of his motion to suppress his statement without finding beyond a reasonable doubt that the State had sustained its burden of proving that defendant's statement was voluntarily given.

The United States Constitution forbids the admission in a criminal trial of a confession coerced from a defendant. *Rogers v. Richmond*, 365 U.S. 534, 5 L.Ed. 2d 760, 81 S.Ct. 735 (1961). In North Carolina, the legislature has statutorily specified the procedures for determining whether a defendant's statements are voluntarily made. When the prosecution seeks to use a defendant's statement in his criminal trial, the defendant may challenge the admissibility of this evidence by a motion to suppress. G.S. 15A-972. The statement must be suppressed if its exclusion is required by the United States Constitution or the North Carolina Constitution, *i.e.*, if it was obtained by coercion. G.S. 15A-974. In determining the admissibility of the statement, the trial court must follow the procedures outlined in G.S. 15A-977. These include conducting a hearing, making findings of fact and conclusions of law, and setting forth in the record the findings and conclusions. G.S. 15A-977(d)(f). The findings of fact must include findings on the issue of voluntariness. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050 (1980). The State must affirmatively show that a defendant was fully informed of his rights and voluntarily waived them. *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976).

The quantum of proof required to establish the voluntariness of a statement is not specified in G.S. 15A-977 and has never been articulated by this Court. Defendant urges the adoption of a requirement that the State prove beyond a reasonable doubt that a defendant's statement was voluntarily given.

Defendant's argument was considered and rejected by the United States Supreme Court in *Lego v. Twomey*, 404 U.S. 477, 30 L.Ed. 2d 618, 92 S.Ct. 619 (1972). The Court there held that the United States Constitution requires a showing of voluntariness by a *preponderance of the evidence*. The decision left the states free, however, to adopt a higher standard pursuant to their own laws.

Several states have adopted the reasonable doubt standard. *See People v. Jimenez*, 21 Cal. 3d 595, 147 Cal. Rptr. 172, 580 P. 2d 672 (1978); *Magley v. State*, 263 Ind. 618, 335 N.E. 2d 811 (1975); *State v. Johnson*, 327 So. 2d 388 (La. 1976); *State v. Tardiff*, 374 A. 2d 598 (Me. 1977); *Younger v. State*, 301 So. 2d 300 (Miss. 1974); *State v. Phinney*, 117 N.H. 145, 370 A. 2d 1153 (1977); *State v. Whittington*, 142 N.J. Super. 45, 359 A. 2d 881 (App. Div. 1976); *People v. Brown*, 44 A.D. 2d 769, 354 N.Y.S. 2d 263 (1974); *State v. Aschmeller*, 87 S.D. 367, 209 N.W. 2d 369 (1973); *Valerio v. State*, 494 S.W. 2d 892 (Tex. Crim. App. 1973); *Blaszke v. State*, 69 Wis. 2d 81, 230 N.W. 2d 133 (1975). One jurisdiction has adopted an intermediate "clear and convincing evidence" test. *State v. Bello*, --- R.I. ---, 417 A. 2d 902 (1980). The majority of jurisdictions considering the question have adhered to the preponderance test set out in *Lego. See Thomas v. State*, 393 So. 2d 504 (Ala. Ct. App. 1981); *McMahan v. State*, 617 P. 2d 494 (Alaska 1980); *State v. Osbond*, 128 Ariz. 76, 623 P. 2d 1232 (1981); *Harris v. State*, 271 Ark. 568, 609 S.W. 2d 48 (1980); *People v. Fordyce*, --- Colo. ---, 612 P. 2d 1131 (1980); *State v. Hawthorne*, 176 Conn. 367, 407 A. 2d 1001 (1978); *Mealey v. State*, 347 A. 2d 651 (Del. Super. 1975); *Finley v. State*, 378 So. 2d 842 (Fla. Dist. Ct. App. 1979); *Gates v. State*, 244 Ga. 587, 261 S.E. 2d 349 (1979), *cert. denied*, 445 U.S. 938, 63 L.Ed. 2d 772, 100 S.Ct. 1332 (1980); *People v. Cozzi*, 93 Ill. App. 3d 94, 416 N.E. 2d 1192 (1981); *State v. Jacoby*, 260 N.W. 2d 828 (Iowa 1977); *State v. Stephenson*, 217 Kan. 169, 535 P. 2d 940 (1975); *Tabor v. Commonwealth*, 613 S.W. 2d 133 (Ky. 1981); *State v. Kidd*, 281 Md. 32, 375 A. 2d 1105, *cert. denied*, 434 U.S. 1002, 54 L.Ed. 2d 498, 98 S.Ct. 646 (1977); *State v. Young*, 610 S.W. 2d 8 (Mo. App. 1980); *State v. Davison*, --- Mont. ---, 614 P. 2d 489

(1980); *Commonwealth v. Farrington*, 270 Pa. Super. Ct. 400, 411 A. 2d 780 (1979); *State v. Smith*, 268 S.C. 349, 234 S.E. 2d 19 (1977); *Griffin v. State*, 604 S.W. 2d 40 (Tenn. 1980); *State v. Breznick*, 134 Vt. 261, 356 A. 2d 540 (1976); *Griggs v. Commonwealth*, 220 Va. 46, 255 S.E. 2d 475 (1979); *State v. Braun*, 82 Wash. 2d 157, 509 P. 2d 742 (1973); *State v. Milam*, --- W.Va. ---, 260 S.E. 2d 295 (1979); *Raigosa v. State*, 562 P. 2d 1009 (Wyo. 1977).

For the reasons enunciated in *Lego*, we adopt the preponderance test as the appropriate standard to be applied by trial courts in North Carolina. In *Lego*, the Court first noted that the due process requirement prohibiting admission of coerced confessions does not depend upon the truth or falsity of the confessions. 404 U.S. at 483-84, 30 L.Ed. 2d at 624, 92 S.Ct. at 624. "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles. *Rogers v. Richmond*, 365 U.S. 534, 540-41, 5 L.Ed. 2d 760, 766, 81 S.Ct. 735, 739 (1961)." *Id.* at 485, 30 L.Ed. 2d at 625, 92 S.Ct. at 624-25. The purpose that a voluntariness hearing is designed to serve is to prevent the use of unconstitutional methods in obtaining confessions and "has nothing whatever to do with improving the reliability of jury verdicts"; therefore the Court reasoned that judging the admissibility of a confession by a preponderance of the evidence does not undermine the holding of *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970). *Id.* at 486, 30 L.Ed. 2d at 626, 92 S.Ct. at 625. The Court ruled in *Winship* that an accused may be convicted only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. 397 U.S. at 364, 25 L.Ed. 2d at 375, 90 S.Ct. at 1073. The petitioner in *Lego* did not contend that either his confession or its voluntariness was an element of the crime charged. Therefore, his rights under *Winship* were not violated.

No provision in the North Carolina Constitution expressly or implicitly requires this Court to adopt a higher quantum of proof than that required by the United States Supreme Court in its interpretation of the United States Constitution. Defendant has failed to show that the rights of an accused are not adequately protected by the United States Constitution. We therefore decline to interpret the North Carolina Constitution to require proof of voluntariness beyond a reasonable doubt. *Cf. State v. Felmet*, 302 N.C. 173, 273 S.E. 2d 708 (1981) (refusing to interpret Article I,

section 14 of the North Carolina Constitution to protect conduct not protected by the First Amendment to the United States Constitution).

The recognition that the burden of proof required under G.S. 15A-977 must comport with the *Lego* mandate of proof by a preponderance of the evidence does not affect our decision in *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050 (1980), or in *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976). Those cases correctly hold that facts found by the trial court in a G.S. 15A-977 hearing are conclusive if supported by competent evidence. 298 N.C. at 339, 259 S.E. 2d at 535; 289 N.C. at 530, 223 S.E. 2d at 376. The standard to be applied by *appellate courts* in reviewing the findings of a trial court is not affected by the standard of proof for the trial court to use in making the findings.

[2] Defendant's second assignment of error stems from the denial of his motion to replace his appointed attorney. In a hearing the morning of defendant's trial, he requested the court to discharge his appointed counsel, Mr. Jay Hockenbury. Defendant was allowed to address the court and stated that he was dissatisfied with Mr. Hockenbury's representation because "He has entered 'Not Guilty' and I want it 'Not Guilty by Temporary Insanity.' " Defendant listed as further reasons for dissatisfaction:

> Well, first and foremost would be, you know, is the fact of this being an unprovoked attack on an innocent victim, and second it was, you know, a thing about the judge involved at the time this incident occurred, and what effect that would have on this crime being committed, and you know, third, well it's—well, I have a list but I didn't bring it with me, you know, things that I wanted him to do, and stuff, but I thought it was going to be handled, you know. Other than this I wasn't prepared to come up here and remember it word for word. However, basically, you know, those are the important things.

Mr. Hockenbury stated that he began practicing law in 1972 and had been trying capital cases since 1973. He had initiated and completed discovery proceedings on behalf of the defendant and had carefully explained all aspects of the case to the defendant. Defendant had not agreed with the attorney's recommendations.

Mr. Hockenbury acknowledged he had failed to investigate defendant's contention that he possibly received a dose of nuclear radiation at the Southport Carolina Power and Light Plant which made him commit the rape.

The court entered findings of fact and concluded that Mr. Hockenbury was capable of representing defendant and had handled his case with due diligence. The court thereupon denied defendant's motion.

The case of *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977), is dispositive of this assignment. In *Gray*, the defendant moved to dismiss his attorney because he had urged Gray to plead guilty to one of the crimes with which he was charged. Gray also complained that his attorney had "misled" him and "put distrust" in his witnesses' hearts. Defendant's final objection was that his appointed counsel was a former assistant district attorney.

This Court held that defendant's complaints were insufficient to require dismissal of his attorney:

> It is clear that defendant had no reasonable objection to his attorney's conduct or preparation of his case. His complaints are general and vague, and the emphasis of his objections shifted during the hearing. His counsel, as appears from the record, was well qualified and did, in fact, represent defendant in an exemplary fashion. Defendant's assertion that he wished to employ his own counsel, made as it was, on the day trial was to begin and without the appearance or even the name of a single attorney who might be privately employed to represent him, was no ground for the dismissal of his court-appointed counsel.

292 N.C. at 281, 233 S.E. 2d at 913. The similarities between *Gray* and this case are compelling. Both involved rather vague, general complaints. Although each case included a disagreement over the appropriate plea, in neither situation was the dispute so severe as to prejudice the presentation of a defense. In *Gray*, defendant in fact pleaded not guilty to all crimes, although his attorney encouraged him to plead guilty to first degree burglary. In this case, defendant pleaded not guilty, although he argued to his attorney that he should plead not guilty by temporary insanity. Defendant never attempted to change his plea, however. While

the failure of counsel to enter the plea desired by his client may be a more fundamental conflict than a mere disagreement over trial tactics, defendant has failed to demonstrate that he in fact seriously desired a plea different from the plea entered.

The true nature of defendant's dissatisfaction with his counsel is best evidenced by his request that his appointed attorney investigate whether defendant had received a dose of nuclear radiation which made him commit the rape. No counsel, appointed or privately employed, is required to pursue every absurd suggestion advanced by his client.

Defendant's unreasonable demands indicate there is little reason to believe he would have been satisfied by any appointed lawyer. "The constitutional right of an indigent defendant in a criminal action to have the effective assistance of competent counsel . . . does not include the right to insist that competent counsel . . . be removed and replaced with other counsel merely because the defendant has become dissatisfied with his services." *State v. Robinson*, 290 N.C. 56, 65-66, 224 S.E. 2d 174, 179 (1976).

[3] Defendant's third assignment of error is that there was insufficient evidence that a dangerous or deadly weapon was employed or displayed. The evidence shows defendant jabbed the sharp end of a ballpoint pen into the neck of the victim. A similar pen was introduced into evidence. From the victim's testimony that she submitted to defendant because she was afraid he would injure her neck with the pen, and from its opportunity to examine a similar pen and consider the manner of its use, the jury could legitimately find that the pen was a dangerous or deadly weapon. The question was properly submitted to the jury.

Defendant's final assignment of error is that the trial court's instructions implied that the jury was required to return a verdict. Defendant argues that the trial court must inform the jury that a mistrial will be declared if the jury cannot reach a unanimous decision. Such is not the law. The assignment is meritless.

Our review of the record impels the conclusion that defendant has had a fair trial free from prejudicial error. The verdict and judgment must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. KEITH DOUGLAS WILSON

No. 57

(Filed 12 January 1982)

1. **Criminal Law § 169.6— exclusion of testimony—failure of record to show answer of witness**

Where the record failed to show what the answer of a witness would have been had he been allowed to answer a question, the exclusion of such testimony was not shown to be prejudicial.

2. **Homicide § 15.2— intent to kill—exclusion of defendant's testimony—absence of prejudice**

The trial court in a homicide case did not commit prejudicial error in refusing to permit defendant to testify whether he had the intention of killing the victim where, in other portions of defendant's testimony, he clearly conveyed to the jury his contention that he did not intend to kill the victim by explaining that he was so angry that in reality he did not know what he was doing, that he panicked, that he was not in his right mind, and that he had not made up his mind to kill the victim.

3. **Homicide § 28.1— perfect or imperfect self-defense—instruction not required**

In a prosecution for first degree murder, the circumstances shown to exist at the time defendant shot the victim were not sufficient to create a reasonable belief in the mind of a person of ordinary firmness that killing the victim was necessary to save defendant from death or great bodily harm, and defendant was therefore not entitled to an instruction on either perfect or imperfect self-defense, where the evidence tended to show that the victim had started two fights with defendant at a vacant lot and had threatened to kill him, but those altercations were over prior to the time defendant left the lot, drove to his home, and obtained a pistol; when defendant returned to the lot with the pistol, he inquired as to where the victim was, found the victim standing by the open door of a car, walked up to the victim and hit him; and as the victim turned and reached into the car defendant shot him in his back.

APPEAL by defendant from *Burroughs, J.*, at the 12 January 1981 Criminal Session of GASTON Superior Court.

Upon a plea of not guilty, defendant was tried on a bill of indictment charging him with the murder of Joe Reid. Prior to the selection of the jury, a conference was held in chambers to determine what aggravating circumstances the state would contend should be considered by the jury at a sentencing hearing if defendant were found guilty of first-degree murder. The court concluded that the state was unable to show any of the aggravating circumstances listed in G.S. 15A-2000(e). Thereupon, the case was presented to the jury as a "non-death penalty" case.

The state presented evidence which is summarized in pertinent part as follows:

On the evening of 7 August 1980 Reid and Billie Nichols rode with Bradford Byrd onto a vacant lot in Mount Holly, N.C. where the Rollins School building was formerly located. Defendant and several other persons were already present when Reid and his group arrived. All of those present had attended the Rollins School and were acquainted with one another. They proceeded to drink beer, smoke marijuana and talk about their school days.

After a while, Byrd, Nichols and Reid decided to leave but Byrd's car would not start. Defendant bet Byrd $10.00 that the starter on the car was defective. Byrd bet defendant that a weak battery was the trouble. Nichols "held the money" for the bettors. A battery was borrowed from another car on the lot and placed in Byrd's car. With the aid of this battery the car started and Byrd collected his bet. While others were removing the borrowed battery from Byrd's car and replacing the batteries in the respective cars, Byrd and defendant began arguing as to whose car would run faster. Reid joined in the conversation. Defendant was waving his hands as he talked and Reid slapped one of them. Thereupon, defendant and Reid began tussling. They fell to the ground and defendant was on top of Reid, holding him down. Although defendant and Reid were about the same height, defendant weighed some 50 or 60 pounds more than Reid.

Others present separated the combatants and defendant walked several yards away to Byrd's car. Reid followed him, proceeded to strike defendant's jaw and another fight ensued. Defendant threw Reid down on the hood of the car, breaking the radio antenna. The combatants were separated again and Reid threatened to kill defendant. In one of the incidents, Reid's arm was cut, presumably by a sharp rock or other object on the ground.

After telling Reid that he had better not be there when he (defendant) returned, defendant left the lot in his automobile. Defendant went to his home which was located a short distance from the lot. Two of his friends followed defendant to his home where they saw him with a gun, a long .22 caliber pistol. In spite of the pleas of his friends not to do so, defendant returned to the Rollins School lot.

When defendant arrived back at the lot, Reid was looking under the hood of Byrd's car. Defendant asked where Reid was, whereupon Reid saw him. Reid backed up a few steps and paused between the car and the open, left front door. Defendant approached Reid and hit him in his face. As Reid turned and took not more than one or two steps, defendant shot him one time in his upper back. Reid fell to the ground after which defendant kicked him and said "Die mother ---". Defendant then left the scene, telling the others not to follow him or they would get "the same thing". Reid died shortly thereafter from hemorrhaging caused by the bullet wound.

Defendant presented evidence including his own testimony. In most respects the testimony of defendant and his eyewitnesses was similar to that given by the state's eyewitnesses. However, defendant testified that he did not know why he went home; that after he returned to the scene and slapped Reid, Reid turned and reached as if he were going into Byrd's car; and that he thought Reid was reaching for a gun.

Other evidence pertinent to the questions raised on appeal will be referred to in the opinion.

The court instructed the jury that it was the jury's duty to return a verdict of (1) guilty of first-degree murder, (2) guilty of second-degree murder, (3) guilty of voluntary manslaughter, or (4) not guilty. The jury returned a verdict finding defendant guilty of first-degree murder and the court entered judgment imposing a life sentence.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the state.

Adam Stein, Appellate Defender, and Marc D. Towler, Assistant Appellate Defender, for defendant.

BRITT, Justice.

Defendant has grouped his assignments of error into four questions in which he contends that the trial court committed prejudicial error in excluding certain evidence proffered by him, and in its instructions to the jury. We find no merit in any of the assignments and leave undisturbed the judgment entered.

I

Defendant argues that a crucial issue in this case is whether he had a reasonable belief that he was in danger of death or great bodily harm at the hands of Reid. He refers to his testimony that after slapping Reid and seeing him turn and make a gesture towards the inside of Byrd's car, he believed Reid was attempting to reach into the car for the purpose of getting a gun. To support his position that he shot Reid in self-defense, he offered certain testimony by himself, Anthony Burch, Derrick Alexander and Casey Grier which was excluded by the court.

[1] Anthony Burch, an eyewitness to the homicide, was presented as a witness by the state. On cross-examination he stated that he did not know anything about Byrd carrying a gun in his car. The witness was then asked: "Had you heard he carried a gun in his car?" The state objected and the objection was sustained. The record fails to show what the witness' answer would have been had he been allowed to answer the question. That being true the exclusion of such testimony is not shown to be prejudicial. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972).

On direct examination defendant was asked why he carried his gun with him when he returned to the Rollins School lot. He answered, "Well, because I had heard that Bradford (Byrd)—". At this point the state objected and the objection was sustained. For the reason given above with respect to Burch's testimony, we hold that defendant has failed to show prejudicial error.

Derrick Alexander was presented as a witness by defendant. In giving his version of the second encounter between Reid and defendant, the witness stated that Byrd came over to the place where defendant was; that "I didn't know whether he was going to hit Spunky (defendant) or not so I was just watching his back for him"; that Alexander said "just let them fight it out"; and that Byrd said "he was going to get his stuff". The witness was then asked "what did you understand (Byrd) to mean when he said he was going to get his stuff?". The court sustained the state's objection to the question.

Here again the record fails to show what the witness' answer would have been had he been allowed to answer the question. That being true, defendant has failed to show prejudice. *State v. Davis, supra.*

Casey Grier, another eyewitness to the homicide, was presented as a witness by defendant. In giving his version of what happened immediately prior to the shooting, he testified that when defendant hit Reid, Reid was standing at the open, front door on the left side of Byrd's car; and that Reid then "bent over a little bit and was bending toward the car". The record then reveals:

> Q. What effort, if any, did you see Reid make to get into the car of Bradford Byrd?
>
> MR. HAMRICK: Objection.
>
> THE COURT: Overruled.
>
> A. From what I seen, it was an effort going that way.
>
> MR. HAMRICK: Objection. Motion to strike.
>
> THE COURT: Members of the jury you won't consider that last answer.
>
> EXCEPTION NO. 12
>
> After Keith hit him, he turned around that way and was going toward the open door when Keith shot him.

Defendant argues that the trial court erred in instructing the jury not to consider "that last answer". Assuming, *arguendo*, that the court erred, the error was not prejudicial in view of the fact that the witness immediately thereafter stated that Reid was going toward the open door when defendant shot him. "The exclusion of evidence cannot be held prejudicial when the same witness thereafter testifies to substantially the same facts." 4 Strong's N.C. Index 3d, Criminal Law, § 169.7. *See also State v. Colvin*, 297 N.C. 691, 256 S.E. 2d 689 (1979).

II

[2] Defendant argues that the trial court committed prejudicial error in refusing to allow him to testify whether he had the intention of killing Reid. On direct examination, as defendant was giving his version of what happened at the time of, and just before, the shooting, he stated that he was still angry after going to his home and returning to the school lot; and that "I didn't ever cool off any at all". He was then asked "[d]id you have any intention of

killing Mr. Reid?". The state's objection was sustained and defendant did not answer the question.

Once more the record does not reveal what the witness' answer would have been; therefore, defendant has failed to show prejudice. *State v. Davis, supra.* Even so, in other portions of his testimony defendant was allowed to testify as to his actions and the reasons behind them. He explained that he was so angry that in reality he did not know what he was doing, that he had panicked, that he was not in his right mind, and that he had not made up his mind to kill Reid. We think defendant clearly conveyed to the jury his contention that he did not intend to kill Reid.

III

[3] By his assignment of error number 8, defendant contends that the trial court erred in failing to instruct the jury on self-defense. By his assignment of error number 9, he argues that the court erred in failing to instruct the jury that they could find him guilty of voluntary manslaughter based on imperfect self-defense. We find no merit in either assignment.

In the recent case of *State v. Norris,* 303 N.C. 526, 279 S.E. 2d 570 (1981), Justice Huskins, speaking for this court, clearly articulated the law in this jurisdiction relating to perfect self-defense and imperfect self-defense as follows:

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Potter, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974); *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971); *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971); *State v. Ellerbe*, 223 N.C. 770, 28 S.E. 2d 519 (1944). The existence of these four elements gives the defendant a *perfect right of self-defense* and requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well.

On the other hand, if defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter. *State v. Potter, supra; State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975); *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916).

303 N.C. at 530.

It will be noted that elements (1) and (2) set out above are common to both perfect self-defense and imperfect self-defense. Applying those elements to the case at hand, we hold that the circumstances shown to exist at the time defendant shot Reid were not sufficient to create a reasonable belief in the mind of a person of ordinary firmness that killing Reid was necessary to save defendant from death or great bodily harm.

Although prior to the time that defendant left the lot and drove to his home, Reid had started two fights with him and had threatened to kill him, at the time defendant left, those altercations were over. It was a "new ballgame" when defendant returned to the lot. He admits that when he returned he had a pistol,

that he inquired as to where Reid was, that he found Reid standing by the open door of Byrd's car, that he walked up to Reid and "smacked" him, and that as Reid turned and reached in the car he shot him in his back. Under these circumstances, defendant was not entitled to an instruction on either type of self-defense.

The facts in *Norris* were entirely different. In that case the evidence tended to show that defendant was the estranged wife of Donald Norris, a former Marine sergeant; that he had left her and was living with Bernice Owens in her trailer; that the defendant had tried to contact her husband at his work and other places in order to obtain support money from him; that early in the morning in question defendant drove to the Owens' trailer and waited for her husband to come out; that when he came out, defendant told him that she wanted to talk to him; that he proceeded to curse her and struck her with his fists, knocking her to the ground; that she then saw Bernice Owens emerging from the trailer; that as defendant arose from the ground she saw her husband coming toward her again; that she reached in the passenger side of the car, got her pistol and shot her husband as he advanced on her; and that she shot him because she was afraid of him and felt that if he and Owens got to her she would not have a chance. These facts clearly warranted an instruction on perfect and imperfect self-defense.

All of defendant's assignments of error are overruled. We conclude that defendant received a fair trial free from prejudicial error.

No error.

JOHNNIE F. CARAWAN, PLAINTIFF v. TOM TATE AND FRIENDLY PARKING SERVICE, INC., DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. AETNA CASUALTY AND SURETY COMPANY, THIRD-PARTY DEFENDANT

No. 104

(Filed 12 January 1982)

1. Rules of Civil Procedure §§ 50.1, 59— judgment n.o.v. versus new trial—inconsistency in order

The trial court's order was inconsistent in that the court granted judgment n.o.v. on the issue of punitive damages because the verdict was ex-

cessive. Excessive verdicts, however, present a ground for granting a new trial and not for granting judgment n.o.v. G.S. 1A-1, Rule 50 and Rule 59(a)(6).

2. Appeal and Error §§ 6, 7; Parties § 2— real parties in interest—right of cross-appeal

In a civil assault action where punitive as well as compensatory damages were awarded to plaintiff by the jury; the trial court allowed defendants' motion for judgment n.o.v. with respect to the punitive damages; the defendants received a judgment against their insurer for the amount they were deemed to owe plaintiff for compensatory damages; and plaintiff subsequently appealed the granting of the judgment n.o.v. for punitive damages, defendants were properly permitted to cross-appeal from the judgment awarding plaintiff compensatory damages. When plaintiff appealed and defendants were faced with the possibility that the appellate court might not agree with the trial court's action regarding the punitive damages issue, defendants potentially became aggrieved parties and they had the right to cross-appeal pursuant to App. Rule 10(d).

APPEAL by plaintiff from the decision of the Court of Appeals reported in 53 N.C. App. 161, 280 S.E. 2d 528 (1981), reversing the judgment of *Howell, J.*, entered at the 20 December 1979 Session of MECKLENBURG Superior Court.

This action arose out of an alleged assault of plaintiff by defendant Tate, an employee of defendant Friendly Parking Service, Inc., during a dispute over parking fees. (The details of the incident are set forth in the Court of Appeals' opinion and need not be repeated here.)

Plaintiff brought suit seeking both compensatory and punitive damages. Defendant Tate counterclaimed for damages, alleging that plaintiff had assaulted him. A third party complaint was filed by defendants against their insurer, Aetna Life and Casualty, praying that they recover from the insurer the amount of any verdict to which plaintiff was entitled. They also sought payment by Aetna of their legal expenses and the costs of defending the action regardless of whether plaintiff obtained a judgment against defendants.

Plaintiff prevailed at trial and the jury awarded him $3,000 compensatory damages and $12,000 punitive damages. Defendants filed motions for judgment notwithstanding the verdict pursuant to G.S. 1A-1, Rule 50, and for a new trial pursuant to Rule 59. In ruling on the motions the court entered the following order:

This Cause came on to be heard before the undersigned upon the defendants Tom Tate and Friendly Parking Service, Inc.'s Motion for Judgment Notwithstanding the Verdict.

The Court, after considering the Motion, makes the following Findings and Conclusions:

(1) That there was sufficient evidence to support the Jury's verdict with respect to compensatory damages in the amount of $3,000.00.

(2) That the Jury's verdict with respect to punitive damages was against the greater weight of the evidence and should be set aside.

Based upon the foregoing Findings and Conclusions, it is ORDERED, ADJUDGED AND DECREED that the defendants' Motion for Judgment Notwithstanding the Verdict on punitive damages is allowed.

Thereupon, the court entered judgment in favor of plaintiff against defendants for $3,000.00 plus costs. The court also entered judgment in favor of defendants against the third party defendant, Aetna, in the amount of $3,000 plus costs including attorney fees.

On 23 January 1980 Aetna paid the judgment against it, depositing $7,030 with the Clerk of Superior Court of Mecklenburg County. Defendants' attorney of record received the money from the clerk and cancelled the judgment against Aetna. Defendants have not paid plaintiff's judgment against them.

Plaintiff gave notice of appeal in open court and the appeal entries were dated 20 December 1979. In apt time, defendants gave notice of cross-appeal from the judgment entered 20 December 1979 awarding plaintiff $3,000 compensatory damages.

The Court of Appeals in an opinion written by Judge Webb, concurred in by Chief Judge Morris, reversed the trial court and ordered a new trial on all issues. Judge Martin (Harry C.) dissented and plaintiff appealed pursuant to G.S. 7A-30(2).

Bailey, Brackett & Brackett, P.A., by Cynthia L. Pauley, for plaintiff-appellant.

Newitt, Bruny & Koch, by John G. Newitt, Jr., for defendant-appellees.

BRITT, Justice.

We agree with the decision of the Court of Appeals ordering a new trial on all issues.

The only question presented in the new briefs filed in this court is whether the Court of Appeals erred in failing to dismiss defendants' cross-appeal for the reason that they were not aggrieved by the judgment of the trial court, and were not the real parties in interest. Before discussing that question we feel impelled to address another question which we deem to have significance.

I.

[1] While the question was not raised by any of the parties, we point out an inconsistency in the trial judge's order relating to defendants' motions for judgment N.O.V. and a new trial. The inconsistency is that with respect to the verdict on punitive damages, His Honor purported to grant the motion for judgment N.O.V. pursuant to Rule 50; however, he gave as his reason that the verdict was excessive, part of one of the grounds for granting a new trial under Rule 59. Clearly, there is a difference in the purpose and applicability of the two rules.

In W. Shuford's treatise on North Carolina Civil Practice and Procedure, § 50-9, pg. 413, we find:

> One of the more far reaching and important innovations found in the rules is the judgment N.O.V. authorized by Rule 50. For the first time in North Carolina practice it is now possible for the trial judge to reserve his ruling on a motion for a directed verdict until the jury has actually returned a verdict and then to allow or deny a motion for a judgment notwithstanding that verdict. *A judgment N.O.V. is nothing more nor less than a directed verdict granted after verdict.* As Rule 50(b)(1) provides, a motion for judgment N.O.V. "shall be granted if it appears that the motion for directed verdict could properly have been granted." (Emphasis added.)

See also G.S. 1A-1, Rule 50.

G.S. 1A-1, Rule 59, provides in pertinent part:

> (a) *Grounds.* — A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> * * *

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice; . . . .

The Court of Appeals correctly held that the punitive damages issue should have been submitted to the jury and that the trial court erred in granting defendants' motion for judgment N.O.V. On the question of setting the verdict aside for the reason that it was excessive, Judge Webb appropriately wrote:

> It may have been that in light of the evidence, the court felt the punitive damages awarded were excessive. It did not set the verdict aside or reduce it in its discretion, however, and that question is not before us for review.

We agree with the majority of the Court of Appeals that the verdict on the issue of punitive damages should not be reinstated and that there should be a new trial on all issues. The Court of Appeals gave sufficient reasons for granting a new trial on the question of compensatory damages, and on retrial the jury must determine first that plaintiff is entitled to recover on that issue before it can consider plaintiff's entitlement to punitive damages. *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968); *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936).

II.

[2] With respect to the question presented in the briefs, there appears to be no dispute regarding the legal principles involved. Only the party aggrieved by a judgment may appeal. *Coburn v. Timber Corp.*, 260 N.C. 173, 132 S.E. 2d 340 (1963). A party aggrieved is one whose rights are substantially affected by judicial order. *Insurance Co. v. Ingram, Comr. of Insurance*, 288 N.C. 381, 218 S.E. 2d 364 (1975); *Coburn v. Timber Corp., supra.* An appeal must also be prosecuted by the aggrieved real party in interest. G.S. 1-277; *Insurance Co. v. Ingram, Comr., supra.* A real party in interest is one who is benefited or injured by the judgment in the case. *Parnell v. Insurance Co.*, 263 N.C. 445, 139 S.E. 2d 723 (1965).

The only dispute relates to the application of those principles to the case at hand. Our view can be summarized by saying that if plaintiff had not appealed, defendants could not have appealed because they were not aggrieved by the judgment inasmuch as Aetna paid it. However, when plaintiff appealed and defendants

were faced with the possibility that the appellate court might not agree with the trial court's action regarding the punitive damages issue, defendants potentially became aggrieved parties and they had the right to cross-appeal. What defendants feared *might* happen on appeal with respect to punitive damages *has* happened, and it is proper that they have their "day in court."

Defendants' cross-appeal is permitted by Rule 10(d) of the Rules of Appellate Procedure which provides:

> (d) *Exceptions and Cross Assignments of Error by Appellee.* Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), or may be included by the appellee in a proposed alternative record on appeal under Rule 11(b).

Rule 10(d) 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.

Except as modified by this opinion, the decision of the Court of Appeals is affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. WILLIAM LEE COOPER

No. 134

(Filed 12 January 1982)

Searches and Seizures § 37— passenger compartment of vehicle—search incident to lawful arrest

An officer's search of the passenger compartment of defendant's truck and a paper bag found therein on 22 May 1980 immediately following defendant's

lawful arrest for driving under the influence and while defendant was sitting in the back seat of the officer's patrol car did not violate the Fourth and Fourteenth Amendments to the U.S. Constitution since the search came within the scope of the decision in *New York v. Belton*, --- U.S. ---- (1981), and that decision could properly be applied retroactively.

ON certiorari to the North Carolina Court of Appeals to review its decision, 52 N.C. App. 349, 278 S.E. 2d 532 (1981).

In the early morning hours of 22 May 1980, Officer G. M. Ray of the Raleigh Police Department and another officer were on duty in a police vehicle parked at a service station at Raleigh Boulevard and New Bern Avenue. At approximately 4 a.m., Officer Ray noticed a red pickup truck approach on New Bern Avenue at a high rate of speed. The truck turned left onto Raleigh Boulevard, sliding sideways with tires squealing. Officer Ray followed the truck down Raleigh Boulevard and observed that it was being driven erratically and at a high rate of speed. He stopped the truck on Raleigh Boulevard near Oakwood Avenue, parking his police cruiser some fifteen feet behind the truck.

As Officer Ray approached the truck, three people got out. Defendant William Lee Cooper, the driver, met Officer Ray between the two parked vehicles. Defendant Cooper was unsteady on his feet and reeked of alcohol. In response to the officer's question, defendant admitted he had been drinking. Officer Ray arrested him and placed him in the back seat of the patrol car.

While the other officer maintained control over defendant's companions, Officer Ray returned to the pickup truck to search for evidence of driving under the influence. The driver's side door would not open. Upon opening the door on the passenger side, Officer Ray immediately smelled a strong odor of marijuana. He slid across the seat to the left and saw a brown paper bag lying in the door well on the driver's side. The top of the bag was twisted closed. Officer Ray picked up the bag and held it a few inches from his nose. It exuded a strong odor of marijuana. He opened the bag and found within it a small plastic bag containing vegetable material. The vegetable material was later determined to be 43.9 grams of marijuana.

Defendant, charged under a proper bill of indictment with felonious possession of marijuana, filed a motion to suppress the

marijuana. The trial court, Bailey, J., conducted a hearing, made pertinent findings, including a finding that the search was made "incidental to the arrest," and concluded the search was proper. He thereupon denied the motion.

Defendant pleaded guilty to maintaining a vehicle for purpose of keeping marijuana, G.S. 90-108(a)(7), and driving under the influence, G.S. 20-138. The cases were consolidated for judgment and defendant was sentenced to six months, suspended for three years, and ordered to pay a fine of $300.

Defendant appealed to the Court of Appeals, pursuant to G.S. 15A-979(b). On 2 June 1981, the Court of Appeals reversed the order denying defendant's motion to suppress on grounds the search was not incident to his arrest. *State v. Cooper*, 52 N.C. App. 349, 278 S.E. 2d 532 (1981). That court vacated the judgment of the superior court and remanded for resentencing in the driving under the influence case.

On 1 July 1981, the United States Supreme Court rendered its decision of *New York v. Belton*, --- U.S. ----, 69 L.Ed. 2d 768, 101 S.Ct. 2860 (1981). The State sought a writ of certiorari to review the decision of the Court of Appeals in light of *Belton*. We allowed the petition for certiorari on 6 October 1981.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for the State.

Donald H. Solomon for defendant appellee.

HUSKINS, Justice.

The sole question posed by this case is whether Officer Ray's search of the passenger compartment of defendant's truck following his custodial arrest violated the Fourth and Fourteenth Amendments to the United States Constitution, *i.e.*, whether this case is within the scope of *New York v. Belton*, --- U.S. ----, 69 L.Ed. 2d 768, 101 S.Ct. 2860 (1981).

In *Belton*, the United States Supreme Court held that when a police officer has effected a lawful custodial arrest of an occupant of a vehicle, the officer may, as a contemporaneous incident of that arrest, conduct a search of the passenger compartment of the vehicle extending to the contents of containers found within the

passenger compartment. Defendant offers three arguments that the holding in *Belton* does not apply to this case.

Defendant first contends that the search was not "a contemporaneous incident of the arrest." At the time of the search, defendant was under arrest and sitting in the back seat of a patrol car; thus, he argues the area searched was no longer within his immediate control. This contention is directly refuted by the holding in *Belton.* After Mr. Belton's car was stopped, he and his three passengers were placed under arrest. The arresting officer "split them up into four separate areas of the Thruway at this time so they would not be in physical touching area of each other." --- U.S. at ----, 69 L.Ed. 2d at 772, 101 S.Ct. at 2862. The officer searched each of the four defendants, then searched the interior of the car, including Belton's jacket. The Supreme Court held that the search of the jacket did not violate the Fourth and Fourteenth Amendments because the search immediately followed a custodial arrest and the jacket was "within the arrestee's immediate control." The Court noted:

> It seems to have been the theory of the Court of Appeals that the search and seizure in the present case could not have been incident to the respondent's arrest, because Trooper Nicot, by the very act of searching the respondent's jacket and seizing the contents of its pocket, had gained 'exclusive control' of them [citations omitted]. But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.'

--- U.S. at ----, n. 5, 69 L.Ed. 2d at 776, n. 5, 101 S.Ct. at 2865, n. 5.

In *Belton* and in this case, the searches immediately followed the arrests. In both situations, defendants had been removed from the passenger compartments of their vehicles before the searches took place. The Supreme Court held that for purposes of the doctrine of *Chimel v. California,* 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969), the passenger compartment of a vehicle in which defendant had been a "*recent occupant,*" is an area within his immediate control. --- U.S. at ----, 69 L.Ed. 2d at 776, 101 S.Ct. at 2865 (emphasis supplied). The fact that defendant in this

case was sitting in a police vehicle instead of standing on the street under an officer's supervision fails to remove the factual setting from the scope of *Belton.*

Defendant next argues that the search of the contents of the paper bag found inside the truck was invalid under the doctrine of *Arkansas v. Sanders,* 442 U.S. 753, 61 L.Ed. 2d 235, 99 S.Ct. 2586 (1979), and *United States v. Chadwick,* 433 U.S. 1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977). The contention is meritless. As the Supreme Court emphasized in *Belton,* "neither of those cases involved an arguably valid search incident to a lawful custodial arrest." --- U.S. at ----, 69 L.Ed. 2d at 776, 101 S.Ct. at 2865. Therefore, as in *Belton,* those cases have no effect on the decision in this case.

Defendant's final contention is that applying the *Belton* rule in this case would be impermissibly retroactive. Retroactive operation of an overruling decision is neither required nor prohibited by the United States Constitution. *Linkletter v. Walker,* 381 U.S. 618, 14 L.Ed. 2d 601, 85 S.Ct. 1731 (1965). The matter is one of judicial policy, to be determined by the court after weighing the merits and demerits of the particular case, by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its application. *Id.* at 629, 14 L.Ed. 2d at 608, 85 S.Ct. at 1738. Decisions are presumed to operate retroactively, and overruling decisions are given solely prospective application only when there is compelling reason to do so. *State v. Rivens,* 299 N.C. 385, 261 S.E. 2d 867 (1980).

The Supreme Court enunciated a "bright line" test in *Belton.* Rather than evaluate each custodial arrest of the occupant of a vehicle to determine whether an article was within his immediate control, a court need only find that an article was within the passenger compartment, and it is deemed to have been within the arrestee's immediate control. The articulation of such a "straightforward rule" was to provide guidance for courts, police officers and individuals. We must conclude that in generalizing the *Chimel* doctrine to provide a workable rule, the Supreme Court intended the decision to operate retrospectively as well as prospectively. Therefore, defendant's contention must fail.

Our review of the record and decisions impels the conclusion that the decision of the Court of Appeals conflicts with a decision

of the United States Supreme Court. The decision of the Court of Appeals is reversed and the case remanded to that court for further remand to Wake Superior Court for reinstatement of the original judgment.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JOSEPH PHILLIP SMITH AND JOHNNY B. SMITH

No. 41

(Filed 12 January 1982)

Constitutional Law § 32; Criminal Law § 98.3— placement of defendants in hold area—no denial of fair trial

Defendants were not denied a fair and impartial trial in an armed robbery case because they were brought into the courtroom prior to the commencement of the trial and placed in a railed "hold area" in the presence of the prospective jurors, especially where the court instructed the jury that the mere fact that defendants entered the courtroom and were seated in the place reserved for those who are in custody was of no legal consequence whatsoever in the jury's determination of the issues involved and, upon inquiry by the court, all jurors indicated that such fact would not affect them in any way.

DEFENDANTS appeal from judgment of *Brannon, J.*, 1 December 1980 Criminal Session, JOHNSTON Superior Court.

Defendants were tried upon separate bills of indictment, proper in form, charging them with armed robbery on 7 April 1979.

The State's evidence tends to show that Joseph Phillip Smith, Johnny B. Smith and Roscoe Washington traveled together from Goldsboro to Smithfield on 7 April 1979 for the purpose of committing a robbery. Upon arrival in Smithfield, they parked in front of Williams Limited, the clothing store they intended to rob. The three men got out of their car, walked across the street and entered the store. Roscoe Washington walked straight to the back where he and Joseph Smith began looking at some pants. There were two female clerks in the store. Roscoe Washington pulled a gun, which had been furnished to him by Joseph Smith, and forced both clerks to accompany them into a small room in the back of the store. The girls were forced to lie on the floor while a search was made for money. While Roscoe

Washington held the gun on the girls and Johnny Smith was in the front part of the store acting as a lookout, Joseph Smith began the search for money. At that time, the husband of one of the girls entered the store, recognized what was happening, and managed to push the alarm button while waiting for his wife. The three robbers escaped the scene and were arrested sometime later in the Smithfield area.

Pursuant to a plea bargain arrangement, Roscoe Washington testified as a witness for the State, narrating the facts as above set out. The testimony of Kay Wilkins and Donna Ellis, the two employees involved, corroborated Roscoe Washington. In addition, one of the girls testified she saw Joseph Smith take $200 from a file drawer, $5 from Kay's wallet and $25 from Donna's pocketbook. There was other evidence pointing unmistakably to the guilt of defendants.

Defendants offered no evidence before the jury.

At the beginning of the trial, defense counsel approached the bench and moved for a continuance on the ground that his two clients entered the courtroom in the presence of all prospective jurors and were seated in the courtroom in the place usually reserved for those who are in custody. The court denied the motion to continue but advised counsel that a curative instruction would be given to the jurors. Accordingly, the fourteen jurors tentatively selected, including two alternates, were instructed that the mere fact that defendants entered the courtroom and were seated in the place reserved for those who are in custody was of no legal consequence whatsoever in the jury's determination of the issues involved. The presiding judge inquired as to whether the jurors would be affected, and all jurors indicated by their answers that such fact would not affect them in any way.

The place where defendants were seated is described in the record as a spot inside a railing "about three-by-eight or six" with three seats in it. After describing it, the presiding judge said:

> The Court is aware that in every courthouse in North Carolina where the Courts have ever been there was an area referred to as a prisoner's box and that is where folks come in and sit down who are in custody, and those who are on bond sit in the audience section of the courtroom itself, and in that sense this courthouse is like every other courthouse in North Carolina and indeed in any other state that the Court has ever seen photographs of a courtroom, but be that

as it may the Court believes that was inquired into and covered with the prospective jurors. . . . [D]efendants did come down and sit in it in the presence of the jurors; however, nothing was done at that time to single them out nor identify them nor the like.

Defendants were convicted of armed robbery as charged and each was sentenced to life imprisonment to run at the expiration of a life term received by each of them in Cumberland County in an unrelated case.

Rufus L. Edmisten, Attorney General, by Charles J. Murray, Special Deputy Attorney General, for the State.

Louis Jordan, for defendant appellants.

HUSKINS, Justice.

Defendants contend they were denied a fair and impartial trial when they were brought into the courtroom prior to the commencement of the trial and placed in a "hold area" in the presence of the prospective jurors. This constitutes their first and only assignment of error.

Defendants' argument is based upon the unsupported assumption that being seated within a section of the courtroom measuring approximately three-by-eight or six feet surrounded by a railing is tantamount to being shackled. There is no contention that the railing was anything other than the type of railing normally used to separate the bar from the spectators. Moreover, there is no evidence, and there seems to be no contention, that defendants were subjected to any unusual security measures. To the contrary, the trial judge characterized the courtroom as similar to every other courthouse in North Carolina. Furthermore, in response to the trial court's interrogation, the jurors all indicated they were totally unaffected by the location of the defendants in the courtroom.

We find no support in law or logic for the contention advanced by defendants. There is nothing in this record to support the argument that being seated where those in custody are ordinarily seated was tantamount to being shackled. Defendants made no attempt to establish any prejudice. The trial court satisfied itself that no prejudice had resulted. The jurors themselves said they had not been, and would not be, prejudiced by the mere fact that they had seen defendants seated within the railed area customari-

ly used for those in custody awaiting trial. This assignment is overruled without further discussion.

Defendants initially assigned as error the ruling of the trial court denying their motion to dismiss at the close of the State's evidence. However, they make no argument and cite no authority on the question posed, and therefore the assignment is deemed abandoned. Rule 28(a), Rules of Appellate Procedure. Even so, they have requested this Court to "review the record to determine if there are matters of record which will reflect that a dismissal was appropriate." In view of the seriousness of the crime of armed robbery and the severity of the punishment it ordinarily demands, we have reviewed the record proper which, in criminal cases, ordinarily consists of (1) the organization of the court, (2) the charge contained in the information, warrant or indictment, (3) the arraignment and plea, (4) the verdict and (5) the judgment. *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976); *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Tinsley*, 279 N.C. 482, 183 S.E. 2d 669 (1971). We find that the court was properly organized, the indictments are proper in form, defendants entered pleas of not guilty, the verdicts were properly returned and the judgments are within the statutory limits provided by law on the date these offenses were committed. See former G.S. 14-87 which remained in effect until July 1, 1981 when armed robbery was made a Class D felony punishable as now provided in G.S. 14-1.1. Thus, we find no error on the face of the record proper. Moreover, we note parenthetically that the guilty verdicts are overwhelmingly supported by the evidence.

Prejudicial error not having been shown, the verdicts and judgments must be upheld.

No error.

STATE OF NORTH CAROLINA v. FRED HURST

No. 67

(Filed 12 January 1982)

1. Criminal Law § 147— motion for appropriate relief—insufficiency of materials to make determination

As the materials before the Court were insufficient to determine if defendant's conviction was obtained in violation of the U.S. or N.C. Constitution

under G.S. 15A-1415, pursuant to G.S. 15A-1418(b) the Court could remand the motion to the trial court; however, the Court, in this case, determined the better procedure to be to dismiss the motion.

2. Criminal Law § 146.1— errors not presented to Court of Appeals—not properly before Supreme Court

Assignments of error not presented to the Court of Appeals are not properly presented to the Supreme Court. App. Rule 16(a).

ON certiorari to review unpublished decision of the Court of Appeals finding no error in judgments entered by *Clark, J.*, at the 2 June 1980 Regular Criminal Session of Superior Court, ALAMANCE County.

Upon pleas of not guilty, defendant was tried on a bill of indictment charging that on 20 December 1979 he (1) possessed 300 tablets of methaqualone, a controlled substance, for purpose of sale, and (2) sold and delivered said quantity of methaqualone; and a second bill of indictment charging that on 1 January 1980 he (1) possessed 100 tablets of methaqualone, and (2) sold and delivered said 100 tablets of methaqualone. Without objection the cases were consolidated for trial.

The state presented evidence tending to show that on 20 December 1979 J. R. Griffith, an officer with the Alamance County Sheriff's Department, saw and had a conversation with defendant in an automobile parked on O'Kelly Street in the Town of Elon College; that on that occasion defendant retrieved from his clothing and delivered to Officer Griffith a paper bag which defendant said contained 300 quaaludes (methaqualone); that the bag contained that which defendant said it did; that the officer paid defendant $870.00 therefor; that on 1 January 1980 Officer Griffith again saw and had a conversation with defendant on O'Kelly Street in the Town of Elon College; that on that occasion, defendant removed from his clothing and delivered to Officer Griffith a clear, plastic bag containing 100 quaaludes; and that the officer paid defendant $290.00 therefor.

Defendant testified as a witness for himself and denied seeing Officer Griffith on said occasions. He also denied possessing or selling quaaludes (methaqualone) at any time. His mother testified that at all times on 1 January 1980 defendant was either in Raleigh visiting friends or was at her home with her.

The jury found defendant guilty of all four charges. On the 20 December 1979 charges, the court entered judgment imposing a prison sentence of not less than eight nor more than ten years. On the 1 January 1980 charges, the court entered judgment imposing a prison sentence of not less than three nor more than five years, this sentence to begin at expiration of the eight-ten year sentence. The court recommended work release whenever defendant becomes eligible for that program.

Defendant gave notice of appeal. On 9 June 1980, the trial court determined that defendant was indigent and appointed Attorney J. D. Pickering, who had represented him at trial as privately employed counsel, to represent defendant on appeal. Mr. Pickering prepared, served and filed a record on appeal in the Court of Appeals but failed to file a brief in that court. Nevertheless, the Court of Appeals considered the two assignments of error set forth in the record on appeal and concluded that they were without merit. The court further stated that "we have carefully examined the record filed herein and find no error in the trial."

Following the filing of the Court of Appeals' decision on 5 May 1981, Attorney John D. Xanthos was employed by defendant. Through his new counsel, defendant petitioned this court for a writ of certiorari to review the decision of the Court of Appeals. We allowed the petition on 18 June 1981.

Rufus L. Edmisten, Attorney General, by Sandra M. King and Ralf F. Haskell, Assistant Attorneys General, for the State.

John D. Xanthos for defendant-appellant.

PER CURIAM.

By permission of this court, defendant has filed an addendum to the record on appeal, setting forth the trial judge's charge to the jury and certain other trial proceedings not included in the original record. The addendum also contains assignments of error not set forth in the original record. In addition, he has filed in this court a motion for appropriate relief pursuant to G.S. 15A-1415(b)(3) and G.S. 15A-1418 *et seq.* Attached to this motion are affidavits of defendant and his mother, Peggy Hurst.

By his first assignment of error defendant contends that he was denied effective assistance of counsel at his trial in superior court and in his appeal to the Court of Appeals in violation of his rights guaranteed by the sixth and fourteenth amendments to the federal constitution. For the reasons hereinafter stated, we decline to pass on this assignment.

[1] While G.S. 15A-1418(a) authorizes the filing of motions for appropriate relief in the appellate division, G.S. 15A-1418(b) provides as follows:

> When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

G.S. 15A-1415 provides, *inter alia*, that at any time after verdict a defendant by motion may seek appropriate relief if his conviction was obtained "in violation of the Constitution of the United States or the Constitution of North Carolina". The materials before us are not sufficient for us to make that determination. While the quoted statute suggests that the motion be remanded to the trial court for hearing and determination, we think that the better procedure in this case is to dismiss the motion and permit defendant, if he so desires, to file a new motion for appropriate relief in the superior court.[1] We will proceed to consider the other assignments of error argued in defendant's brief.

By his second assignment of error defendant contends the trial court expressed an opinion in the presence of the jury in violation of G.S. 15A-1222. By his third assignment of error, he contends that the trial court erred in its instructions to the jury.

1. "The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division . . . ." N.C. Constitution, Art. IV, Sec. 13(2).

[2] Rule 16 of the Rules of Appellate Procedure sets out the scope of review by this court of decisions of the Court of Appeals. Rule 16(a) provides in pertinent part:

> Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

The questions which defendant attempts to present by his second and third assignments of error were not presented to the Court of Appeals, therefore, they are not properly presented in his new brief to this court. Nevertheless, we have considered those questions and conclude that they are without merit and that discussion of them is not justified.

After a careful review of the record on appeal, the addendum thereto, the decision of the Court of Appeals and the briefs filed in this court, we hold that defendant received a fair trial, free from prejudicial error.

The decision of the Court of Appeals is affirmed.

Defendant's motion for appropriate relief is dismissed.

STATE OF NORTH CAROLINA v. PAUL EMANUEL DOUGLAS

No. 56

(Filed 12 January 1982)

APPEAL of right pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals reported in 51 N.C. App. 594, 277 S.E. 2d 467 (1981), by *Judge Wells*, *Judge Vaughn* concurring and *Judge Becton* dissenting, finding no error in defendant's trial before *Mills, J.*, at the 2 June 1980 Criminal Session of STANLY County Superior Court.

Defendant was indicted on charges of breaking or entering, and larceny and receiving.

The State's evidence tended to show that at 12:34 a.m., 5 March 1980, Officer J. E. Galliher of the Albemarle Police Department, while stopped at a traffic light on North First Street in Albemarle, observed a 1970 Oldsmobile with twelve to sixteen inches of cloth hanging from the trunk. Officer Galliher could see what appeared to be a small white appliance inside the trunk. Galliher stopped the vehicle to inform the driver that the cloth was hanging out of the trunk. As he approached the vehicle, he could see another small appliance in the back seat. Upon closer examination, Galliher saw a clothes washer and curtains in the trunk, and a clothes dryer, pillows, a bedspread, and curtains in the back seat. Galliher recognized the items as being of the type found in mobile homes, and he was aware of several prior thefts of washers and dryers from Conner Mobile Homes in Albemarle. Defendant was unable to produce his driver's license when so requested, and Galliher radioed the Albemarle Police Communication Department to make a driver's license check on defendant. He also radioed Officer L. C. Ingold to request him to check the Conner Mobile Home lot, located approximately one-half mile from where defendant's auto was stopped, for a possible breaking, entering and larceny of a washer and dryer. Officer Ingold discovered that two mobile homes had been entered. While awaiting a response to the records check, Galliher received information from Ingold that a mobile home had been found opened at Conner's lot and a washer and dryer apparently removed. Officer Galliher informed defendant and his companion that they were to be held pending an investigation of a possible breaking and entering. He seized the automobile and took defendant and his companion to the Stanly County Jail.

The Manager of Conner Mobile Homes met Officer Galliher at the lot and identified the property found in defendant's vehicle. It was determined that the curtains, pillows, and bedspread had come from a double-wide unit belonging to Conner Mobile Homes and that the washer and dryer had been removed from a single-wide unit which had been sold the preceding day but was still on the lot awaiting relocation. Officer Galliher proceeded to the county jail where he placed defendant under arrest for breaking or entering and larceny. Defendant was given his *Miranda* warn-

ings; thereafter, he signed a written statement admitting his guilt of the crimes charged.

Defendant offered no evidence in his behalf.

The jury returned verdicts of guilty of felonious breaking or entering, and of felonious larceny. Judgment was entered upon the verdicts imposing sentences of seven to ten years on each conviction to run consecutively.

Rufus L. Edmisten, Attorney General, by Ben G. Irons, III, Assistant Attorney General, for the State.

Hopkins, Hopkins & Tucker, by Samp C. Hopkins, Jr., for defendant.

PER CURIAM.

Defendant assigns as error the alleged violation of his Fourth Amendment rights grounded upon the stop and detention by Officer Galliher and the seizure of the washer and dryer, the admissibility of his confession, and the trial court's failure to quash the indictment charging him with breaking and entering a building in violation of G.S. 14-54.

Defendant contends that Officer Galliher lacked probable cause to stop and detain him and that the "plain view" doctrine did not entitle Officer Galliher to seize the items which did not reasonably appear to be associated with criminal activity. He further asserts that in light of the foregoing contentions his confession was inadmissible since the police lacked probable cause to stop and detain him and seize the washer and dryer. Finally, defendant maintains that the indictment charging him with violation of G.S. 14-54 was defective since he contends that a mobile home is not a building as defined in G.S. 14-54(c).

Subsequent to defendant's trial and conviction in the case now before us (Court of Appeals case number 8020SC1023), defendant was tried and convicted at the 2 September 1980 Criminal Session of Stanly County Superior Court on charges of breaking or entering and felonious larceny which involved the single-wide mobile home and personal property belonging to Edgie Nell Broadway. Defendant appealed that conviction to the North Carolina Court of Appeals and in an opinion by Chief Judge

Morris, with Judges Webb and Whichard concurring, (case number 8120SC57, filed 6 October 1981), the Court of Appeals found no error in the trial below in that case. The facts and questions of law presented by the assignments of error in Court of Appeals case number 8020SC1023 and Court of Appeals case number 8120SC57 are identical except as to the ownership of the mobile homes and the ownership of the personal property taken from the respective buildings.

We approve the application of the law to the facts in Judge Wells' well-reasoned opinion in Court of Appeals case number 8020SC1023, the case before us for decision, and adopt the opinion as our own. Our action in approving and adopting Judge Wells' opinion is strongly buttressed by Chief Judge Morris's opinion in case number 8120SC57 in which the Court of Appeals considered nearly identical facts and questions involving the same defendant and reached the same result as in Judge Wells' opinion.

We do not deem it necessary to encumber the reports with a third opinion in light of the fact that every question presented by defendant in the appeal before us has been adequately answered in the well-written opinions by Judge Wells and Chief Judge Morris.

The decision of the Court of Appeals in case number 8020SC1023 is

Affirmed.

STATE OF NORTH CAROLINA v. JAMES CALVIN JONES

No. 40

(Filed 12 January 1982)

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Battle, J.*, at the 6 October 1980 Criminal Session of ROBESON County Superior Court.

This is the second time that this case has been before us. Defendant was originally tried in October 1977. Upon his conviction of first-degree murder, he was sentenced to death. In that

case we granted a new trial because of prejudicial comments made by the district attorney. *See State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979).

In instant case defendant was again tried on a bill of indictment charging him with the first-degree murder of Jimmy Locklear on 3 July 1977. He was convicted of second-degree murder and sentenced to life imprisonment.

In instant case the State offered evidence tending to show that around noon on 3 July 1977 defendant was released from the Robeson County prison unit on a pass, and during the afternoon, he borrowed his brother's car. He also borrowed a friend's rifle and some ammunition. Defendant began to search for a young man named Jimmy Locklear, who had reportedly been going with defendant's wife while defendant was in prison. He was unable to locate Jimmy Locklear, so he proceeded to the home of Herbert Locklear, who had also supposedly been going with defendant's wife. Herbert Locklear resided with his father, who coincidentally was also named Jimmy Locklear.

The State's witness Johnny Dial testified that at about 4:30 p.m. on 3 July 1977 he saw an old man and a younger man struggling in the doorway of the house where Herbert Locklear and his father Jimmy Locklear lived. He observed the older man break away and run toward the highway and saw the younger man shoot the fleeing man in the back. At trial the witness identified defendant as the man who did the shooting. There was also evidence to the effect that defendant told his brother late in the afternoon of 3 July 1977 that he had just killed Herbert Locklear's father.

The medical evidence presented by the State tended to show that Jimmy Locklear, father of Herbert Locklear, died as a result of two bullet wounds to the back.

Defendant presented no evidence.

Rufus L. Edmisten, Attorney General, by Alfred N. Salley, Assistant Attorney General, for the State.

Bruce W. Huggins for defendant.

PER CURIAM.

Upon return of the jury verdict, defendant duly gave notice of appeal. This amounted to an exception to the judgment so as to present for our review any matters appearing upon the face of the record. *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Ayscue*, 240 N.C. 196, 81 S.E. 2d 403 (1954). Defendant also filed a record on appeal in which in lieu of grouping exceptions and setting forth assignments of error he stated: "Defendant's attorney having reviewed carefully, and having found no errors, submits this record to the Court for its review pursuant to the Rules of Appellate Procedure."

In a criminal case, the record on appeal consists of the following: (1) an index of the contents of the record, which shall appear on the first page thereof; (2) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session the time and place of rendition and the party appealing; (3) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court; (4) copies of docket entries or of a stipulation of counsel showing all arraignments and pleas; (5) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (6) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (7) copies of the verdict and of the judgment, order, or other determination from which appeal is taken; (8) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (9) copies of all other papers filed and proceedings had in the trial courts which are necessary for an understanding of all errors assigned; and (10) exceptions and assignments of error set out as provided in Rule 10. Rule 9(b)(3), Rules of Appellate Procedure.

Defendant failed to file a brief as required by Rule 13 of the Rules of Appellate Procedure. In fact, no assignments of error appear in the record which has been duly filed with us. Therefore, we have before us only such error as may appear on the face of the record. *Dillard v. Brown*, 233 N.C. 551, 64 S.E. 2d 843 (1951); *State v. Robinson*, 214 N.C. 365, 199 S.E. 270 (1938). Ordinarily,

we would dismiss summarily a case which comes to us in this posture. Rule 15(g)(4). However, in cases involving death or life sentences, we customarily examine the record before us for any error that might appear. We have done so in this case, and the record discloses that the indictment was proper in form, defendant was arraigned and duly entered a plea of not guilty, the verdict was properly returned and entered, and the judgment imposed was within the statutory limits.

The record did not contain the court's charge, and we must therefore presume that the court correctly instructed the jury on the applicable law and correctly applied the law to the facts of this case. *State v. Hines*, 266 N.C. 1, 145 S.E. 2d 363 (1965). We are unable to find any fatal defect on the face of the record on appeal. Further, there was overwhelming evidence in the record to show that the crime charged was committed and that defendant was the perpetrator of that crime.

We find no error prejudicial to defendant.

No error.

THURMAN LEE MOORE v. PETE ALVIN MOODY, HOWARD FERGUSON AND THE FORD MOTOR COMPANY, A CORPORATION

No. 71

(Filed 12 January 1982)

Appeal and Error § 20— denial of summary judgment—discretionary review by Supreme Court

Except in extraordinary circumstances, the Supreme Court will not consider, either by writ of certiorari or discretionary review, any denial of a motion for summary judgment prior to the entry of final judgment in the case.

ON certiorari pursuant to Rule 21 of the Rules of Appellate Procedure to review an order of *Llewellyn, J.*, at the 20 October 1980 Civil Session of NORTHAMPTON Superior Court denying defendants' motion for summary judgment. On 4 March 1981 we allowed defendant Ford Motor Company's petition for certiorari. We also treated the papers filed by defendant Ford Motor Company as a motion to bypass the Court of Appeals and granted that

motion. The Court of Appeals had denied an identical petition for certiorari by defendant Ford Motor Company on 21 January 1981.

Young, Moore, Henderson & Alvis, by Walter E. Brock, Jr., and Barbara B. Coughlin, for defendant-appellant Ford Motor Company.

Rosbon D. B. Whedbee and Perry W. Martin for plaintiff-appellee.

PER CURIAM.

The only question presented to this Court is whether the trial court erred in denying defendant Ford Motor Company's motion for summary judgment which motion was based upon the provisions of G.S. 1-50(6). The trial court concluded that the six year statute of limitations set forth in G.S. 1-50(6) was inapplicable to instant case, or if applicable, the statute was unconstitutional as applied to the facts of this case.

After a thorough and careful examination of the record, the briefs, and the authorities cited therein, and after giving due consideration to the oral arguments presented on this question, we conclude that the petition for writ of certiorari was improvidently allowed. The order allowing certiorari is hereby vacated. The decision of the trial court denying defendant's motion for summary judgment shall remain undisturbed and in full force and effect. Except in extraordinary circumstances, this Court will not consider, either by writ of certiorari or discretionary review, any denial of a motion for summary judgment prior to the entry of final judgment in a case wherein summary judgment was denied.

Certiorari improvidently granted.

N. C. GRANGE MUTUAL INSURANCE COMPANY AND AMERICAN HAIL MANAGEMENT, INC. v. THOMAS E. JOHNSON

No. 79

(Filed 12 January 1982)

BEFORE *Judge Preston* presiding at the 9 June 1980 Session of WAKE Superior Court plaintiff moved for summary judgment. *Judge Preston* allowed the motion, and the Court of Appeals affirmed in an opinion by *Judge Webb* in which *Judges Hedrick* and *Hill* concurred. 51 N.C. App. 447, 276 S.E. 2d 469 (1981). We allowed defendant's petition for further review on 9 July 1981.

Young, Moore, Henderson & Alvis, by Walter Brock, Jr., Attorney for plaintiff-appellees.

Franklin Smith, Attorney for defendant appellant.

PER CURIAM.

This is an action to recover $10,340 paid by plaintiff to defendant on a crop hail insurance policy on the ground that coverage under the policy had been suspended at the time of the loss because defendant breached the "other insurance" clause[1] in the policy.

The facts are not in dispute. Plaintiff issued its policy to become effective on 21 May 1978. Thereafter defendant applied for and was issued a second crop hail insurance policy by another insurer to become effective on 8 June 1978 on a portion of the same crop insured by plaintiff. Defendant did not give notice to plaintiff of this second policy. The hail loss occurred on 9 July 1978. Defendant filed proofs of loss with both insurers. In answer to a question on plaintiffs' proof of loss form defendant asserted

1. The clause provides:

"OTHER INSURANCE

It is hereby agreed that if other insurance is written on the insured interest in the above described crops this Company will be notified in writing of the amounts of such other insurance, including Federal Crop Insurance Corporation Coverage.

It is further agreed that unless or until so notified of such other insurance the coverage under this policy shall be suspended."

that he had no other crop hail insurance on the crop in question except that provided by the "Federal Government." Plaintiff paid defendant $10,340 for his loss. Thereafter plaintiff discovered the second crop hail insurance policy[2] and brought this action to recover what it had paid under its policy.

After reviewing the record and briefs, and hearing oral arguments on the questions presented, we conclude that the petition for further review was improvidently granted. Our order granting further review is, therefore, vacated. The decision of the Court of Appeals affirming the judgment of Wake Superior Court remains undisturbed and in full force and effect.

Discretionary review improvidently granted.

FRED M. SIMMONS AND WIFE, EUNICE S. SIMMONS v. UNITED STATES OF AMERICA, ACTING THROUGH THE FARMERS HOME ADMINISTRATION, U.S. DEPARTMENT OF AGRICULTURE, JAMES O. BUCHANAN, TRUSTEE

No. 121

(Filed 12 January 1982)

APPEAL as of right pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals which affirmed the trial court's dismissal of plaintiffs' action for lack of jurisdiction over the subject matter (G.S. 1A-1, Rule 12(h)(3)) entered by *Judge Howell* on 29 October 1980 in Superior Court, CLEVELAND County. The opinion of the Court of Appeals, reported at 53 N.C. App. 216, 280 S.E. 2d 463 (1981), is by *Judge Hedrick* with *Judge Martin (Harry C.)* concurring and *Judge Wells* dissenting in part.

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2. Apparently the second insurer has also repudiated its policy, but the reason does not clearly appear in the record.

Harold J. Bender, U.S. Attorney, by Max O. Cogburn, Jr., Assistant U.S. Attorney, and Lawrence B. Lee, Senior Attorney, Office of the General Counsel, U.S. Department of Agriculture, for defendant-appellee United States of America.

Hamrick, Mauney, Flowers, Martin & Deaton, by W. Robinson Deaton, Jr., for plaintiff-appellants.

PER CURIAM.

The facts are fully and accurately stated in the opinion of the Court of Appeals. For the reasons given in that opinion, the decision of the Court of Appeals is

Affirmed.

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

BONDURANT v. BONDURANT

No. 170.

Case below: 54 N.C. App. 493.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 12 January 1982. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 12 January 1982.

BURNS v. MEYERS

No. 108 PC.

Case below: 54 N.C. App. 191.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

CALDWELL v. ST. PAUL INSURANCE CO.

No. 128 PC.

Case below: 54 N.C. App. 346.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982.

CITY OF WINSTON-SALEM v. TICKLE

No. 65 PC.

Case below: 53 N.C. App. 516.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982.

COBB v. COBB

No. 149 PC.

Case below: 54 N.C. App. 230.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 12 January 1982.

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

COCHRAN v. CITY OF CHARLOTTE

No. 81 PC.

Case below: 53 N.C. App. 390.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 12 January 1982.

CRUTCHLEY v. CRUTCHLEY

No. 122 PC.

Now No. 10 PA 82.

Case below: 53 N.C. App. 732.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 12 January 1982.

DIXON v. KINSER and KINSER v. DIXON

No. 106 PC.

Case below: 54 N.C. App. 94.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982.

DUKE POWER v. WINEBARGER

No. 99 PC.

Case below: 54 N.C. App. 365.

Petition by defendants for discretionary review under G.S. 7A-31 denied 12 January 1982.

FAYNE v. FIELDCREST MILLS, INC.

No. 111 PC.

Case below: 54 N.C. App. 144.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

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

GILLESPIE v. DRAUGHN and GILLESPIE v. DRAUGHN

No. 135 PC.

Case below: 54 N.C. App. 413.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982.

GREENE v. MURDOCK

No. 75 PC.

Case below: 53 N.C. App. 552.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 January 1982.

HARRELL v. WHISENANT

No. 72 PC.

Case below: 53 N.C. App. 615.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982.

HARRIS v. RACING, INC. and HYDE v. RACING, INC.

No. 105 PC.

Case below: 53 N.C. App. 597.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

HEMRIC v. MANUFACTURING CO.

No. 136 PC.

Case below: 54 N.C. App. 314.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982.

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

HILLIARD v. CABINET CO.

No. 112 PC.

Now No. 8 PA 82.

Case below: 54 N.C. App. 173.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 12 January 1982.

HYDER v. WEILBAECHER

No. 133 PC.

Case below: 54 N.C. App. 287.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

IN RE MOORE

No. 57 PC.

Now No. 5 PA 82.

Case below: 53 N.C. App. 808.

Petition by Moore for discretionary review under G.S. 7A-31 allowed 12 January 1982.

IN RE TRULOVE

No. 113 PC.

Case below: 54 N.C. App. 218.

Petition by Board for discretionary review under G.S. 7A-31 denied 12 January 1982.

IN RE WHARTON

No. 124 PC.

Now No. 9 PA 82.

Case below: 54 N.C. App. 447.

Petition by Guilford County for discretionary review under G.S. 7A-31 allowed 12 January 1982.

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

JOINT VENTURE v. CITY OF WINSTON-SALEM

No. 109 PC.

Case below: 54 N.C. App. 202.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

LARSEN v. SEDBERRY

No. 103 PC.

Case below: 54 N.C. App. 166.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

LORDEON v. PETERS

No. 110 PC.

Case below: 54 N.C. App. 191.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982. Motion of Commissioner to dismiss appeal for lack of substantial constitutional question allowed 12 January 1982.

NEWMAN v. NEWMAN

No. 355 PC.

Case below: 53 N.C. App. 630.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

NOLAND CO. v. POOVEY

No. 88 PC.

Case below: 54 N.C. App. 695.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

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

PRUETT v. PRUETT

No. 114 PC.

Case below: 54 N.C. App. 191.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 12 January 1982.

S. F. McCOTTER & SONS v. O.H.A. INDUSTRIES

No. 107 PC.

Now No. 7 PA 82.

Case below: 54 N.C. App. 151.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 12 January 1982.

SHORE v. CHATHAM MANUFACTURING CO.

No. 146 PC.

Case below: 54 N.C. App. 678.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982.

SOUTHERN ATHLETIC/BIKE v. HOUSE OF SPORTS, INC.

No. 43 PC.

Case below: 53 N.C. App. 804.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 12 January 1982. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 12 January 1982.

SOUTHERN SPINDLE v. MILLIKEN & CO.

No. 85 PC.

Case below: 53 N.C. App. 785.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

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

STATE v. ELLERBEE

No. 132 PC.

Case below: 51 N.C. App. 249.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 January 1982.

STATE v. GUY and STATE v. YANDLE

No. 138 PC.

Case below: 54 N.C. App. 208.

Petition by defendant Yandle for writ of certiorari to North Carolina Court of Appeals denied 12 January 1982.

STATE v. JOHNSON

No. 71 PC.

Case below: 53 N.C. App. 631.

Petition by State for discretionary review under G.S. 7A-31 denied 12 January 1982.

STATE v. JONES

No. 26 PC.

Now No. 3 PA 82.

Case below: 53 N.C. App. 466.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 12 January 1982

STATE v. JOYNER

No. 73 PC.

Case below: 54 N.C. App. 129.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

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

STATE v. LINDER

No. 84 PC.

Case below: 25 N.C. App. 474.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 January 1982.

STATE v. LINEBERGER

No. 125 PC.

Case below: 54 N.C. App. 493.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

STATE v. LUCKEY

No. 145.

Case below: 54 N.C. App. 178.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 January 1982.

STATE v. MAHER

No. 144 PC.

Now No. 11 PA 82.

Case below: 54 N.C. App. 639.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 12 January 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 12 January 1982.

STATE v. MURRELL

No. 98 PC.

Case below: 54 N.C. App. 342.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 12 January 1982.

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

STATE v. PECK

No. 145 PC.

Now No. 12 PA 82.

Case below: 54 N.C. App. 302.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 12 January 1982.

STATE v. PENNELL

No. 123 PC.

Case below: 54 N.C. App. 252.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 January 1982.

STATE v. SIMMONS

No. 50 PC.

Case below: 52 N.C. App. 165.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 January 1982.

STATE v. SMITH

No. 86 PC.

Case below: 53 N.C. App. 809.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 January 1982.

STATE v. SMITH

No. 120 PC.

Case below: 54 N.C. App. 493.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 January 1982.

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

STATE v. SNIPES

No. 101 PC.

Case below: 54 N.C. App. 192.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

STATE v. THOMPSON

No. 96 PC.

Case below: 54 N.C. App. 192.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

THOMAS v. POOLE

No. 95 PC.

Case below: 54 N.C. App. 238.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

TOWN OF HUDSON v. MARTIN-KAHILL FORD

No. 134 PC.

Case below: 54 N.C. App. 272.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

WILLIAMS v. RICHARDSON

No. 76 PC.

Case below: 53 N.C. App. 663.

Petition by defendant for discretionary review under G.S. 7A-31 denied 12 January 1982.

APPENDIXES

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

ADDITIONS TO GENERAL RULES OF PRACTICE FOR SUPERIOR AND DISTRICT COURTS

AMENDMENTS TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

AMENDMENTS TO RULES RELATING TO DISCIPLINE AND DISBARMENT OF ATTORNEYS

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 9 of the North Carolina Rules of Appellate Procedure entitled "THE RECORD ON APPEAL—FUNCTION, COMPOSITION, AND FORM" is amended as follows:

The third paragraph of Rule 9(c)(1) is amended to read as follows:

> As an alternative to narrating the testimonial evidence as a part of the record on appeal, the appellant may cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposing party or parties or as settled by the trial tribunal as the case may be, to be filed with the clerk of the court in which the appeal is docketed. This alternative also may be used to present voir dire, jury instructions or other trial proceedings where those proceedings are the basis for one or more assignments of error and a stenographic transcript of those proceedings has been made. If this alternative is selected, the briefs of the parties must comport with Rule 28(b)(4) and 28(c); and, in criminal appeals, the District Attorney upon certification of the record shall forward one copy of the settled, certified transcript to the Attorney General of North Carolina.

Rule 28 of the North Carolina Rules of Appellate Procedure entitled "BRIEFS: FUNCTION AND CONTENT" is amended as follows:

Rule 28(b)(4) is amended to read as follows:

(4) If pursuant to Rule 9(c)(1) appellant utilizes the stenographic transcript of the evidence in lieu of narrating the evidence as part of the record on appeal, and if there are portions of the transcript which must be reproduced verbatim in order to understand a question presented in the brief and if, because of length, a verbatim reproduction is not contained in the body of the brief itself, such verbatim portions of the transcript shall be attached as appendixes to the brief. Reference may then be made in the argument of the question presented to the relevant appendix. It is not intended that an appendix be compiled to show the general nature of evidence or the absence of evidence relating to a particular question presented in the brief.

Adopted by the Court in Conference this 12th day of January, 1982, *to be effective for all appeals docketed after 15 March 1982.*

MEYER, J.
For the Court

Rule 15 of the North Carolina Rules of Appellate Procedure entitled "DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. § 7A-31" is hereby amended as follows:

First, by inserting after the words "Utilities Commission," in the first sentence of subsection (a) entitled "Petition of Party" the following:

"the North Carolina State Bar, the Property Tax Commission,"

Second, by amending the citation to "G.S. Chap. 15, Art. 22" in the same subsection (a) to read:

"G.S. Chap. 15A, Art. 89."

By Order of the Court in Conference, this 18th day of November, 1981.

MEYER, J.
For the Court

Rule 21 of the North Carolina Rules of Appellate Procedure entitled "CERTIORARI" is hereby amended as follows:

By rewriting subsection (a) to read as follows:

"(a) *Scope of the Writ.*

(1) *Review of the Judgments and Orders of Trial Tribunals.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) *Review of the Judgments and Orders of the Court of Appeals.* The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of decisions of the Court of Appeals in cases appealed from the North Carolina Utilities Commission, the North Carolina Industrial Commission, the North Carolina State Bar, the Property Tax Commission, or the Commissioner of Insurance."

Rule 21 of the North Carolina Rules of Appellate Procedure entitled "CERTIORARI" is hereby amended as follows:

By adding a new subsection (e) as follows:

"(e) *Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.* Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been sentenced to life imprisonment or death shall be filed in and determined by the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases."

Rule 26 of the Rules of Appellate Procedure entitled "Filing and Service" is amended by adding a new subsection (g) to read as follows:

(g) Size of Paper. All papers presented to the court for filing shall be letter size (8½" x 11"), with the exception of wills and exhibits.

This rule shall become effective July 1, 1982 for all appeals arising from cases filed in the court of original jurisdiction after that date.

By order of the Supreme Court in conference, this the 5th day of May 1981.

MEYER, J.
For the Court

Rule 26(c) of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, 738 is hereby amended to read as follows (new material appears in italics):

Manner of Service

Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, *or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.*

Adopted by the Court in Conference this 11th day of February 1982, to become effective upon adoption. This amendment shall be promulgated by the publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

MITCHELL, J.
For the Court

Rule 29(a)(1) of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, 746 is hereby amended to read as follows:

RULE 29

SESSIONS OF COURTS; CALENDAR FOR HEARINGS

(a) Sessions of Court

(1) Supreme Court. The Supreme Court shall be in continuous session for the transaction of business. Hearings in appeals will be held generally during the week beginning the Monday following the first Tuesday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

Adopted by the Court in Conference this 3rd day of March, 1982, to become effective upon adoption. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

MITCHELL, J.
For the Court

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Rule 5 of the General Rules of Practice for the Superior and District Courts entitled "Form of Pleadings" is amended by adding the following paragraph thereto:

> All papers presented to the court for filing shall be letter size (8½" x 11"), with the exception of wills and exhibits. The Clerk of Superior Court shall require a party to refile any paper which does not conform to this size.

This rule shall become effective July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

By order of the Supreme Court in conference, this the 5th day of May 1981.

MEYER, J.
For the Court

ADDITIONS TO GENERAL RULES OF PRACTICE FOR SUPERIOR AND DISTRICT COURTS

RULE 21

Jury Instruction Conference. At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions. The provisions of the first two paragraphs of this Rule 21 also apply to the giving of all additional instructions, except that the court in its discretion shall decide whether additional argument will be permitted.

Adopted by the Supreme Court in conference the 15th day of September 1981.

MEYER, J.
For the Court

RULE 22

Local Court Rules. In order to insure general uniformity throughout each respective judicial district, all trial judges shall observe and enforce the local rules in effect in any judicial district where they are assigned to hold court. The senior resident judge shall see that each judge *assigned to hold a session of court in his district* is furnished with a copy of the local court rules at or before the commencement of his assignment.

Adopted by the Supreme Court in conference the 21st day of September 1981.

MEYER, J.
For the Court

AMENDMENTS TO RULES GOVERNING ADMISSION TO THE 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 at the regular quarterly meeting of the Council of the North Carolina State Bar on April 16, 1982.

BE IT RESOLVED that Rule .0404(1), (2), (3) and (4) of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 NC 742 and as amended in 295 NC 747 be amended as follows:

§ .0404 FEES

(1) By deleting the figure of $170.00 and substituting in its place the figure $200.00.

(2) By deleting the figure $300.00 and substituting in its place the figure $345.00.

(3) By deleting the figure $170.00 and substituting in its place the figure $200.00.

(4) By deleting the figure $300.00 and substituting in its place the figure $345.00.

BE IT FURTHER RESOLVED that Rule .0502(2) of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appears in 289 NC 744 and as amended in 295 NC 747 be amended as follows:

§ .0502 REQUIREMENTS FOR COMITY APPLICANTS

(2) By deleting the figure $575.00 and substituting in its place the figure $625.00.

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 Governing Admission to the Practice of Law in the State of North Carolina have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at regular quarterly meeting, unanimously adopt said amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of April, 1982.

B. E. James, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law of 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 4th day of May, 1982.

Joseph Branch
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law of 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 4th day of May, 1982.

Mitchell, J.
For the Court

AMENDMENTS TO RULES RELATING TO DISCIPLINE AND DISBARMENT OF ATTORNEYS

The following amendments to the Rules and Regulations and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 1982.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Sections 14(13) and 14(20) as appear in 288 NC 758, 759, as amended in 300 NC 754 and 755, be and the same are hereby amended by adding a new section (13.1) and by rewriting the first sentence in (20) to read as follows:

§ 14 Formal Hearing.

(13.1) All papers presented to the Disciplinary Hearing Commission for filing shall be on letter size paper (8½ x 11 inches) with the exception of exhibits. The Secretary shall require a party to refile any paper that does not conform to this size. This rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

(20) All reports and orders of the Hearing Committee shall be signed by the members of the Committee or by the Chairman of the Hearing Committee on behalf of the Hearing Committee and shall be filed with the Secretary. The copy to the Defendant shall be served by registered or certified mail, return receipt requested. If the Defendant's copy mailed by registered or certified mail is returned as unclaimed, or undeliverable, then service shall be as provided in Rule 4 of the Rules of Civil Procedure.

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 have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at regular quarterly meeting, unanimously adopt said amendments to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of April, 1982.

B. E. James, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendments to the Disciplinary Rules 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 4th day of May, 1982.

Joseph Branch
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Disciplinary Rules 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 4th day of May, 1982.

Mitchell, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 6. Right to Appeal Generally

When plaintiff appealed a judgment n.o.v. with respect to punitive damages awarded him, defendants had the right to cross-appeal a judgment awarding plaintiff compensatory damages even though defendants received a judgment against their insurer for the amount they were deemed to owe plaintiff for compensatory damages. *Carawan v. Tate*, 696.

§ 20. Appellate Review of Nonappealable Interlocutory Orders by Certiorari

Except in extraordinary circumstances, the Supreme Court will not consider, either by certiorari or discretionary review, any denial of a motion for summary judgment prior to the entry of final judgment in the case. *Moore v. Moody*, 719.

ARREST AND BAIL

§ 1. Right of Private Citizen to Make Arrest

The defendant in a felony-murder prosecution was not entitled to an instruction on justification or excuse based upon the statute setting forth when a private person may detain another who has committed a crime in his presence where defendant fired a pistol into a vehicle occupied by the victim after the victim and another took two six packs of beer from the store in which defendant was working without paying for them. *S. v. Wall*, 609.

ATTORNEYS AT LAW

§ 11. Procedure for Disbarment Proceedings

The appropriate standard of review for decisions from the State Bar Disciplinary Hearing Commission is the "whole record" test as set out in the APA. *N.C. State Bar v. DuMont*, 627.

The legislature in 1969 had no intention of providing a constitutional right to jury trial for attorneys in disciplinary proceedings when it submitted Article I, § 25 to the people. *Ibid.*

AUTOMOBILES

§ 131.1. Sufficiency of Evidence of Hit and Run

The State's evidence was sufficient to support defendant's conviction as an accessory after the fact to felonious hit and run driving. *S. v. Fearing*, 499.

§ 131.2. Hit and Run; Instructions

Trial court erred in failing to instruct the jury that the State had to show that the driver knew that a person had been injured or killed in an accident to establish his guilt of felony hit and run. *S. v. Fearing*, 471; *S. v. Duvall*, 557.

BANKS AND BANKING

§ 3. Duties to Depositors

A rule under the heading "Bankbooks" in a savings account passbook providing that "No assignment or transfer of the Bank Book need be recognized by the Bank unless it consents thereto, and a memorandum thereof entered in said Book" restricted only the assignment of the passbooks and not the accounts. *Rosenstein v. Mechanics and Farmers Bank*, 541.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

Even if defendant's brothers were officers of the State because they hired a private prosecutor and statements made to them by defendant were thus discoverable, there was no merit to defendant's contention that admission of the statements was erroneous on the ground the State failed to supply the statements pursuant to defendant's request for discovery. *S. v. Misenheimer*, 108.

Defendant's due process right to discover elements of the State's case at the sentencing phase does not exceed such due process right at the guilt/innocence phase of a trial. *S. v. Taylor*, 249.

BURGLARY AND UNLAWFUL BREAKINGS

§ 7. Instructions on Lesser Included Offenses

Testimony in a first degree burglary and rape case that defendant asked the victim, "Where is Johnny?" did not tend to show that defendant did not initially intend to commit the felony of rape when he illegally entered the victim's home and did not require the court to submit the lesser offense of non-felonious breaking and entering. *S. v. Wright*, 349.

CONSTITUTIONAL LAW

§ 5. Separation of Powers

G.S. 143B-283(d) violates the Separation of Powers Clause of the North Carolina Constitution in providing for the appointment of four legislators to the Environmental Management Commission. *State ex rel. Wallace v. Bone*, 591.

§ 28. Due Process and Equal Protection in Criminal Proceedings

The felony-murder rule set forth in G.S. 14-17 does not establish a presumption of premeditation and deliberation in violation of due process and equal protection. *S. v. Wall*, 609.

Our system of superior court judge rotation is constitutionally valid. *S. v. Williams*, 394.

§ 30. Discovery

Defendant's due process right to discover elements of the State's case at the sentencing phase does not exceed such due process right at the guilt/innocence phase of a trial. *S. v. Taylor*, 249.

§ 31. Affording Accused Basic Essentials for Defense

The trial court did not err in denying defendant's motion for additional counsel, a research assistant, a statistician, and a jury selection expert. *S. v. Williams*, 394.

There was no abuse of discretion in the trial court's refusal to release defendant, who was charged with first degree murder and armed robbery, from custody in order that he might seek alibi witnesses. *Ibid.*

§ 32. Right to Fair and Public Trial

Defendants were not denied a fair trial in an armed robbery case because they were brought into the courtroom prior to commencement of the trial and placed in a railed "hold area" in the presence of the prospective jurors. *S. v. Smith*, 706.

Defendant's First and Fourth Amendment rights were not violated by the denial of his pretrial motion to prohibit all attorneys, their assistants, investigators,

CONSTITUTIONAL LAW — Continued

and employees, the Cabarrus County Superior Court Clerk, the County Sheriff, the County Jailer, police officials and other law enforcement officers and employees, and all witnesses associated with the case from commenting on it to any newspaper, radio, or television reporters, agents, or employees within Cabarrus County during the course of the proceedings. *S. v. Willams*, 394.

§ 45. Right to Appear Pro Se

The trial court did not err in denying defendant's motion to allow him to act as co-counsel with his court-appointed attorneys. *S. v. Williams*, 394.

It was not error for the trial judge to fail to conduct a hearing to determine whether defendant wished to represent himself after defendant stated to the court that he did not want a lawyer. *S. v. Gerald*, 511.

§ 46. Removal or Withdrawal of Appointed Counsel

The trial court did not err in failing, upon request, to discharge defendant's appointed counsel. *S. v. Johnson*, 680.

§ 48. Effective Assistance of Counsel

A defendant charged with first degree murder of his father was not denied the effective assistance of counsel by failure of his trial counsel to renew his motion to dismiss at the close of all the evidence, to present defendant as a witness, or to offer any psychiatric testimony about defendant's mental condition. *S. v. Misenheimer*, 108.

§ 56. Trial by Jury Generally

The arraignment of defendant's co-conspirators in the presence of prospective jurors was not violative of the provision in G.S. 15A-1213 providing that "[t]he judge may not read the pleadings to the jury" and did not violate defendant's right to trial by an impartial jury. *S. v. Elkerson*, 658.

§ 57. When Jury Trial Not Required

The legislature in 1969 had no intention of providing a constitutional right to jury trial for attorneys in disciplinary proceedings when it submitted Article I, § 25 to the people. *N.C. State Bar v. DuMont*, 627.

§ 60. Racial Discrimination in Jury Selection Process

Where defendant failed to rebut the regularity in the drawing or selection of the jury, his contention that the court erred in denying his motion to require the clerk to provide him with the racial makeup of the jury panel must fail. *S. v. Elkerson*, 658.

§ 62. Challenges to Jury

Defendant's reliance on G.S. 15A-1212(3), permitting challenges for cause where a juror participates "in criminal or civil proceedings involving a transaction which relates to the charge against the defendant," was misplaced in a case in which his co-conspirators were arraigned before prospective jurors. *S. v. Elkerson*, 658.

§ 80. Death and Life Imprisonment Sentences

A sentence of life imprisonment for a felony-murder is not cruel and unusual punishment. *S. v. Wall*, 609.

The death penalty statute is not unconstitutional on the ground that it constitutes cruel and unusual punishment and it does not impermissibly extend the Court's jurisdiction without a constitutional amendment. *S. v. Williams*, 394.

CONTRACTS

§ 28. Instructions in Actions Involving Contracts

In an action to recover damages for breach of contract, evidence was insufficient to raise a question for the jury as to whether parties intended to enter into a thirty month contract or whether they intended to enter a contract for a renewal term; therefore, the trial court did not err in failing to so instruct the jury. *Uniform Service v. Bynum International, Inc.*, 174.

CORPORATIONS

§ 1. Corporate Existence

Plaintiff's forecast of evidence was sufficient to allow it to proceed to trial on the theory that defendant was conducting his business as an individual rather than as a corporation and was personally liable to plaintiff for repairs to trucks which had been transferred by defendant to a corporation. *Bone International, Inc. v. Brooks*, 371.

COURTS

§ 9.1. Review of Another Judge's Rulings Affecting Conduct of Litigation

The trial judge erred in granting the State's renewed motion for a special jury venire from another county after another judge had denied the special venire approximately 6 months earlier. *S. v. Fearing*, 499; *S. v. Duvall*, 557.

CRIME AGAINST NATURE

§ 3. Evidence

The evidence was sufficient to convict defendants of a first degree sexual offense where it tended to show that (1) the defendants engaged in a "sexual act" as defined by G.S. 14-27.1(4), (2) "by force and against the will" of the victim, and (3) each defendant was aided and abetted by one or more other persons. *S. v. Locklear*, 534.

CRIMINAL LAW

§ 5. Mental Capacity

The trial court in a first degree murder case properly excluded testimony by a psychologist that he had concluded from testing defendant that defendant had an I.Q. of 54 and that defendant's mental deficiency would cause him to use poor judgment and be "impulsive in his responses." *S. v. Marshall*, 167.

§ 6. Mental Capacity as Affected by Alcohol

In a prosecution for second degree murder, defendant's evidence was insufficient to require the trial judge to instruct the jury on the defense of voluntary intoxication. *S. v. Gerald*, 511.

§ 13. Jurisdiction in General

Defendant's motion for appropriate relief upon the ground that the indictment was fatally defective could properly be made for the first time in the appellate division. *S. v. Sturdivant*, 293.

§ 15.1. Motion for Change of Venue on Ground of Pretrial Publicity

The trial judge did not abuse his discretion when he denied defendant's pretrial motion for a change of venue because of pretrial publicity. *S. v. Williams*, 394.

CRIMINAL LAW — Continued

§ 16.1. Jurisdiction of Superior and District Courts

Superior court had original jurisdiction of a prosecution for the misdemeanor of death by vehicle where that charge was consolidated for trial with a felony charge of hit and run driving. *S. v. Fearing*, 471.

§ 26. Plea of Former Jeopardy

Imposition of punishment for an armed robbery conviction was entirely proper where the first degree murder conviction under the felony murder rule was premised on the underlying felony of breaking or entering and felonious larceny. *S. v. Murvin*, 523.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

There was no violation of the double jeopardy clause in considering rape as part of the crime of kidnapping and as a crime in itself. *S. v. Jones*, 323.

§ 33. Facts in Issue and Relevant to Issues in General

In a prosecution for second degree murder where there was evidence that defendant called the deputy sheriff and complained about threats made by and trouble with five boys, including the deceased, and the deputy sheriff advised defendant that his office could not do anything until the defendant had a warrant issued for communicating a threat, the trial court did not err in failing to allow defendant to cross-examine the deputy sheriff as to his knowledge of the statute specifying when an officer may arrest without a warrant. *S. v. Atkins*, 582.

§ 33.1. Evidence as to Identity of Perpetrator

A rape victim's testimony that she thought her assailant had asked her whether she knew "Leon Sales," a name which had some similarity to defendant's name, was relevant to prove the identity of her assailant. *S. v. Searles*, 149.

§ 34. Inadmissibility of Evidence of Defendant's Guilt of Other Offenses

In a prosecution of two defendants for various sexual offenses, an officer's rebuttal testimony that one defendant admitted to him that he had committed a similar sexual offense with a prostitute some seven months prior to the acts in question was too remote to show a common scheme or plan, and its admission was prejudicial error which entitled both defendants to a new trial. *S. v. Shane*, 643.

§ 34.2. Admission of Inadmissible Evidence as Harmless Error

Testimony about statements made by defendant to a witness about other crimes he had committed and statements made by defendant to police concerning his kidnapping of the witness were improperly admitted; however, the error was harmless. *S. v. Taylor*, 249.

§ 34.4. Admissibility of Evidence of Other Offenses

In a prosecution for first degree rape, evidence that defendant accosted and choked one woman and robbed, choked and forced another woman to remove her clothes and took her knife and car within a four hour period prior to the matter on trial was relevant as a part of the chain of circumstances leading up to the matter on trial and to show a common plan or scheme. *S. v. Rick*, 356.

§ 34.5. Admissibility of Evidence of Other Offenses to Show Identity of Defendant

In a prosecution for murder and armed robbery, the trial judge did not err in admitting evidence of a murder and armed robbery that occurred hours prior to the

murder and robbery in question as the evidence of the earlier crime tended to show intent and identity. *S. v. Williams*, 394.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Intent and Motive

An accomplice's testimony that defendant told him he had obtained illegal drugs in Ohio by robbing drug stores in a manner similar to the attempted armed robbery in question was competent to show defendant's intent and motive. *S. v. Irwin*, 93.

Testimony by a rape and burglary victim that defendant told her "that wasn't the first time anything like this had happened, . . . that he enjoyed degrading white women" was competent to show defendant's motive for sexually assaulting the victim and his criminal intent when he unlawfully entered her home. *S. v. Searles*, 149.

§ 42. Articles Connected with Crime

Defendant's stipulation as to the victim's cause of death did not relieve the State of the burden to prove its entire case beyond a reasonable doubt, and admission of photographs and physical evidence relating to the victim, a pistol and bullets was not error. *S. v. Elkerson*, 658.

§ 43. Photographs

Photographs of defendant's car were properly admitted to illustrate the testimony of an officer tending to show that a hit and run was committed with defendant's car and that a subsequent effort had been made to conceal this fact at a body shop. *S. v. Fearing*, 499.

§ 46.1. Flight of Defendant as Implied Admission; Competency of Evidence

An officer's testimony was competent to show flight and to place defendant in close proximity to a gun found by the police notwithstanding it may have also tended to show defendant's involvement in a separate and distinct crime. *S. v. Rankin*, 577.

§ 50.2. Opinion of Nonexpert

The trial court did not err in failing to allow defendant's witness, who was not qualified as an expert, to testify as to his opinion of the prejudices white jurors unopposed to capital punishment would be likely to harbor against a black criminal defendant. *S. v. Taylor*, 249.

§ 53.1. Medical Expert Testimony as to Cause of Death

A pathologist was properly permitted to give an expert opinion on the cause of death based solely upon his personal observations and the factual knowledge he thereby obtained during his examination of deceased's body without testifying in response to a hypothetical question. *S. v. Fearing*, 499.

§ 63. Evidence as to Sanity of Defendant

It was error to permit the district attorney to cross-examine defendant's psychiatrist using a report about defendant's competency to stand trial made by a second psychiatrist who did not testify. *S. v. Taylor*, 249.

§ 66.1. In-court Identification of Defendant; Competency of Witnesses

Three in-court identifications of defendant were competent as two identifications were given by witnesses of the shooting and the third was given by a taxi driver who transported the defendant. *S. v. Taylor*, 249.

CRIMINAL LAW — Continued

§ 66.3. In-court Identification of Defendant; Findings of Court

Defendant's argument that he was unable to refute the testimony of two witnesses who made in-court identifications of him because the State did not disclose information concerning the procedures used when these witnesses made out-of-court identifications is without merit. *S. v. Taylor*, 249.

§ 73.3. Statements Not Within Hearsay Rule; Statements Showing State of Mind

Statements made by a driver to an officer in defendant's presence concerning the circumstances of an accident did not constitute inadmissible hearsay against defendant but were competent (1) as part of the res gestae and (2) as evidence of defendant's knowledge and state of mind. *S. v. Fearing*, 499.

§ 73.4. Statements Not Within Hearsay Rule; Res Gestae

In a prosecution for first degree murder, the trial court did not err in allowing the witness to testify as part of the res gestae on direct examination that his son returned to the car and told him that defendant "had the guard on the floor." *S. v. Murvin*, 523.

§ 75. Tests of Voluntariness of Confession

The preponderance of the evidence test is the appropriate standard to be applied by the trial courts in N.C. in determining the voluntariness of a confession under G.S. 15A-977. *S. v. Johnson*, 680.

§ 75.2. Confession; Effect of Promises by Officers

The evidence on voir dire supported the court's determination that defendant's confession to a murder was not induced by an offer of help to keep defendant from receiving the death penalty so that he would receive help for his drinking and drug problems. *S. v. Rook*, 201.

Any statements by officers concerning help for defendant with his drinking and family problems would not render defendant's confession involuntary. *Ibid.*

§ 75.6. Confession; Requirement that Defendant Be Warned of Constitutional Rights

The evidence supported the trial court's conclusion that defendant's two statements were voluntarily made with full knowledge of his constitutional rights even though he was advised of his Miranda rights only once. *S. v. Artis*, 378.

§ 75.14. Defendant's Mental Capacity to Confess

The evidence on voir dire did not compel a conclusion that defendant lacked sufficient mental capacity to confess voluntarily to the murder of his father, although defendant had experienced psychiatric problems in the past and apparently entertained delusions about his father. *S. v. Misenheimer*, 108.

§ 76.4. Confession; Conduct of Voir Dire Hearing Generally; Evidence

The trial court's refusal to allow defense counsel to preserve the defendant's answers in the record concerning evidence seized during the illegal search of defendant's bedroom constituted error which rendered the Court unable to determine the voluntariness of defendant's confession and, therefore, constituted prejudicial error. *S. v. Silva*, 122.

§ 77. Admissions and Declarations of Persons Other than Defendant

Defendant was not denied his constitutional right to confront a witness who testified against him where a codefendant, at the time of a pretrial voir dire, re-

CRIMINAL LAW — Continued

fused to testify concerning alleged inculpatory statements made by her to police officers, but, at trial, testified and defense counsel extensively cross-examined her. *S. v. Williams*, 394.

§ 77.3. Admissions of Codefendants

In a first degree murder and armed robbery trial, the court did not err in admitting the testimony of defendant's girlfriend which resulted from a plea bargain arrangement and which implicated defendant even though there was evidence that her original statements to police had been coerced. *S. v. Williams*, 394.

§ 82.1. Attorney-Client Privilege

The court erred in concluding that an affidavit which a witness executed was within the scope of the attorney-client privilege as an aunt and a friend were present when she made the statement to her attorney and the affidavit did not relate to a matter for which she was professionally consulting her attorney. *S. v. Murvin*, 523.

§ 82.2. Physician-Patient Privilege

Where a psychiatrist was appointed by the court and was a witness for the court, there was no error in allowing the written evaluation of defendant to be released to the district attorney as no physician-patient privilege existed. *S. v. Taylor*, 249.

§ 84. Evidence Obtained by Unlawful Means

Evidence obtained from defendant's person after he was lawfully arrested pursuant to a warrant was admissible at his trial. *S. v. Sturdivant*, 293.

§ 85.2. Character Evidence; State's Evidence Generally

Defendant's witness's testimony concerning defendant moved her testimony beyond the bounds of merely being a character witness and thus expanded the scope of permissible cross-examination of her to particular acts of misconduct by defendant and questions about her possible bias. *S. v. Taylor*, 249.

§ 86.1. Impeachment of Defendant

Rebuttal testimony that defendant told an officer that he participated in a sexual offense with a prostitute some seven months before the crimes in question constituted improper impeachment of defendant's testimony upon a collateral matter. *S. v. Shane*, 643.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

Questions to defendant relating to whether he resigned from a police department because of sexual improprieties were not competent for impeachment purposes in that they included references to mere allegations of misconduct and failed to identify a specific act. *S. v. Shane*, 643.

§ 86.8. Credibility of State's Witnesses

In a prosecution of defendant for first degree murder of his father wherein the trial court permitted defense counsel to ask brothers and sisters of defendant on cross-examination whether they were among family members who had employed a private prosecutor, the trial court did not err in refusing to permit further cross-examination of defendant's siblings concerning their motives for hiring the private prosecutor. *S. v. Misenheimer*, 108.

CRIMINAL LAW — Continued

§ 87.1. Leading Questions

The defendant failed to show abuse of discretion on the part of the trial judge where he allowed numerous leading questions by the district attorney. *S. v. Williams*, 394.

Trial court did not abuse its discretion in permitting the prosecutor to ask an officer leading questions pertaining to the license number of the car operated by defendant on the night of a burglary and robbery. *S. v. Rankin*, 577.

§ 89. Credibility of Witnesses

Deaf and mute persons are not incompetent as witnesses merely because they are deaf and mute if they are able to communicate the facts by a method which their infirmity leaves available to them and are of sufficient mental capacity to observe the matters as to which they will testify and to appreciate the obligation of an oath. *S. v. Galloway*, 485.

§ 89.3. Corroboration of Witnesses; Prior Statements

The trial court did not err in allowing a deputy sheriff and an S.B.I. agent to testify concerning statements made by a co-conspirator who was a witness for the State after charges against him were disposed of through plea bargaining. *S. v. Elkerson*, 658.

§ 90. Rule that Party Is Bound by and May Not Discredit Own Witness

Asking the State's witness "Were you saying that you were uncertain that he was the man that walked in the store with the gun?" was not improper as the purpose of this question was to question whether defendant was the one who actually pulled the trigger. *S. v. Williams*, 394.

§ 91. Speedy Trial

G.S. 15A-702 does not exempt counties with limited court sessions from the operation of the time limits stated in G.S. 15A-701, but justifiable delay caused by a county's number of court sessions is a period which may be excluded from the required time table of G.S. 15A-701. *S. v. Fearing*, 499.

The following periods of time were properly excluded from the statutory speedy trial period: time consumed by the disposition of the State's motions for a special jury venire from another county; time elapsing between the court's denial of the State's first motion for a special venire and the next regularly scheduled term of court in the county; time during which a continuance was granted to defendant; and time between the date the trial judge ordered the selection of a special jury venire from another county until the date of trial. *Ibid.*

§ 91.1. Continuance

The trial judge did not abuse his discretion in failing to allow a continuance of defendant's trial until the disposal of charges brought against him concerning a killing and robbery which occurred shortly before the robbery and murder for which he was tried. *S. v. Williams*, 394.

§ 91.7. Continuance on Ground of Absence of Witness

Defendant was not denied the effective assistance of counsel by the court's order granting him a continuance of only two days in which to locate a witness. *S. v. Searles*, 149.

§ 92.4. Consolidation Proper

There was no abuse of discretion on the part of the trial court in consolidating the charges of felonious larceny of an automobile, conspiracy to commit armed rob-

bery and robbery with a dangerous weapon where at the time the consolidation order was entered there appeared to be a sufficient transactional connection among the three offenses. *S. v. Silva*, 122.

§ 98.3. Custody of Defendant During Trial

Defendants were not denied a fair trial in an armed robbery case because they were brought into the courtroom prior to commencement of the trial and placed in a railed "hold area" in the presence of the prospective jurors. *S. v. Smith*, 706.

§ 101.2. Exposure of Jurors to Publicity or Evidence Not Formally Introduced

The use of the words "gas chamber" by the trial judge in an article published about 30 days prior to trial did not result in prejudicial error warranting a new trial. *S. v. Williams*, 394.

§ 102.1. Scope of Argument

Any impropriety in the prosecutor's reference in his jury argument to the facts of a decided case was cured by the court's immediate sustention of an objection thereto. *S. v. Wright*, 349.

§ 102.5. Prosecutor's Conduct in Examining Defendant and Other Witnesses

In a trial for first degree rape, there was nothing to indicate that the State was making inquiry of witnesses as to what their testimony was at a preliminary hearing. *S. v. Galloway*, 485.

The trial court erred in a prosecution for first degree rape by allowing the district attorney to make inquiry concerning a tatoo of the word "sex" on defendant's arm; however, the error was not prejudicial. *Ibid.*

Defendant was not entitled to a new trial for prosecution of first degree rape on the basis that the district attorney violated a pretrial agreement that no questions concerning his record would be asked. *Ibid.*

§ 102.6. Particular Comments in Jury Argument

In a prosecution for hit and run and death by vehicle, the district attorney's argument that the State could not call defendant's wife, an occupant of the car, as a witness was invited by defense counsel's argument that the State could have called occupants of the car as witnesses and was not error. *S. v. Fearing*, 471.

§ 112.7. Instructions on Affirmative Defenses

Defendant's contention that the trial court's references to the defense of insanity during the instructions to the jury on the elements of second degree murder and voluntary manslaughter were prejudicially complicated was without merit. *S. v. Gerald*, 511.

§ 113.3. Request for Instructions on Subordinate Feature of Case Required

There is no ground for exception that a trial judge failed to instruct a jury in a final charge as to the nature of corroborative evidence unless his attention is called to the matter by a prayer for instruction. *S. v. Elkerson*, 658.

§ 128.2. Power to Order Mistrial; Particular Grounds

The trial court did not err in failing to declare a mistrial because of the prosecutor's substantive use in his jury argument of a statement by defendant which had been admitted for impeachment purposes or because the jury failed to reach a verdict after deliberating for four and a half hours. *S. v. Wall*, 609.

CRIMINAL LAW — Continued

§ 135.3. Judgment and Sentence; Exclusion of Veniremen Opposed to Death Penalty

Excluding jurors because of their opposition to the death penalty, "death qualification," is proper, and the same jury should hear both the guilt/innocence and the penalty phases of the trial unless the original jury is "unable to convene." *S. v. Taylor*, 249.

§ 135.4. Judgment and Sentence in Cases Under G.S. 15A-2000

Where defendant was found guilty of first degree murder on both premeditation and deliberation and felony murder theories, the trial court properly submitted the underlying felony of rape as an aggravating circumstance. *S. v. Rook*, 201.

The "especially heinous, atrocious or cruel" aggravating circumstance is not unconstitutionally vague. *Ibid.*

The trial court did not err in permitting the jury to return its recommendation for a sentence of death in a first degree murder case without requiring the jury to indicate in writing its finding as to each mitigating circumstance submitted to it. *Ibid.*

Admission of testimony offered by the State solely to refute mitigating circumstances upon which defendant might later rely was error; however, it was harmless. *S. v. Taylor*, 249.

Evidence that defendant was convicted and sentenced for the crime of rape in another state was admissible at the sentencing phase to support the aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person. *Ibid.*

Both the defendant and the State should be allowed to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation in the sentencing proceeding. *Ibid.*

Cross-examination of the Deputy Warden at Central Prison during the sentencing phase concerning a specific murder committed in Central Prison placed before the jury irrelevant evidence of an unrelated crime but did not constitute prejudicial error. *Ibid.*

The trial court did not err in excluding testimony by defense witnesses on the religious, ethical, legal and public policy perspectives of capital punishment at the sentencing phase of defendant's trial. *Ibid.*

As the defendant was convicted of first degree murder under the felony murder rule, it was error for the trial judge to submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony; however, the error was harmless. *Ibid.*

In a felony-murder case in which the underlying felony was robbery, it was not error for the trial court to instruct the jury that they could consider as an aggravating circumstance that the murder was committed for pecuniary gain. *Ibid.*

The trial court's instructions on the mitigating circumstances found in G.S. 15A-2000(f)(2) and (6) were sufficient. *Ibid.*

Evidence of a plea bargain agreement between the State and a codefendant was not admissible as a mitigating circumstance in a sentencing hearing in a first degree murder case. *S. v. Irwin*, 93.

Voluntary intoxication at the time of the commission of a murder does not constitute the mitigating factor of being under the influence of mental or emotional disturbance but may properly be considered as relating to the impaired capacity mitigating circumstance. *Ibid.*

CRIMINAL LAW — Continued

Trial court properly submitted the aggravating circumstance as to whether a murder was committed for pecuniary gain in a trial in which defendant was convicted of first degree murder under the theory that the murder was committed in the perpetration of an attempted armed robbery. *Ibid.*

Trial court committed prejudicial error in submitting the aggravating circumstance as to whether a murder was committed while defendant was an aider or abettor in the commission of the crime of kidnapping where the evidence was insufficient to support a conviction for kidnapping. *Ibid.*

An indictment need not allege one or more aggravating circumstances to support a judgment imposing the death penalty. *S. v. Williams*, 394.

In a prosecution for murder and armed robbery, the trial court erred in submitting the aggravating circumstance that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." *Ibid.*

§ 138.2. Cruel and Unusual Punishment

A sentence of life imprisonment for a felony-murder is not cruel and unusual punishment. *S. v. Wall*, 609.

§ 142.3. Conditions of Probation Held Proper

A condition of defendant's probation for felonious possession of stolen credit cards that he not operate a motor vehicle from 12:01 a.m. until 5:30 a.m. during the three-month period of probation was reasonably related to defendant's rehabilitation and was valid. *S. v. Cooper*, 180.

A defendant cannot question the legality of a condition of probation unless he raises the issue no later than the hearing at which his probation is revoked. *Ibid.*

§ 143.13. Appeal from Order of Revocation of Probation

Defendant's motion for appropriate relief on the ground that he was denied his right to appointed counsel at his trial for bastardy at which he was given a suspended sentence is not yet ripe for appellate review where the trial court has not determined whether defendant willfully failed to comply with the court's judgment and has not invoked the suspended sentence. *S. v. McCoy*, 363.

§ 146.1. Appeal Limited to Questions Raised in Lower Court

Assignments of error not presented to the Court of Appeals are not properly presented to the Supreme Court. *S. v. Hurst*, 709.

§ 146.6. Appeal Where Issue Is Moot

Questions relating to the sentencing phase of a first degree murder trial are moot where the jury recommended that defendant be given a life sentence. *S. v. Marshall*, 167.

§ 147. Motions in the Appellate Court

As the materials before the Court were insufficient to make a determination on defendant's motion for appropriate relief, the Court could remand the motion to the trial court; however, the Court, in this case, determined the better procedure to be to dismiss the motion. *S. v. Hurst*, 709.

§ 149.1. Appeal by State Not Permitted

Under G.S. 15A-1445, the State has no right to appeal the trial judge's refusal to submit any of the aggravating circumstances under G.S. 15A-2000 to the jury at the sentencing phase of defendant's trial. *S. v. Elkerson*, 658.

CRIMINAL LAW — Continued

§ 158. Conclusiveness and Effect of Record

The Court is bound by the record before it, and in the absence of anything in the record to indicate otherwise, must assume that the trial judge ruled properly on matters before him. *S. v. Williams*, 394.

§ 161. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General

Where counsel for defendant withdrew all assignments of error as being without merit but requested the Court to review the record on appeal to determine whether there exists any prejudicial or reversible error, the Court under Rule 2 of the Rules of Appellate Procedure had authority to review the entire record even though Rule 28 limits their review to questions presented. *S. v. Poplin*, 185.

§ 168.2. Particular Errors in Instructions as Harmless

Incomplete instructions to the jury pool concerning their duty should the trial reach the sentencing phase were not prejudicial error as correct instructions were given to the jury during the sentencing phase. *S. v. Taylor*, 249.

§ 169.3. Error in Admission of Evidence Cured by Introduction of Other Evidence

When evidence that one of the victims was pregnant at the time she was shot was admitted without objection, the benefit of a later objection was lost. *S. v. Taylor*, 249.

DAMAGES

§ 12.1. Pleading Punitive Damages

In a civil action in which plaintiff alleged assault and battery, his complaint was sufficient to state a cause of action for punitive damages. *Shugar v. Guill*, 332.

§ 17.7. Punitive Damages

The evidence presented on the issue of punitive damages in plaintiff's action for assault and battery was insufficient to carry the issue to the jury. *Shugar v. Guill*, 332.

EXECUTORS AND ADMINISTRATORS

§ 33.1. Family Agreements; Necessity of Bona Fide Controversy as to Validity of Will

In order for a promise not to contest a will to constitute consideration to support a family settlement agreement modifying a will, there must be a *bona fide* dispute as to the validity of the will in question. *Holt v. Holt*, 137.

Plaintiff failed to rebut defendants' showing that there was no bona fide dispute as to a codicil's validity, and summary judgment was properly entered for defendants. *Ibid.*

HOMICIDE

§ 4.2. Murder in Commission of Felony

Defendant's conviction of first degree felony murder could properly be based upon the underlying felony of discharging a firearm into an occupied vehicle. *S. v. Wall*, 609.

HOMICIDE — Continued

§ 14.2. Burden of Proof on the State

The felony-murder rule set forth in G.S. 14-17 does not establish a presumption of premeditation and deliberation in violation of due process and equal protection. *S. v. Wall*, 609

§ 15.2. Competency of Evidence of Defendant's Mental Condition, Malice

Trial court in a homicide case did not commit prejudicial error in refusing to permit defendant to testify whether he had the intention of killing the victim. *S. v. Wilson*, 689.

§ 20. Photographs

Defendant's stipulation as to the victim's cause of death did not relieve the State of the burden to prove its entire case beyond a reasonable doubt, and admission of photographs and physical evidence relating to the victim, the pistol and the bullets was not error. *S. v. Elkerson*, 658.

§ 21.1. Sufficiency of Evidence Generally

Trial court properly admitted photographs of a murder victim's body and of the service station where the homicide took place. *S. v. Marshall*, 167.

§ 21.5. Sufficiency of Evidence of First Degree Murder

In a prosecution of defendant for the murder of his father which occurred after defendant and his father had engaged in a struggle, the jury could properly find that the killing was the product of an earlier formed specific intent to kill rather than an intent formed under the influence of the provocation of the struggle and that defendant was thus guilty of first degree murder. *S. v. Misenheimer*, 108.

The evidence was sufficient to permit the jury to find that defendant killed the victim with premeditation and deliberation where defendant obtained a weapon and shot the victim after defendant and the victim had engaged in a scuffle. *S. v. Marshall*, 167.

Submission of a charge of first degree murder to the jury under the theory of premeditation and deliberation was not improper because the State introduced a confession containing defendant's statements that he did not mean to strike the victim with a knife or to run over her with a car. *S. v. Rook*, 201.

§ 21.6. Sufficiency of Evidence of First Degree Murder; Homicide in Perpetration of Felony

The State's evidence was sufficient to support findings by the jury that deceased died from a gunshot wound received during an attempted armed robbery, that defendant fired the fatal shot, and that defendant was thus guilty of first degree murder under the felony murder rule. *S. v. Irwin*, 93.

§ 23. Instructions in General

The defendant in a felony-murder prosecution was not entitled to an instruction on justification or excuse based upon the statute setting forth when a private person may detain another who has committed a crime in his presence where defendant fired a pistol into a vehicle occupied by the victim after the victim and another took two six packs of beer from the store in which defendant was working without paying for them. *S. v. Wall*, 609.

§ 25.1. Instructions in Felony Murder Cases

In felony murder cases, the law in this State is that premeditation and deliberation are presumed; therefore, an instruction that the intent of the defendant did not matter was not erroneous. *S. v. Taylor*, 249.

HOMICIDE — Continued

§ 27.2. Instructions on Involuntary Manslaughter

Defendant was not prejudiced by the court's instruction defining involuntary manslaughter as the "unlawful" rather than the "unintentional" killing of a human being by an unlawful act not amounting to a felony or an act done in a criminally negligent way. *S. v. Misenheimer*, 108.

§ 28.1. Duty of Court to Instruct on Self-Defense

The evidence in a first degree murder case was insufficient to require an instruction on either perfect or imperfect self-defense. *S. v. Wilson*, 689.

§ 30.2. Submission of Lesser Offenses; Manslaughter

Defendant in a first degree murder trial was not prejudiced by the failure of the trial court to charge on voluntary manslaughter where defendant was found guilty of first degree murder on the theory of felony-murder and was found not guilty on the charge of first degree murder with premeditation and deliberation. *S. v. Wall*, 609.

§ 30.3. Submission of Lesser Offenses; Involuntary Manslaughter

Defendant's statement that he thought the victim was reaching under the seat of a truck for a gun and "then the gun went off," when taken in context with his other testimony, including a statement that "when I pulled the trigger on the shotgun, he went down," and when taken in context with a written statement to the police on the night of the shooting in which defendant admitted that he pulled the trigger and shot the victim in the head, was insufficient evidence to raise an inference that the shooting was unintentional and to require an instruction on involuntary manslaughter. *S. v. Gerald*, 511.

§ 31. Verdict

Imposition of punishment for an armed robbery conviction was entirely proper where the first degree murder conviction under the felony murder rule was premised on the underlying felony of breaking or entering and felonious larceny. *S. v. Murvin*, 523.

The trial court did not err in permitting the jury to return its recommendation for a sentence of death in a first degree murder case without requiring the jury to indicate in writing its finding as to each mitigating circumstance submitted to it. *S. v. Rook*, 201.

HUSBAND AND WIFE

§ 9. Liability of Third Person for Injury to Spouse

The decision in *Nicholson v. Hospital*, 300 N.C. 295, which recognized a cause of action for loss of a spouse's consortium, will be applied retrospectively. *Cox v. Haworth*, 571.

INDICTMENT AND WARRANT

§ 6.2. Sufficiency of Evidence to Support Issuance

An officer's affidavit supplied probable cause for the issuance of a warrant for defendant's arrest for rape. *S. v. Sturdivant*, 293.

§ 13.1. Discretionary Denial of Motion for Bill of Particulars

The trial court correctly denied defendant's motion for a bill of particulars as it requested some matters which were capable of being ascertained by viewing the murder scene and it requested "matters of evidence." *S. v. Williams*, 394.

INDICTMENT AND WARRANT — Continued

A defendant does not have a constitutional right to a bill of particulars stating the aggravating circumstances upon which the State will rely in seeking the death penalty. *S. v. Taylor*, 249.

§ 14. Grounds for Motion to Quash

The trial court did not err in denying defendant's motion to quash the indictment and dismiss the charges against him on the ground that the indictments were based upon a coerced confession by a witness which implicated defendant. *S. v. Williams*, 394.

INSURANCE

§ 142. Actions on Burglary and Theft Policies; Provisions as to Visible Marks or Evidence

In an action on a burglary policy the evidence was sufficient for the loss to come within the provision of an insurance policy requiring theft by actual force and violence as evidenced by physical damage to the interior of the premises at the place of exit. *Norman v. Banasik*, 341.

JUDGES

§ 1. Regular Judges

Our system of superior court judge rotation is constitutionally valid. *S. v. Williams*, 394.

JURY

§ 2.1. Discretion of Trial Court in Granting Motion for Special Venire

The trial judge erred in granting the State's renewed motion for a special jury venire from another county after another judge had denied the special venire approximately 6 months earlier. *S. v. Fearing*, 499; *S. v. Duvall*, 557.

§ 5.2. Discrimination and Exclusion in Selection of Jury

A question of the chairman of a county's jury commission asking him how he could explain the fact that 23% of the county's population was black but only 17% of the jury list was black was properly excluded. *S. v. Taylor*, 249.

Defendant failed to establish a prima facie violation of the Sixth Amendment fair cross-section requirement for juries where the disparity in the racial composition of the jury was only 6.3% and the jury pool was compiled as required by G.S. 9-2. *Ibid.*

§ 6. Voir Dire; Practice and Procedure

Defendant failed to show that the trial court erred in the denial of his motion "for individual voir dire." *S. v. Marshall*, 167.

The court did not err in denying defendant's motion to require the district attorney and his staff to disclose personal, business, social, church, and civic ties with the prospective jurors as the proper way to inquire into such matters is on the jury voir dire. *S. v. Williams*, 394.

§ 6.2. Form of Questions on Voir Dire

There was no error in the refusal of the trial court to allow defendant to ask hypotheticals which were incomplete and overly broad of prospective jurors concerning the death penalty. *S. v. Taylor*, 249.

MASTER AND SERVANT — Continued

Where the medical evidence in the record was not sufficiently definite as to the cause of plaintiff's disability to permit effective appellate review, the case must be remanded for further medical testimony and findings of fact. *Ibid.*

Where the evidence supported the Industrial Commission's conclusion that claimant was totally disabled and 55% of her disability was due to an occupational disease and 45% of her disability was due to other physical infirmities, it was not error for the Industrial Commission to award claimant compensation for a 55% partial disability rather than for total disability. *Morrison v. Burlington Industries*, 1.

The evidence supported findings by the Industrial Commission that plaintiff does not have an occupational disease and that his shortness of breath is due to pulmonary emphysema and chronic bronchitis. *Walston v. Burlington Industries*, 670.

MUNICIPAL CORPORATIONS

§ 2.1. Annexation; Compliance with Statutory Requirements in General

The trial court was required under the facts to accept the city's total acreage estimates in an annexation action as any errors were less than 5%. *In re Annexation Ordinance*, 565.

The additional personnel and equipment needed to extend services need not be estimated in an annexation plan in order to determine whether the city has provided the services it promised. *In re Annexation Ordinance*, 549.

NOTICE

§ 2. Sufficiency and Requisites of Notice

In order for a newspaper to qualify to publish notices of tax lien sales, it must meet the "general circulation" requirements of both G.S. 105-369(d) and G.S. 1-597. *Media, Inc. v. McDowell County*, 427.

The *Old Fort Dispatch* qualified under the statutory "general circulation" provisions for publication of notices of ad valorem tax lien sales. *Ibid.*

PARTIES

§ 2. Parties Plaintiff; Who Is Real Party in Interest

When plaintiff appealed a judgment n.o.v. with respect to punitive damages awarded him, defendants had the right to cross-appeal a judgment awarding plaintiff compensatory damages even though defendants received a judgment against their insurer for the amount they were deemed to owe plaintiff for compensatory damages. *Carawan v. Tate*, 696.

RAPE

§ 1. Nature and Elements of Offense

In a first degree rape case, the jury could legitimately find from the evidence that a pen was a dangerous or deadly weapon. *S. v. Johnson*, 680.

§ 4. Relevancy and Competency of Evidence

The prosecutor was properly permitted to identify three separate sexual acts as he elicited evidence from the victim as to whether she had consented to each sexual act. *S. v. Searles*, 149.

RAPE — Continued

A rape victim's testimony that she thought her assailant had asked her whether she knew "Leon Sales," a name which had some similarity to defendant's name, was relevant to prove the identity of her assailant. *Ibid.*

Evidence of the prosecuting witness's "night blindness" in a prosecution for first degree rape was clearly relevant to explain the witness's inability to give a clearer description of the circumstances surrounding the crime. *S. v. Galloway*, 485.

§ 4.1. Relevancy and Competency of Evidence of Improper Acts

In a prosecution of two defendants for various sexual offenses, an officer's rebuttal testimony that one defendant admitted to him that he had committed a similar sexual offense with a prostitute some seven months prior to the acts in question was too remote to show a common scheme or plan, and its admission was prejudicial error which entitled both defendants to a new trial. *S. v. Shane*, 643.

§ 4.2. Relevancy of Evidence of Physical Condition of Prosecutrix

In a prosecution for first degree rape, there was nothing improper in a medical expert's testimony that an examination of the victim revealed evidence of traumatic and forcible penetration consistent with an alleged rape. *S. v. Galloway*, 485.

§ 4.3. Evidence of Unchastity of Prosecutrix

In a prosecution for first degree rape, the trial court did not err in refusing to allow defendant to ask the prosecuting witness: (1) "Are you or are you not a virgin?" and (2) "Are you or are you not on birth-control pills?" *S. v. Galloway*, 485.

§ 5. Sufficiency of Evidence

The State's evidence was sufficient to support one defendant's conviction of first degree rape under the theories that a deadly weapon was used or that defendant was aided and abetted; however, the evidence was insufficient to support a second defendant's conviction of first degree rape under such theories but was sufficient to support a verdict of second degree rape. *S. v. Barnette*, 447.

The evidence was insufficient to support conviction of a defendant for first degree sexual offense on the theory that he was aided and abetted where it showed only that another unknown person was present while defendant committed the crime. *Ibid.*

Trial court properly submitted an issue to the jury as to whether a pocketknife allegedly employed by defendant in a rape was a deadly weapon, and the State's evidence was sufficient to convict defendant of first degree rape upon the theory that he employed a deadly weapon in the commission thereof. *S. v. Sturdivant*, 293.

§ 6. Instructions

The trial court's instruction in a rape case that "consent induced by fear is not consent at law" was not inadequate in failing to require that the fear be reasonable and of violence. *S. v. Barnette*, 447.

Trial court's instruction that a verdict of guilty of first degree rape would be warranted if the jury found defendant had "employed or displayed" a dangerous or deadly weapon during an act of forcible sexual intercourse when the indictment charged only that defendant had "employed" a deadly weapon was not prejudicial error. *S. v. Sturdivant*, 293.

Trial court effectively prevented the jury from considering evidence of any sexual deed that did not entail the use of a deadly weapon on a charge of first degree rape by instructing on the difference between first and second degree rape. *Ibid.*

RAPE — Continued

§ 6.1. Instructions on Lesser Degrees of Crime

Where the only theory that would sustain defendant's conviction of a sexual offense was aiding and abetting, defendant could only be tried for a first degree sexual offense and the court's instruction on second degree sexual offense was error. *S. v. Barnette*, 447.

The trial court was not required to submit second degree rape and second degree sexual offense as the evidence supported only verdicts of first degree rape, first degree sexual offense, or not guilty. *S. v. Jones*, 323.

§ 7. Verdict

Where there was insufficient evidence of use of a deadly weapon and aiding and abetting which would make the crime first degree rape, the jury's verdict of guilty of first degree rape must be considered as a verdict of guilty of second degree rape. *S. v. Barnette*, 447.

REGISTRATION

§ 5. Parties Protected by Registration

G.S. 47-18, our recordation statute, does not protect a purchaser from claims to property arising out of litigation. *Hill v. Memorial Park*, 159.

RULES OF CIVIL PROCEDURE

§ 59. New Trials

Excessive verdicts present a ground for granting a new trial and not for granting judgment n.o.v. *Carawan v. Tate*, 696.

SCHOOLS

§ 13.2. Dimissal of Teachers

A career school teacher cannot be dismissed for "neglect of duty" unless it is shown that a reasonable man under those same circumstances would have recognized the duty and would have considered himself obligated to conform. *Overton v. Board of Education*, 312.

A career teacher's conduct in staying away from school pending resolution of criminal charges against him did not constitute "neglect of duty" for which he could be dismissed. *Ibid.*

SEARCHES AND SEIZURES

§ 12. Stop and Frisk Procedures

An officer did not violate defendant's constitutional right by temporarily detaining defendant as a suspect where the totality of the circumstances afforded the officer reasonable grounds to believe criminal activity was afoot. *S. v. Jones*, 323.

§ 23. Probable Cause for Issuing Warrant; Sufficiency of Evidence

An officer's affidavit was sufficient to support issuance of a warrant to search the trailer in which defendant lived for "a wooden club or instruments that could be used as a club, bloody clothing, and other instrumentalities" of a "rape, kidnapping, murder." *S. v. Rook*, 201.

SEARCHES AND SEIZURES — Continued

§ 33. Plain View Rule

An officer violated no constitutional right in seizing a sawed-off shotgun which protruded from a brown paper bag in the back seat of a vehicle and was in plain view from a vantage point the officer had legally obtained. *S. v. Jones*, 323.

§ 37. Scope of Search Incident to Arrest; Vehicles

An officer's search of the passenger compartment of defendant's truck and a paper bag found therein immediately following defendant's lawful arrest for driving under the influence and while defendant was sitting in the back seat of the officer's patrol car did not violate the Fourth and Fourteenth Amendments to the U.S. Constitution. *S. v. Cooper*, 701.

§ 45. Necessity for Voir Dire Hearing

It was error for the trial court to refuse to excuse the jury and to refuse to conduct a voir dire on the legality of the search of defendant's bedroom immediately upon defendant's general objection to testimony concerning the fruits of that search. *S. v. Silva*, 122.

TAXATION

§ 25.4. Ad Valorem Taxes; Valuation and Assessment

Notice of the 1977 schedules of values used by Wilkes County in appraising property for ad valorem property tax purposes was found insufficient where a public newspaper of general circulation printed a notice pertaining to the revaluation only once, buried it in a page, and printed it some twenty-seven months before the effective date of the revaluation. *In re McElwee*, 68.

Where the record in an appeal by taxpayers concerning the revaluation of property in Wilkes County in 1977 indicated on-site visits of all the property in Wilkes County could not have been made, the revaluation of taxpayer's properties must be considered as illegally done. *Ibid.*

A decision to conduct a county wide appraisal of property in a time of less than two months, and to complete it some twenty-seven months prior to its effective date, is plainly arbitrary under G.S. 105-317. *Ibid.*

When a taxpayer has rebutted the presumption of regularity in property valuation in favor of the county, the burden then shifts to the county to demonstrate by competent, material and substantial evidence that the values determined were not substantially higher than that called for by the statutory formula. *Ibid.*

In order for a county to use sales of similarly used lands in establishing present use valuation, the county must demonstrate that the buyers and sellers involved in the comparable sales transactions had knowledge of the property's capability to produce income in its present use, that the present use is the highest and best use and that the purchaser intended to continue to use the property in its present use. *Ibid.*

§ 25.11. Ad Valorem Tax Proceedings; Judicial Redress

G.S. 105-345.2 is the controlling judicial review statute for appeals from the Property Tax Commission. *In re McElwee*, 68.

TAXATION — Continued

§ 39.2. Foreclosure of Tax Sale Certificates; Notice

In order for a newspaper to qualify to publish notices of tax lien sales, it must meet the "general circulation" requirements of both G.S. 105-369(d) and G.S. 1-597. *Media, Inc. v. McDowell County*, 427.

The *Old Fort Dispatch* qualified under the statutory "general circulation" provisions for publication of notices of ad valorem tax lien sales. *Ibid.*

WITNESSES

§ 1.3. Competency; Physical Condition of Witness

Deaf and mute persons are not incompetent as witnesses merely because they are deaf and mute if they are able to communicate the facts by a method which their infirmity leaves available to them and are of sufficient mental capacity to observe the matters as to which they will testify and to appreciate the obligation of an oath. *S. v. Galloway*, 485.

WORD AND PHRASE INDEX

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