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Chief Justice SHARP and Justice BRANCH concur in the result.

APPEAL by defendant pursuant to G.S. 7A-27 (a) and G.S. 7A-31 (a) from Judge Perry Martin, 14 October 1974 Criminal Session of PITT Superior Court.

Each defendant was indicted and convicted upon separate bills for accessory before the fact to the murder of Linwood Branch on 29 March 1974 and for conspiracy to commit murder. The cases were consolidated for trial over objection of defendant Branch. Each defendant received sentences of life imprisonment and ten years imprisonment on the respective charges.

The State offered evidence which tended to show the facts summarized below.

Matthew Jack Whealton, the principal witness against the defendants, admitted shooting a man whom he thought was the victim, Linwood Branch. Defendant Connie Hardee Branch was the wife of the deceased and she was apparently having an affair with defendant Roy Lee Sullivan. Whealton testified that in exchange for his turning State's evidence, the prosecution agreed not to seek the death penalty for his part in the death of Mr. Branch.

Whealton's further testimony was substantially as follows. His first contact with Sullivan was by telephone in December, 1973. Later they arranged to meet at an airport terminal in Norfolk, Virginia, in February, 1974. They met as planned and drove to a motel at Virginia Beach where Sullivan offered Whealton \$4,000 to find someone to kill Mr. Branch. Whealton replied that he might be able to find such a person. Subsequently he told Sullivan by telephone that he had found someone, but the price would be \$5,000.

Around 1 March 1974 Whealton met a woman who introduced herself as Connie Branch at the Fass Seafood House in Washington, North Carolina. She sat in the front seat of his car in the restaurant parking lot and told him that she wanted her husband killed because they would lose the child they were trying
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to adopt if she got a divorce. She indicated that she would not mind if an innocent man were convicted if Whealton killed her husband. Sullivan soon joined them. He kissed Mrs. Branch on arrival. They proceeded to discuss their plans for the killing. Both Sullivan and Mrs. Branch wanted it "to look like a robbery" and suggested it take place by the carport of the Branch home which was in or near Greenville, North Carolina. Sullivan gave Whealton some pictures of Mr. Branch and offered him a \$5,000 check. Whealton refused to take the check and insisted on cash. Following this meeting, Whealton received numerous telephone calls from Sullivan inquiring about the

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progress of the plans.

At a meeting in mid-March Sullivan gave Whealton \$5,000 in cash. Whealton returned to his home in Chesapeake, Virginia, and called one Harold Wiseman who agreed to help him with the planned killing. Whealton bought a .38 caliber pistol and a .32 caliber pistol, giving the .32 caliber pistol to Wiseman along with \$2,500.

On 19 March 1974 Whealton and Wiseman came to North Carolina to kill Branch. When he was located, they were unable to kill him because someone was with him, whereupon they went back to Virginia. They returned to North Carolina on 21 March 1974, but were too intoxicated to do anything and drove back to Virginia.

On 27 March 1974 Sullivan and Mrs. Branch contacted Whealton by telephone at Earl's Market in Chesapeake, Virginia, and inquired as to when he would kill Branch. On Friday, 29 March 1974, Whealton and Wiseman returned to North Carolina. Sullivan advised them that Branch had a different car, a 1968 Buick Skylark, and told them Branch was expected to arrive at his home around 10:00 that evening. Whealton drove Wiseman to the Branch home around 8:30 or 9:00 p.m., and Wiseman got out of the car to await Branch's arrival. However, Wiseman apparently lost his nerve, and in ten or fifteen minutes Whealton saw him walking away from the Branch home. Soon thereafter Whealton saw Branch drive into his driveway. He followed him in his vehicle and called to him by name, "Linwood." Branch walked toward the car in which Whealton was seated. When he was about fifteen feet away, Whealton shot him. Branch continued walking toward the Whealton car, stumbled, and fell against the car. Whealton pushed Branch away and left the scene. On the way back to Virginia, Whealton threw the
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.38 caliber pistol he had used into the Albemarle Sound. The next day, Saturday, Sullivan called Whealton to say Branch had not died and then on Monday called to say he was dead.

Whealton identified Sullivan in the courtroom without hesitation. However, he twice was unable to identify Mrs. Branch during the first part of his testimony. After the two-hour noon recess of the first day of court, during which Whealton saw five pictures of Mrs. Branch taken at different times, he was able to make an in-court identification of her as the woman he had met at the Fass Seafood Restaurant about 1 March 1974. Mrs. Branch had changed the style and color of her hair and put on glasses since her meeting with Whealton. He said that he was able to recognize her after she turned and he saw her profile. He also stated that he first made a positive identification of her some time after the first two requests for an identification in court and before he saw the five pictures during the noon recess. A subsequent examination of Deputy Sheriff Dalton

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Respass, who had spoken with Whealton and shown him the pictures during the noon recess in violation of the court's sequestration order, verified Whealton's testimony that Mrs. Branch's appearance was changed. Cross-examination of Respass revealed that he had shown the same pictures of her to Whealton about two weeks before the trial and that he had identified her then. Other witnesses substantially corroborated the testimony of Whealton.

Further evidence of the State tended to show: that deceased died as a result of a pistol wound to the head; that Whealton, in the company of Gloria Allsbrook and Wiseman, was at the Lemon Tree Inn in Chocowinity (about twenty miles from Greenville) on at least three occasions, including 29 March 1974; that Sullivan borrowed \$6,526.61 from a loan company on 11 March 1974 to buy a crop dusting plane, but no plane was bought; that within one day of the loan the check was cashed and \$1,025.00 of it was deposited; that Sullivan in the presence of Mrs. Branch said he was going to marry her and exhibited wedding rings; that Sullivan and Mrs. Branch were frequently seen together in the first three months of 1974 and particularly were seen alone together at the Kinston Stock Yard for thirty minutes on 24 March 1974; that Sullivan had telephone conversations with two men in South Carolina and asked them if they could find a killer, telling one of them that the intended victim was the husband of his girl friend.
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Additionally, the State introduced into evidence numerous telephone records. These records showed the following telephone calls: (1) a call on 8 March 1974 between the Cline Chevrolet dealership in Virginia where Whealton and Wiseman worked, and Sullivan's telephone in Kinston; (2) a call on 9 March 1974 from another Cline Chevrolet location in Virginia and Sullivan's telephone in Kinston; (3) numerous calls (one in April, eighteen in March, seventeen in February, and six in January) from the telephone of Better Homes Realty Company, Greenville, which listed defendant Connie Branch as the owner, and Sullivan's telephone in Kinston; (4) numerous calls (twenty-five in March, six in February, and one in January) from the telephone for Branch's General Store in Greenville listed in the name of L. N. Branch (the deceased) to the telephone of Sullivan; (5) three calls on 19 March 1974 from the Lemon Tree Inn, Chocowinity, where other records indicated Whealton registered on 19, 20 and 29 of March 1974, to Sullivan's telephone; (6) a four-minute call at 8:07 a.m. on 30 March 1974 from a Pittsboro Memorial Hospital pay telephone (the name "Connie" was noted on the record) to Sullivan's telephone; and (7) numerous other calls noted in the body of the opinion. Many of these telephone calls corroborated testimony of Whealton as to the calls he made to Sullivan and the close contact between Sullivan and Mrs. Branch.

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Defendants presented no evidence.

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Attorney General Sidney S. Eagles, Jr., for the State.

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Roy Lee Sullivan and James, Hite, Cavendish & Blount by
Dallas Clark, Jr., for Connie Hardee Branch, for defendant appellants.

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[11] Mrs. Branch assigns as error the admission of the testimony of Bennett concerning Sullivan's telephone call to him in April immediately following the killing to find out whether or not "the heat was on" Whealton. "[T]he declaration or act of one is not admissible in evidence as against other members of the conspiracy if it was made after the termination of the conspiracy This is true whether the conspiracy is terminated by the achievement of its purpose or by the failure to achieve

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it." 16 Am. Jur. 2d, Conspiracy, 40, at 148; State v. Littlejohn, 264 N.C. 571, 142 S.E.2d 132 (1965). "[D]eclarations of one of the conspirators, made after the offense has been committed and in the absence of the others, are not competent against the others, because not uttered in furtherance of the common design. S. v. Dean, 35 N.C. 63." State v. Ritter, 197 N.C. 113, 116, 147 S.E. 733, 734 (1929). Thus, it was error to admit this testimony as to Sullivan's conversations after Branch had been killed and the objective of the conspiracy had been achieved. However, the error committed was harmless beyond a reasonable doubt since this evidence standing alone in no way implicated Mrs. Branch and since there was plenary other evidence showing that Mrs. Branch and Sullivan conspired to kill Branch. Chapman v. California, supra; State v. Brinson, 277 N.C. 286, 177 S.E.2d 398 (1970). The assignment of error is overruled.

[12] Next, Mrs. Branch assigns as error the admission of the testimony of Bennett concerning a subsequent telephone call in April from Bennett to Sullivan to find out more information about the killing. In this subsequent call, Sullivan related that Whealton killed Branch for \$5,000 and that he (Sullivan) and Mrs. Branch were in love and to be married as soon as possible. Since this testimony involved declarations made outside the presence of Mrs. Branch and after the conspiracy to kill Mr. Branch had been terminated by the achievement of its purpose, it was error to admit this testimony against Mrs. Branch. State v. Ritter, supra. However, an examination of the record shows that Mrs. Branch was not prejudiced by the admission of this testimony. Although reference was made to Mrs. Branch in this conversation, the very facts related about her were established by plenary other evidence. In brief, Sullivan and Mrs. Branch had been seen alone together on several occasions for extended periods. They were frequently in contact with each other and had been seen kissing each other. Also, Sullivan, in the presence of Mrs. Branch, had stated that they were to be married and had displayed wedding rings. Furthermore, the fact that Sullivan and Mrs. Branch were in love and to be married did not directly implicate her in the crimes charged. Moreover, there was overwhelming evidence, especially considering Whealton's testimony and identification of Mrs. Branch, showing her involvement in the crime charged. Thus, the error committed was harmless beyond a reasonable doubt. Chapman v. California,

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supra; State v. Brinson, supra. The assignment of error is overruled.

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