

CRAWFORD ISSUES

(4) Admitting Lab Report With BAC Level and Witness's Testimony About Another's Chemical Analyst's Permit Did Not Violate Sixth Amendment Right to Confrontation Under Crawford v. Washington, 541 U.S. 36 (2004)

State v. Hinchman, ___ N.C. App. ___, 666 S.E.2d 199 (16 September 2008).

The defendant was convicted of DWI. On June 23, 2004, a trooper arrested the defendant for DWI and transported him to a hospital to obtain a blood sample, which was then sent to the SBI for a chemical analysis. An SBI chemical analyst completed a lab report on August 30, 2004, indicating a BAC of 0.10. On September 16, 2004, the lab report was served on the defendant. The trooper filed an affidavit and revocation report with the district court on November 2, 2004. The district court entered a revocation order on November 5, 2004, revoking the defendant's driver's license for a minimum of 30 days under G.S. 20-16.5. The defendant surrendered his license and did not request an hearing to contest the validity of the revocation order as provided in G.S. 20-16.5(g). A district court judge issued an order dismissing the DWI charge because the 140-day delay in revoking his driver's license was punishment under the Double Jeopardy Clause that prohibited the DWI prosecution. The state appealed the district court judge's order to superior court, which vacated the ruling. The defendant was then convicted of DWI in district court and later in superior court. He then appealed to the North Carolina Court of Appeals. (4) The court ruled, relying on *State v. Heinricy*, 183 N.C. App. 585 (2007), and *State v. Forte*, 360 N.C. 427 (2006), that the admission into evidence of the lab report containing the defendant's BAC level and a witness's testimony about another's chemical analyst's permit did not violate the defendant's Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004).

(1) Statements by Dying Shooting Victim to Private Citizen Were Not Testimonial Under Crawford v. Washington, 541 U.S. 36 (2004)

State v. Calhoun, 189 N.C. App. 166, 657 S.E.2d 424 (4 March 2008).

The defendant was convicted of first-degree murder. The victim was shot in witness A's home when she was not there. Witness A and a law enforcement officer responded to the shooting and arrived at the home at the same time. The victim lay motionless on the living room floor. Witness A asked the victim who had shot him, and the victim told her it was "Chico" and "Worm." Witness A asked the victim to squeeze her hand to confirm that information, and the victim did so. The officer witnessed the identification. (1) The court ruled that the statements by the

dying shooting victim to witness A, a private citizen, were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004).

No *Crawford v. Washington*, 541 U.S. 36 (2004), Violation When SBI DNA Expert Testified in Place of Another SBI DNA Expert Who Had Analyzed Sample in Rape Kit

State v. Little, 188 N.C. App. 152, 654 S.E.2d 760 (15 January 2008). The court ruled, distinguishing *State v. Cao*, 175 N.C. App. 434 (2006), that there was no *Crawford v. Washington*, 541 U.S. 36 (2004), violation when an SBI DNA expert testified in place of another SBI DNA expert who had analyzed the sample in a rape kit. The testifying expert confirmed that she could review the other expert's work, check the technical aspects of it, and verify his findings without conducting a new analysis of the sample.

Jail Detention Center Incident Reports and Statements Contained in These Reports Were Not Testimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004)

State v. Raines, 362 N.C. 1, 653 S.E.2d 126 (7 December 2007). During a capital sentencing hearing, a state's witness in charge of the county detention center testified about the defendant's behavior while awaiting trial. He referred to jail detention center reports and statements contained in these reports. The court ruled that these reports and statements were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). The court noted that there was no indication in the record that these reports were prepared for use in later legal proceedings. Instead, the record indicated that they were created as internal documents concerning the administration of the detention center. The statements contained in the reports from detention officers and inmates were not taken in such a manner to be testimonial or to be used in later criminal proceedings.

(1) Statements Made by Victim to Friend Were Not Testimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006)

State v. Williams, ___ N.C. App. ___, 648 S.E.2d 896 (21 August 2007). The defendant was convicted of first-degree murder. (1) The court ruled that statements made by the victim to a friend were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006). The statements were made before the commission of the murder and in the course of a private conversation outside the presence of a law enforcement officer. There was no indication that the statements were made with the thought of a future trial in mind.

Affidavit Containing Defendant's Blood Alcohol Level Was Not Testimonial Statement Under Crawford v. Washington and Its Admission Did Not Violate Defendant's Confrontation Rights

State v. Heinrichy, 183 N.C. App. 585, 645 S.E.2d 147 (5 June 2007).

The defendant was convicted of second-degree murder based on his driving recklessly while impaired and killing a tow truck operator. The state was permitted to introduce an affidavit containing the defendant's blood alcohol level involving a prior DWI conviction that was introduced to prove malice. The chemist who tested the defendant's blood with a gas chromatograph and prepared the affidavit did not testify at the defendant's trial. The court ruled, based on *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137 (2006), *State v. Smith*, 312 N.C. 361, 323 S.E.2d 316 (1984), and *State v. Cao*, 175 N.C. App. 626 S.E.2d 301 (2006), that the affidavit was not a testimonial statement under *Crawford v. Washington*, 541 U.S. 36 (2004), and its admission did not violate the defendant's confrontation rights.

(1) Statements Made by Shooting Victim During 911 Call Were Nontestimonial under Davis v. Washington, 126 S. Ct. 2266 (2006), and Crawford v. Washington, 541 U.S. 36 (2004)

(2) Report Detailing Timeline of 911 Call and Responses Made by Law Enforcement Was Nontestimonial Under Crawford v. Washington, 541 U.S. 36 (2004), and Admissible as Business Record Under Hearsay Rule 803(6)

(3) Information Form Used by Neighborhood Security Guards Was Nontestimonial Under Crawford v. Washington, 541 U.S. 36 (2004), and Admissible as Business Record Under Hearsay Rule 803(6)

State v. Hewson, 182 N.C. App. 196, 642 S.E.2d 459 (20 March 2007).

The defendant was convicted of the first-degree murder of his wife whom he shot while she was inside her home. (1) The wife called 911 to report that she had been shot by her husband. She died shortly after making the 911 call. The court ruled that her statements were nontestimonial under *Davis v. Washington*, 126 S. Ct. 2266 (2006), and *Crawford v. Washington*, 541 U.S. 36 (2004). The court stated that the 911 call described current circumstances requiring police assistance. (2) The court ruled, relying on *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137 (2006), the an event report detailing the timeline of the 911 call and the responses made by law enforcement was nontestimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and was admissible as a business record under Rule 803(6). (3) The court ruled that a pass-on information form

used by neighborhood security guards was nontestimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and was admissible as a business record under Rule 803(6). An entry by a security guard on the form included information that the victim's husband had been threatening her and to make sure that he does not use the pass system to get into the neighborhood.

(2) Ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), Does Not Apply to Non-Capital Sentencing Hearing

State v. Sings, 182 N.C. App. 162, 641 S.E.2d 370 (6 March 2007).
(2) The court ruled, relying on the rationale of *State v. Phillips*, 325 N.C. 222, 381 S.E.2d 325 (1989), and distinguishing *State v. Bell*, 359 N.C. 1, 603 S.E.2d 2004), that the ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply to a non-capital sentencing hearing.

Statements of Nontestifying Declarants Were Not Testimonial Under *Crawford v. Washington* Because They Were Not Offered to Prove Truth of Matters Asserted

State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394 (6 February 2007).
The court ruled that statements of nontestifying declarants were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), because they were not offered to prove the truth of the matters asserted. They instead were offered to explain the officers' presence at certain places.

(1) No Violation of Sixth Amendment Confrontation Rights Under *Crawford v. Washington* in Admitting Videotaped Interviews of Child Sexual Abuse Victims Because They Took Stand at Trial and Were Available for Cross-Examination

State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68 (2 January 2007).
The defendant was convicted of six counts of first-degree sexual offense involving three children under thirteen years old. (1) The court ruled that there was no violation of the defendant's Sixth Amendment confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004), in admitting videotaped interviews of child sexual abuse victims because they took the stand at trial and were available for cross-examination (the defendant did not cross-examine them).

1.Evidence--Hearsay--Nontestimonial--Residual hearsay exception *****

State v. Brigman 178 NCA 78 (2006).

The trial court did not abuse its discretion in a multiple first-degree sex offense and multiple taking indecent liberties with a minor case by admitting the **children's hearsay statements** to their foster parents and to medical personnel, because: (1) defendant concedes that the statements made to the children's foster parents were not testimonial, and therefore, **did not violate the Confrontation Clause**; (2) the children's statements to their foster parents were admissible under the residual hearsay exception when the children testified they had told the foster parents about things defendant had done but did not remember what they told the foster parents, the statements were more probative on the points for which they were offered than any other evidence the State could produce through reasonable efforts at the time, the State gave proper notice of its intent to offer the statements, the children's statements possess equivalent circumstantial guarantees of trustworthiness, and it cannot be said the trial court's findings and conclusions were manifestly unsupported by reason or were so arbitrary that they could not have been the result of a reasoned decision; and (3) Child 3's statements to a doctor (that defendant put his hand in the child's bottom, that it hurt, and that defendant touched the two other children in the same way) were not testimonial and defendant's right to confrontation was not violated when it cannot be concluded that a reasonable child under three years of age would know or should know that his statements might later be used at trial.

2. Evidence-Hearsay-Testimony that Officer Yelled to Stop-Not Testimonial

State v. Ferebee 177 NCA 785 (2006)

The admission of hearsay testimony that a campus police officer yelled for defendant to stop was not a violation of the Confrontation Clause because the statement was **not testimonial**, and was not prejudicial because there was substantial other evidence to the same effect.

6. Constitutional Law-Right of Confrontation DNA Report Testimony from Agent who did not Perform Tests

State v. Hocutt 177 NCA 341 (2006).

The trial court did not err by permitting an **SBI agent to testify about the results of DNA tests performed by another agent who did not testify**. It has been held that such testimony is **non- testimonial** under Crawford v. Washington, 541 U.S. 36, and thus does not violate the Confrontation Clause.

4. Constitutional Law--Right of Confrontation--Gunshot Residue _Expert Testimony_ Tests and Report by Nontestifying Expert_Harmless Error

State v. Shelly 176 NCA 575 (2006).

The admission of an SBI forensic chemist's expert testimony as to the opinions he formed from his review of gunshot residue tests performed on the friend of two murder victims by a nontestifying SBI forensic chemist, including his review of the report prepared by the other chemist, did not violate defendant's Sixth Amendment right of confrontation pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). Moreover, any error under *Crawford* in the admission of the nontestifying chemist's report and testimony by the SBI chemist stating the opinion of the nontestifying chemist as contained in that report was harmless beyond a reasonable doubt where the gunshot residue testing was performed only because defendant asserted that the victims' friend may have taken a gun belonging to and used by one victim from the scene of the shootings, the opinions of both the testifying and nontestifying chemists were equivocal as to whether the victim's friend could have handled a gun at or about the time of the shootings, and the totality of the evidence in the case overwhelmingly established defendant's guilt of the murders.

Constitutional Law- Right to Confrontation -Expert Testimony Based on Report

State v. Durham, 176 NCA 239 (2006)

The introduction of an **autopsy report by a non-testifying pathologist** did not violate defendant's confrontation rights **under *Crawford v. Washington*, 541 U.S. 36**, and was not plain error. The pathologist who testified was accepted as an expert, had observed the autopsy, and relied on the report of the pathologist who performed the autopsy (who has since taken employment outside North Carolina). **The report was tendered as evidence of the basis of the expert witness's opinion**, and defendant was given the opportunity to cross-examine the expert.

6. Evidence—Codefendants' Custodial Statement--No Powerfully Incriminating Characteristics

State v. Jacobs, 174 NCA 1 (2005)

Defendant's right of confrontation was not denied by the trial **court's ruling allowing a detective to read the codefendant's custodial statement to the jury**, because: (1) the use of the word “we” in the codefendant's redacted statement did not clearly implicate defendant; and (2) the statement did not contain those powerfully incriminating characteristics requiring reversal under the Confrontation Clause.

1. Constitutional Law--Right to Confrontation--Nontestimonial Evidence

State v. Bunn, 173 NCA 729 (2005)

The trial court did not commit plain error in a possession with intent to sell and deliver marijuana, sale and delivery of marijuana, and possession of cocaine with intent to sell case by allegedly violating defendant's right to

confrontation arising from the use of expert testimony based on chemical analyses conducted by a nontestifying chemist, because: (1) defendant had an opportunity to cross-examine the expert; (2) the analyses on which the expert testimony was based were not hearsay since it was not offered for the truth of the matter asserted, but rather to demonstrate the basis of the expert's testimony; and (3) **it is well-established that an expert may base an opinion on tests performed by others in the field.**

1. Constitutional Law; Evidence_Right of Confrontation_S.B.I. Reports_Preparer Unavailable For Cross-Examination_Business Records_No Crawford Violation

State v. Forte, 360 NC 427 (2006)

Defendant's right of confrontation under **Crawford v. Washington, 541 U.S. 36 (2004)**, **was not violated by the admission of S.B.I. reports**, containing both analysis results and chain of custody information, prepared by an S.B.I. agent who did not testify at trial and was unavailable for cross-examination by defendant because the reports are not testimonial statements that are inadmissible under Crawford but are purely ministerial observations that do not offend the public records exception of N.C.G.S. § 8C-1, Rule 803(8) and were properly admitted under the business records exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(6).

(1) Court Rules, in Case from State of Washington, Statements Identifying Assailant Made in 911 Call by Non-Testifying Assault Victim Were Not Testimonial Under Crawford v. Washington, 541 U.S. 36 (2004)

(2) Court Rules, in Case from State of Indiana, Statements at Crime Scene by Non-Testifying Assault Victim in Response to Interrogation by Law Enforcement Officer During Investigation of Assault Were Testimonial Under Crawford v. Washington, 541 U.S. 36 (2004)

(3) Court States That Indiana Courts May, on Remand, Determine Whether State Properly Raised Claim of Defendant's Forfeiture by Wrongdoing That Would Forfeit Defendant's Sixth Amendment Right to Confrontation, and If So, Whether Claim Was Meritorious

Davis v. Washington, (19 June 2006). US Sup Ct.

This case, decided under the name *Davis v. Washington*, involved appeals from two separate state criminal prosecutions, one from the state of Washington (*Davis v. Washington*) and the other from the state of Indiana (*Hammon v. Indiana*). In *Davis v. Washington*, a 911 operator conversed with an alleged assault victim who reported an assault and other ongoing events and, in response to the operator's questioning, named her assailant. In *Hammon v. Indiana*, law enforcement officers responded to a reported domestic disturbance at the home of Hershel Hammon (defendant) and Amy Hammon (alleged assault victim). Amy Hammon appeared frightened but told the officers that nothing had occurred. The defendant

told the officers there had been an argument but it had never become physical. The officers noticed a gas heating unit with flames emanating from the glass front and pieces of glass on the floor. After officers separated them, Amy Hammon told an officer that Hershel had assaulted her. She also completed an affidavit at the scene that described the incident. The Court stated that, without attempting to produce an exhaustive classification of all statements as testimonial or nontestimonial under Crawford v. Washington, 541 U.S. 36 (2004), it sufficed to decide these two cases with the following definitions: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

(1) In Davis v. Washington, the Court ruled that the early statements in the 911 call in which the assault victim identified her assailant were not testimonial. The 911 operator's questions objectively indicated their primary purpose was to enable law enforcement assistance to meet an ongoing emergency. The Court indicated that statements in a 911 call after an emergency has ended may be testimonial.

(2) In Hammon v. Indiana, the Court ruled that Amy Hammon's statements to the officer after she was separated from Hershel Hammon were testimonial. The officer was not seeking to determine "what is happening," but rather "what happened." Objectively viewed, the primary, if not the sole, purpose of the interrogation was to investigate a possible crime. The Court indicated that not all questions at a crime scene will be testimonial. Exigencies-such as officers' needing to know whom they are dealing with to assess the situation, the threat to their own safety, and possible danger to the potential victim-may often mean that initial inquiries produce nontestimonial statements.

*****[Author's note: The Court's analysis and ruling that Amy Hammon's statements were testimonial cast doubt on the analysis and ruling in State v. Lewis, 360 N.C. 1, 619 S.E.2d 830 (2005), that the victim's statements to the initial responding officer were not testimonial.] *****

(3) The Court stated that Indiana state courts in Hammon v. Indiana may, on remand, determine whether the state properly raised a claim of the defendant's forfeiture by wrongdoing that would forfeit the defendant's Sixth Amendment right to confrontation, and if so, whether the claim was meritorious.

1. Constitutional Law--Right to Confrontation_-Prior Sexual Assault--Testimonial Evidence_-Photo Lineup--Harmless Error

State v Moore, 173 NCA 494 (2005)

Although the trial **court violated defendant's right to confrontation** in a double second-degree rape, first-degree kidnapping, possession of cocaine, possession of drug paraphernalia, and habitual misdemeanor assault case by allowing the admission of evidence regarding an alleged prior sexual assault obtained from a detective's testimony that a **prior victim identified defendant as her assailant when the prior victim was unavailable at trial**, it was harmless error beyond a reasonable doubt because: (1) the victim in this case provided sufficient detail of her rape and identified defendant as her attacker; and (2) the sexual assaults upon two prior victims were properly admitted to show defendant's modus operandi, common plan or scheme, intent, and knowledge. **Witness ID of Def. in Photo Lineup was testimonial under Crawford v Washington.**

2. Constitutional Law--Right to Confrontation--Nontestimonial Evidence--Law Enforcement Fingerprint Card

State v Windley, 173 NCA 187 (2005)

The trial **court did not violate defendant's Sixth Amendment right to confrontation** by admitting into evidence **law enforcement record cards allegedly bearing his fingerprint** and defendant is not entitled to a new trial on the conspiracy to traffic in cocaine conviction, because the fingerprint card created upon defendant's arrest and contained in the Automated Fingerprint Identification System database was a business record and therefore nontestimonial.

2. Constitutional Law--Right to Confrontation--Nontestimonial Evidence--Adequate Indicia of Reliability

State v Lawson, 173 NCA 270 (2005)

Defendant's Sixth Amendment right to confrontation was not violated in an assault with a deadly weapon inflicting serious injury case even though defendant contends the statements made by his former girlfriend to the victim were testimonial in nature according to **Crawford v. Washington, 541 U.S. 36 (2004)**, because: (1) the **statements were nontestimonial** and made while the victim was being transported to a hospital for injuries caused by defendant; (2) the statements were not made during any police investigation, rather they were made during a private conversation between the girlfriend and the victim and outside the presence of any police officer; (3) these statements were made merely to inform the victim of the attacker's identity since the girlfriend knew and the victim did not; and (4) it was unlikely that when the girlfriend made these statements she was thinking in terms of anything outside the scope of her private conversation, and she was not thinking about testifying as to this matter before the court.

3. Constitutional Law_right of confrontation--reports forming basis of expert opinion_no violation

State v Bethea, 173 NCA 43 (2005)

The Confrontation Clause does not act as a bar to testimonial statements admitted for purposes other than the truth of the matter asserted. The trial court here did not err when it allowed an SBI agent to use another agent's report as the basis of his expert opinion that shell casings were discharged from the weapon in question. It is clear in this case that the **testimony was offered as the basis of an expert's opinion rather than for the truth of the matter asserted.**

1. Evidence--lab report--performing chemist unavailable--basis of expert opinion - right of confrontation

State v Lyles, 172 NCA 323 (2005)

Lab reports performed by an unavailable chemist were properly admitted as the basis of the expert opinion of a Charlotte-Mecklenburg supervising chemist that substances taken from defendant were cocaine. Furthermore, **there was no confrontation clause violation where the expert witness was available for cross-examination. "Crawford"**

Constitutional Law; Evidence--right of confrontation--hearsay--unavailable witness--testimonial statements--photographic lineup identification--harmless error

State v. Allen 171 NCA 71 (2005)

A review of defendant's case in light of **Crawford v. Washington**, 541 U.S. 36 (2004), revealed that although defendant's right to confrontation was violated in a first-degree murder case by the admission of evidence through an officer's testimony of statements made by two unavailable witnesses to the officer in the victim's apartment and during one witness's photographic lineup identification of a coparticipant on 28 January 1998 since the statements were testimonial, the error was harmless beyond a reasonable doubt

because: (1) the evidence of defendant's guilt even without considering the statements made by the two unavailable witnesses is overwhelming; (2) two of the State's witnesses testified that they, along with defendant and two others, were involved in a plan to rob the victim; (2) the doctor who performed the autopsy testified that the older victim's wounds were consistent with a high-velocity bullet from a rifle and that the cause of death was a gunshot wound to the abdomen, and defendant admitted that he was carrying an assault rifle into the apartment and that the victim fell after defendant pulled the rifle's trigger; and (3) even though the officer testified that one of the witnesses identified a photo of a coparticipant as being the person who shot her daughter, this evidence did not directly

implicate defendant for the murder of the other victim, defendant himself testified that the coparticipant was present with him and that shots were fired in the apartment, neither witness identified defendant, and defendant was not convicted for the murder of the six-year-old girl.

2. Evidence; Constitutional Law – hearsay – residual hearsay exception – Right of confrontation –harmless error

State v. Champion, 171 NC App 716 (2005)

The trial **court erred** in a first-degree murder case by allowing a detective to testify as to what a witness told her on the date of the attack under the residual hearsay exception of N.C.G.S. 8C-1, Rule 804(b)(5) because the court improperly considered the corroborative nature of the statements in determining their trustworthiness. Defendant's Sixth Amendment right of confrontation under **Crawford v Washington**, 541 US 36 (2004) was also violated by the admission of those statements because, although the witness had died and was thus unavailable, there was no indication that defendant was given the opportunity to cross-examine the witness regarding the statements. However, the erroneous admission of the statements **was harmless** beyond a reasonable doubt when: (1) the jury heard similar evidence from other sources and was free to determine defendant's guilt based upon evidence irrespective of the witness's statements; and (2) there was overwhelming evidence establishing defendant's guilt.

Evidence--expert testimony--analyses conducted by others--right to confrontation--analyses not hearsay

State v. Delaney 171 NCA 141 (2005)

The trial **court did not violate defendant's right to confrontation in a drug case by admitting expert testimony based on chemical analyses conducted by someone other than the testifying expert**, because: (1) defendant had an opportunity to cross-examine the expert as provided under *Crawford v. Washington*, 541 U.S. 36 (2004); (2) an expert may base an opinion on tests performed by others in the field; and (3) the analyses on which the expert testimony was based were not hearsay.

Constitutional Law--right of confrontation--nontestimonial hearsay--sexual abuse--statements of children conveyed through foster and adoptive parents--catchall exception--unavailable witness

State v. Brigman 171NCA 305 (2005)

The trial **court did not err** in a multiple first-degree sex offense and multiple counts of indecent liberties case involving defendant mother's three sons by **admitting the statements by the sons as conveyed through their foster and adoptive parents**, because: (1) defendant waived her right to confront two of the boys whose statements were admitted under the catchall exception based on circumstantial guarantees of trustworthiness when defendant failed to call these two boys to testify; (2) none of the challenged statements constituted formal statements to police or other government officers; (3) although defendant implies the foster parents played a quasi-governmental role since they recorded the boys' statements and conveyed the statements to both DSS and the police, the statements are not the type of formal testimonial statements envisioned by the U.S. Supreme Court in **Crawford v. Washington**, 541 U.S. 36 (2004); and (4) the boy whose statements were admitted based on the fact that he was an unavailable witness made statements spontaneously to his foster mother, who was one of the people closest to him, without the reasonable belief that the statements would be used at a subsequent trial, and statements made to family, friends, and acquaintances without an intention for use at trial have consistently been held not to be testimonial.

1. Constitutional Law--Confrontation Clause--unavailable declarant--testimonial or nontestimonial statement

State v. Lewis 360 NC 1 (2005)

A trial court's determination of whether an unavailable witness's statements violate defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution includes: (1) an inquiry of whether the statement is testimonial or nontestimonial; (2) if the statement is testimonial, the trial court must then ask whether the declarant is available or unavailable to testify during the trial; and (3) if the declarant is unavailable, the trial court must determine whether the accused had a prior opportunity to cross-examine the declarant about this statement since, if the accused had such an opportunity, the statement may be admissible if it is not otherwise excludable hearsay, and if the accused did not have this opportunity the statement must be excluded.

3. Constitutional Law--Confrontation Clause--unavailable declarant--testimonial and nontestimonial statements

State v. Lewis 360 NC 1 (2005)

The **Court of Appeals erred in an assault** with a deadly weapon inflicting serious injury and felony breaking and entering case **by granting defendant a new trial based on the erroneous conclusion that admission of the unavailable victim's statements to law enforcement violated defendant's rights under the Confrontation Clause** of the

Sixth Amendment to the United States Constitution regarding the **victim's responses to an officer's questions following the assault and robbery in the victim's home and the victim's subsequent identification of her attacker from a police photograph lineup**, because: (1) under *Crawford v. Washington*, 541 U.S. 36 (2004), testimonial statements are inadmissible at trial unless the victim was unavailable and defendant had a prior opportunity to cross-examine the victim; (2) the victim's statements to the officer were nontestimonial statements and the Confrontation Clause does not prohibit their admission at trial since the officer's questioning of the victim and other witnesses was not structured police questioning when the focus of the officer's interview with the victim was to gather as much preliminary information as possible about the alleged incident, to determine if a crime had indeed been committed, to ascertain if medical attention was required, and to identify a potential perpetrator, and a person in the victim's position would not or should not have reasonably expected her statements to be used at trial; and (3) although the victim's identification of defendant to a detective was testimonial and should not have been admitted at trial unless defendant had an opportunity to cross-examine the victim based on the fact that it was made in response to structured police questioning and a reasonable person in the victim's position would expect her statements could be used at a subsequent trial, such error was harmless since there was competent overwhelming evidence of defendant's guilt. **See Farb p. 4 but see Davis v. Washington, (19 June 2006). US Sup Ct.**

1. Evidence--basis for expert's report--initial evidence gathering by another Testimony from an expert SBI firearms examiner was properly admitted where it was based in part on initial evidence taken by another agent who did not testify.

State v. Walker 170 NCA 632 (2005)

The evidence was corroborative and helped form the basis of the expert's opinion; the expert testified that he independently analyzed the entirety of the evidence, including the other agent's report; defendant was afforded a full opportunity to cross-examine the expert as to the basis of his expert opinion; and defendant did not request a limiting instruction.

2. Constitutional Law--right to confront witnesses--interrogation--unavailable witness—excited utterance

State v. Sutton 169 NCA 90 (2005)

The trial **court did not commit plain error by violating defendant's Sixth Amendment right to confront witnesses** against him in a first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury case when it allowed **one of the victim's statements to police to be admitted into evidence as an excited utterance when she did not**

testify at trial, because: (1) although the police questioning of the witness was interrogation, meaning the statement produced by that questioning was testimonial and the **trial court erred by providing no opportunity for defendant to cross-examine the witness on the contents of the statement**, there was plenary evidence of defendant's guilt; and (2) there was substantial evidence that defendant was the primary participant in the murder, robbery, and assault even though the jury only needed to find beyond a reasonable doubt that defendant and his coparticipant acted together with a common purpose to rob the victims that night since the jury was instructed on acting in concert. *People v. Bradley*, 799 N.Y.S.2d 472 (N.Y. A.D. 2005).

A New York appellate court recently ruled that when an **officer responded to a 911 call from a domestic violence victim (who was at the door, bloody, and (visibly shaken) and asked her "What happened?"** her statement in response to that question was **not testimonial under Crawford v. Washington**, 541 U.S. 36 (2004). The court **cited several cases, one of which was State v. Forrest**, 164 N.C. App. 272 (2004), affirmed per curiam, 359 N.C. 424 (2005).

1. Evidence--hearsay--unavailable witness--right of confrontation

State v. Morton 166 NCA 477 (2004)

The trial **court erred** in a possession of stolen goods case by allowing inadmissible hearsay into evidence and the case is remanded for a new trial, because: (1) an unavailable witness's testimonial statements to a detective are inadmissible since defendant did not have a prior opportunity to cross-examine the unavailable witness regarding his statements and the admission of those statements during the trial was a violation of defendant's right to confrontation under the Sixth Amendment; and (2) as the State offered no evidence that defendant knew the items were stolen, in the absence of the unavailable witness's inadmissible statements, it cannot be concluded the error was harmless beyond a reasonable doubt.

Rev'd State v. Lewis 360 NC 1 (2005) Constitutional Law--right of confrontation--testimonial hearsay--identification by photographic lineup

State v. Lewis 166 NCA 596 (2004)

Although defendant contends the trial court erred in an assault with a deadly weapon inflicting serious injury, non-felonious breaking or entering, and robbery with a dangerous weapon case by admitting the testimony of an officer concerning statements made by the victim to him at her apartment and statements by another officer concerning the victim's identification of her in a photographic line-up under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 804(b)(5) after the victim died of unrelated causes, defendant's argument is not reached because the

admission of the evidence was a violation of defendant's Sixth Amendment rights under the Confrontation Clause and defendant is entitled to a new trial on that ground since: (1) both the victim's statement to the police and her identification of defendant in the photo line-up constitute testimonial evidence that are inadmissible based on the fact that the witness was unavailable and defendant did not have a proper opportunity to cross-examine; (2) the fact that the information provided may be quite reliable or trustworthy is irrelevant; and (3) it cannot be concluded that the error was harmless beyond a reasonable doubt because once the evidence by the victim is excluded, there is no eyewitness testimony available giving an account of the crime or anyone who can place defendant with the victim during the time of its commission, there is no forensic evidence, and defendant never confessed to the crime. **Sup. Ct. to review**

2. Evidence--hearsay--nontestimonial statements--right of confrontation

State v. Blackstock 165 NCA 50 (2004)

Hearsay statements made by a murder victim to his wife and daughter concerning the shooting of the victim during a robbery were nontestimonial and not rendered inadmissible by *Crawford v. Washington*, 541 U.S. ___ (2004) where they were made during personal conversations that took place over a period of several days after the shooting at a time when the victim's physical condition was improving and he could have expected to personally testify at the trial. **See p. 66 footnote; Ohio v Roberts still ok as to non – testimonial**

1. Constitutional Law--right to confrontation--nontestifying witness--Crawford--testimonial evidence

State v. Clark 165 NCA 279 (2004)

A nontestifying witness's statement to an officer during the initial investigation and her later affidavit during questioning **constituted testimonial evidence under Crawford v. Washington**, ___ U.S. ___ (2004). The affidavit contained statements which implicated defendant and which were made under oath during police questioning. **The fact that the initial statement was not under oath is not dispositive.**

3. Constitutional Law--right to confrontation--nontestifying witness--unavailable

State v. Clark 165 NCA 279 (2004)

The trial court did not err by declaring a witness unavailable where the prosecutor informed the court that he had personally visited the scene, that the State had attempted to contact the witness through her friends, and that an officer had made several attempts to locate her. The State subsequently

offered additional evidence regarding the witness's unavailability, including the officer's testimony.

4. Constitutional Law–right to confrontation–nontestifying witness–prior testimony

State v. Clark 165 NCA 279 (2004)

Defendant's Sixth Amendment right to confrontation was not violated by the admission of a nontestifying witness's prior testimony where defendant was present at the earlier trial, was represented by counsel, and had the opportunity to cross-examine the witness. The jury in the second trial heard the entire transcript, including the cross-examination about defendant's convictions, addictions, and any special treatment she received for her testimony.

3. Constitutional Law–Confrontation Clause–kidnap victim's statements following release–Crawford analysis

State v. Forrest 164 NCA 272 (2004)

A kidnapping and assault **victim's spontaneous statements** to police immediately following her rescue **were nontestimonial** and were not rendered inadmissible by *Crawford v. Washington*, ___ U.S. ___ (2004). She was not providing a formal statement, deposition, or affidavit, she did not know that she was bearing witness, and she was not aware that her utterances might impact further proceedings. The Confrontation Clause was not implicated. *Crawford v. Washington*, US Sup Ct. March 8, 2004 Court Rules That **"Testimonial" Statement Obtained Before Trial Is Admissible Under the Confrontation Clause Only If the Declarant Is Available for Cross-Examination at Trial or If the Declarant Is Unavailable at Trial, There Was a Prior Opportunity for Cross-Examination of Declarant** Based on the Court's statements in footnote 9, **this ruling (1) does not prohibit the state's introduction of a testifying witness's out-of-court "testimonial" statement, under either an exception to the hearsay rule or as a prior consistent statement (that is, for corroborative purposes), because the witness is available for cross-examination; and (2) does not prohibit the state's use of "testimonial" statements for purposes other than establishing the truth of the matter asserted, such as for impeachment of a witness.**