

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-358

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Wilkes County
No. 02 CRS 52026

ELIZABETH GREEN BYRD,
Defendant.

Appeal by defendant from judgment entered 28 July 2004 by Judge William Z. Wood, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 28 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kelly D. Miller, for defendant-appellant.

JACKSON, Judge.

Elizabeth Green Byrd ("defendant") appeals from a judgment and commitment resentencing her for second degree murder. For the reasons discussed herein, we remand the case for resentencing.

On 10 December 2002, defendant pled guilty pursuant to a plea agreement to second-degree murder. In accordance with the terms of the plea agreement, the State reduced the charge from first-degree murder, with no provisions relating to sentencing. At sentencing, the trial judge found four non-statutory aggravating factors and

three statutory mitigating factors. The trial court determined that the aggravating factors outweighed the mitigating factors, and sentenced the defendant from the aggravated range to a term of 180 to 225 months imprisonment. On appeal, this Court found that the trial court erred by finding as a non-statutory aggravating factor that defendant committed felony murder but was not charged with it. Further, the Court determined that it was error for the trial judge to consider as an aggravating factor that defendant voluntarily entered the affray. Thus, this Court remanded for resentencing. *State v. Byrd*, 164 N.C. App. 522, 596 S.E.2d 860 (2004).

On remand, the trial court found as non-statutory aggravating factors that "defendant acted with premeditation and deliberation and committed a first-degree murder, but was allowed to plead to second-degree murder" and that "defendant could have been but was not charged with shooting into an occupied property." The trial court found three factors in mitigation, but found that the factors in aggravation outweighed the factors in mitigation and sentenced defendant from the aggravated range to a term of 180 to 225 months imprisonment. Defendant appeals.

Defendant first argues that the trial court lacked jurisdiction to sentence her in the aggravated range because the State failed to allege the aggravating factor in defendant's indictment. However, this argument has been rejected expressly by our Supreme Court in *State v. Allen*, 359 N.C. 425, 438, 615 S.E.2d 256, 265 (2005). Accordingly, the assignment of error is overruled.

Defendant next argues that the trial court erred in sentencing her in the aggravated range because the aggravating factors were not submitted to the jury. We agree. In *Allen*, our Supreme Court concluded that, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, 615 S.E.2d at 265 (citing *Blakely*, 542 U.S. at ___, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16, 15A-1340.17). Here, the trial court, not the jury, found two non-statutory aggravating factors which increased defendant's sentence above the statutory maximum allowed by her guilty plea to second degree murder. Accordingly, in light of our Supreme Court's decision in *Allen*, the trial court committed reversible error and the matter is remanded for resentencing.

Remanded for resentencing.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).