

Criminal Procedure

Sentencing

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf>). The trial court did not violate G.S. 15A-1340.16(d) (evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation) by submitting, in connection with assault with a deadly weapon charges, the aggravating factor that the 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.” The court reasoned that for the assault charges the State was not required to prove that the defendant used a weapon or device which would normally be hazardous to the lives of more than one person.

Evidence

Crawford

Applicability to Sentencing Hearings

State v. Hurt, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090442-1.pdf>). *Crawford* and the confrontation clause applies to all “*Blakely*” sentencing proceedings in which a jury makes the determination of a fact or facts that, if found, increase the defendant’s sentence beyond the statutory maximum. Because the trial court’s admission of testimonial hearsay evidence during the defendant’s non-capital sentencing proceeding violated the defendant’s confrontation rights. The defendant pleaded guilty to second-degree murder. At the sentencing hearing, the jury found the aggravating factor that the murder was especially heinous, atrocious, or cruel and the trial judge sentenced the defendant in the aggravated range. The court distinguished *State v. Sings*, 182 N.C. App. 162 (2007) (declining to apply the confrontation clause in a non-capital sentencing hearing), on the basis that it involved a sentencing based on the defendant’s stipulation to aggravating factors not a *Blakely* sentencing hearing and limited that decision’s holding to its facts. The court explained that its rationale for applying *Crawford* to non-capital *Blakely* sentencing proceedings “mirrors the justification for securing the right to confrontation in the capital sentencing context,” a right already recognized by the North Carolina Supreme Court. It stated: both the penalty phase of a capital case and a *Blakely* sentencing hearing in a non-capital case require the State to prove an element to a jury beyond a reasonable doubt, and without a finding of an aggravating factor by the trier of fact, the presumptive sentence is the maximum sentence that can be imposed for the crime. It continued: “Where confrontation rights apply in one context, they should apply equally to the other.” Noting that other cases have held that the confrontation clause does not apply in non-capital sentencing, the court followed *State v. Rodriguez*, 754 N.W.2d 672 (Minn. 2008), to hold otherwise. The court also noted that its opinion “has no effect on the established inapplicability of other evidence rules at sentencing.”

Substitute Analyst Cases

State v. Hurt, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090442-1.pdf>). Applying *Crawford* to a non-capital *Blakely* sentencing hearing in a murder case, the court held that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts. The evidence at issue came from Special Agent Barker, an expert forensic biologist and serologist with the State Bureau of Investigation (SBI) and Special Agent Freeman with the SBI DNA unit. Barker testified that Special Agent Todd tested the evidence for the presence of blood and other bodily fluids and prepared a lab report of his results. Barker testified that Todd identified blood on the defendant’s clothing and on a cigarette butt. Freeman testified that former SBI Special Agent Spittle performed DNA testing on several items and testified to the results

of Spittle's analysis, including his conclusion that DNA on the defendant's clothing matched the victim's DNA profile. Freeman also testified that the saliva-end of the cigarette found at the crime scene matched the defendant's DNA. The court held that the reports at issue were testimonial under *Melendez-Diaz*. Noting that *Melendez-Diaz* would not bar admissibility if the reports merely provided a basis for the testifying experts' independent opinions, the court concluded that the reports were not limited to this permissible function. Although both Barker and Freeman performed peer review of the reports at issue, neither took part in any testing nor performed any independent analysis. In a footnote, the court distinguished this evidence from the testimony of Dr. Lantz, a forensic pathologist. Lantz testified regarding an autopsy done by former forensic pathologist Dr. Winston. Lantz testified to the wounds described in the final autopsy diagnosis and to his opinion that six of the wounds hit vital organs and could have been fatal. He opined that because of the nature of the wounds, it might have taken several minutes for the victim to lose consciousness and several more minutes to die. The court noted that Lantz's opinion regarding the wounds' impact and the time for loss of consciousness "was clearly based, not on the report at all, but on his own independent experience as a pathologist."

Opinions

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf>). The trial court committed reversible error by allowing the State's expert to use "odor analysis" as a baseline for his opinion as to the defendant's blood-alcohol level (BAC) at the time of the accident, formed using retrograde extrapolation. When the defendant reported to the police department more than ten hours after the accident, she was met by an officer. Although the officer did not perform any tests on the defendant, he detected an odor of alcohol on her breath. The expert based his retrograde extrapolation analysis on the officer's report of smelling alcohol on the defendant's breath. He testified that based on "look[ing] at some papers, some texts, where the concentration of alcohol that is detectable by the human nose has been measured[.]" the lowest BAC that is detectable by odor alone is 0.02. He used this baseline for his retrograde extrapolation and opined that at the time of the accident, the defendant had a BAC of 0.18. The court noted that because odor analysis is a novel scientific theory, an unestablished technique, or a compelling new perspective on otherwise settled theories or techniques, it must be accompanied by sufficient indices of reliability. Although the expert testified that "there are published values for the concentrations of alcohol that humans . . . can detect with their nose," he did not specify which texts provided this information, nor were those texts presented at trial. Furthermore, there was no evidence that the expert performed any independent verification of an odor analysis or that he had ever submitted his methodology for peer review. Thus, the court concluded, the method of proof lacked the required indices of reliability. The court also noted that while G.S. 20-139.1 sets out a thorough set of procedures governing chemical analyses of breath, blood, and urine, the odor analysis lacked any of the rigorous standards applied under that provision. It concluded that the expert's retrograde extrapolation was not supported by a reliable method of proof, that the odor analysis was so unreliable that the trial court's decision was manifestly unsupported by reason, and that the trial court abused its discretion in admitting this testimony.

404(b)

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf>). The trial court committed prejudicial error by admitting, under rule 404(b), the defendant's prior impaired driving convictions to show malice for purposes of a second-degree murder charge. Three of the defendant's four prior impaired driving convictions occurred eighteen or nineteen years prior to the accident at issue and one occurred two years prior. Given the sixteen-year gap between the older convictions and the more recent one, the court held that there was not a clear and consistent pattern of criminality and that the older convictions were too remote to be admissible under rule 404(b).

Criminal Offenses

Conspiracy

State v. Sanders, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100233-1.pdf>). Evidence of the words and actions of the defendant and others, when viewed collectively, provided sufficient evidence of an implied agreement to assault the victim. The court noted that the spontaneity of the plan did not defeat the conspiracy and that a meeting of the minds can occur when a party accepts an offer by actions.

Larceny, Possession, & Related Offenses

State v. Nickerson, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091511-1.pdf>). Unauthorized use of a motor propelled conveyance is a lesser included offense of possession of stolen goods and on the facts presented, the trial court erred by failing to instruct the jury on the lesser included offense.

Impaired Driving

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf>). In a case in which there was no admissible evidence as to the defendant's blood alcohol level, the court found that the evidence was insufficient to show that the defendant drove while impaired, even though it showed that she had been drinking before driving. The accident at issue occurred when the defendant collided with someone or something extending over the double yellow line and into her lane of traffic. Under these circumstances, the fact of the collision itself did not establish faulty or irregular driving indicating impairment.