NO. COA13-182
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Wayne County
No. 10 CRS 05488

BRENDA WILLIAMS GARNER

Appeal by defendant from judgments entered 29 August 2012 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Jane L. Oliver, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

MCCULLOUGH, Judge.

On 29 August 2012, a jury convicted defendant Brenda Williams Garner on four counts of discharging a weapon into an occupied vehicle that is in operation in violation of section 14-34.1(b) of the North Carolina General Statutes. On appeal, defendant argues the following: (1) the trial court violated her constitutional rights by excluding of the testimony of a

defense witness; (2) she received ineffective assistance of counsel; (3) the evidence was insufficient to support her verdict; (4) the trial court committed plain error by failing to instruct on the lesser-included offense of shooting into an occupied vehicle; (6) the trial court erred by entering judgments not supported by the verdict; and that (7) there was a clerical error in the consolidated judgment form for counts three and four. We find no error in defendant's trial, but remand for correction of a clerical error.

I. Background

The State's evidence tended to show the following: On 19 September 2010, Nicole Galbreath ("Galbreath") was driving her white Chrysler out of Pleasant Acres – a mobile home subdivision. Her boyfriend, Sam Cannon ("Cannon"), and nephew, Tyrique Flowers, were passengers in her vehicle. Galbreath was at a stop sign when defendant pulled up beside her driving a black Lincoln. Defendant exited her vehicle, grabbed a gun from her purse, and shot at Galbreath's vehicle. Galbreath drove down Genoa Road to flee defendant but defendant chased Galbreath in her car and attempted to pull up beside Galbreath's vehicle.

Galbreath turned down Pecan Road, turned beside a store, and noticed that defendant was still following her. Defendant,

once again, exited her vehicle and shot at Galbreath's vehicle. Thereafter, while defendant continued to chase Galbreath, Galbreath drove down Arrington Bridge Road where the police pulled defendant over.

Deputy Travis Sparks of the Wayne County Sheriff's Office testified that on 19 September 2010 he responded to a call of a car chase. Dispatch had advised of a black vehicle chasing and shooting at a white vehicle. Deputy Sparks observed the car chase between defendant and Galbreath on Arrington Bridge Road and initiated a traffic stop of defendant's vehicle. Defendant stopped her vehicle and placed her hands out of the window. Deputy Sparks approached defendant's vehicle and observed a firearm sitting in the passenger seat of her car. Defendant was asked to step out of her vehicle.

Deputy Charles Schaefer, also with the Wayne County Sheriff's Office, arrived on the scene and placed defendant in handcuffs. Defendant was then placed in the back of a patrol car.

Detective Carl Lancaster of the Wayne County Sheriff's Department testified that he interviewed defendant at the sheriff's office. Defendant was given her *Miranda* warnings and voluntarily agreed to make a statement that was reduced to

writing as State's Exhibit 14. Defendant's statement included the following:

> I caught a ride with this guy named Mark to go look for my car that my boyfriend, Sam Cannon, was driving. My sister had informed me that it was parked in Pleasant Acres on Genoa Road at Cox Road. Mark dropped me off at my car. Sam was not there. I had put a gun, which was a .380 caliber, in the car last night because I had been to a nightclub. I looked under the passenger seat and found my gun. I had keys to my car, but Sam had left the keys in the ignition. I was concerned with Sam driving the car with a gun under the seat. Sam is a convicted felon. I started driving the car into Pleasant Acres. I saw Sam riding with Nicole. I tried to stop Sam and talk with him. Sam kept going. I pointed the gun into the air and fired three shots into the air. Nicole kept driving. I leveled the gun off at the car; I fired twice. I saw two holes in the car. One was in the taillight lens and the other was in the middle below the taillight lens. I was not trying to shoot anybody or hurt anybody. I was just trying to get Sam's attention.

Both defendant and Galbreath's vehicles were impounded. Defendant Lancaster testified that he found a .380 shell casing in the driver's side floorboard of defendant's vehicle. He also took photographs of Galbreath's vehicle. Lancaster testified that there was a hole in the driver's side rear quarter panel and a hole in the driver's side taillight lens of Galbreath's vehicle. There was also "some type of indentation caused by a

firearm" above the registration plate. In addition, Lancaster testified that there was a hole in the radiator of Galbreath's vehicle.

Defendant testified at trial in her own defense. Defendant had known and been in a relationship with Cannon for over five years. On 19 September 2010, defendant made her way towards Pleasant Acres to retrieve her car, a Lincoln. The night before, defendant had left her gun under the seat of her vehicle. Once she found her car sitting on the side of the road, she entered her vehicle and proceeded to drive into the Pleasant Acres subdivision. Defendant saw Galbreath's car drive towards her and became aware that Galbreath and Cannon were together. Defendant testified that she shot her gun into the air once "to let [Cannon] know I was armed." Defendant then followed Galbreath's car out of Pleasant Acres and assumed they were headed towards Cannon's father's house. Defendant was driving down Arrington Bridge Road when police stopped her.

Defendant testified that she told the officer who pulled her over that she was trying to get her car back from Cannon. The officer asked defendant where the gun was and she replied that it was lying in the front seat. The officer asked defendant to get out of her car and to stand near the back of

her car. Two other officers arrived at the scene and placed defendant in handcuffs. Defendant was placed in the patrol car.

While she was in the patrol car, defendant answered a phone call from her cousin. Defendant asked her cousin to relay a message to Galbreath: "tell [Galbreath] not to take out any charges on me." Defendant was subsequently taken to the sheriff's office where she was interviewed by Detective Lancaster for approximately two hours.

Defendant testified that she gave a statement to Detective Lancaster, that Detective Lancaster transcribed it, and that she had an opportunity to review it before she signed it. However, at trial, defendant denied that the following information included in her written statement was true: she shot three shots into the air; she leveled the gun off at the car and fired twice; and she saw two holes in the car.

On 2 May 2011, defendant was indicted on four counts of discharging a firearm into occupied property in violation of section 14-34.1(b) of the North Carolina General Statutes. Defendant was tried before a jury at the 27 August 2012 criminal session of Wayne County Superior Court, the Honorable Arnold O. Jones, II, Judge presiding. On 29 August 2012, the jury returned guilty verdicts on all four counts.

After consolidating counts three and four, in three separate judgments, the trial court sentenced defendant for a term of sixty-six (66) months to eighty-nine (89) months in each judgment. The first two terms were to run consecutively and the last term was to run concurrently with the second term. Defendant appeals.

II.

Defendant first argues that her constitutional rights were violated when the trial court ruled to prohibit a defense witness from testifying at trial.

On the first day of trial, the trial court judge instructed members of the jury to not discuss the case amongst themselves and to avoid contact with the parties, counsel, and potential witnesses. On the second day of trial, a juror notified the trial court judge that someone had spoken to her on the way out the previous day. The juror identified the speaker as Gean Hules Gelin, a witness for defense.

The trial court conducted a voir dire hearing to inquire about the contact between the juror and Gelin. The trial court ruled that "[b]ased on everything I have heard and considered, and arguments of counsel, not finding the witness to be

credible, I am not going to allow him to testify in this trial." Defendant did not object to this ruling at trial.

Our Court has held that "[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (citations omitted). Because defendant failed to present this constitutional argument at trial, we decline to address it now.

III.

In her second argument, defendant contends that defense counsel's assistance was rendered ineffective by failure to move to suppress defendant's written custodial statement.

> To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's "performance was deficient," and (2) "the deficient performance prejudiced the defense." Counsel's performance is defective when it falls "below an objective standard of reasonableness." A defendant is prejudiced by deficient performance when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

State v. Wilkerson, 363 N.C. 382, 413, 683 S.E.2d 174, 193 (2009) (citations omitted).

On 23 August 2012, defense counsel moved to suppress statements defendant made when she was handcuffed and placed in custody by a deputy who questioned her without giving her *Miranda* warnings. The trial court granted defense counsel's motion to suppress these statements finding the following, in pertinent part:

> First of all, the officers approached the Defendant at approximately 6:28 p.m. on September 19, 2010. At least two officers approached the Defendant, and at the time two officers approached, there was an officer already on site[.]
>
> Second, I don't know which officer it was, but an officer did tell the Defendant to place her hands above her head, and that he was cuffing her because he felt like it. He also went on to say that he was not sure of the situation involving weapons[] . . .
>
> Third, the officer said, "Do you want to tell me who he is?" . . . "For the sixth time, who is he? Were you shooting at him?" And then a statement made, "It's looking bad for you." You want – "Do you want to keep ignoring everything I ask you? Do you want to talk to me?"
>
> . . .
>
> It appears to me that any emergency or exigent circumstances that the officers would have addressed concerning the weapons very early in this process were resolved in favor of it was safe. Therefore, I'm going to find that the questionings that were – that were given, a person in her standing would have felt she was not free to leave.

> She was handcuffed. She was in the presence of at least three uniformed officers. . . . [T]he answer given by the Defendant are suppressed.

At trial, defendant testified that after she was arrested and placed in the patrol car, she was driven to the sheriff's office where she was interviewed by Detective Lancaster. Prior to defendant's interview, Lancaster testified that he gave defendant her *Miranda* warnings and filled out a *Miranda* rights form. Defendant indicated that she understood her rights, indicated that she wished to answer questions, and agreed to make a statement. Defendant's statement was reduced to writing and admitted into evidence. Lancaster read the statement to the jury that defendant gave on 19 September 2010.

Defendant now argues that based on the holdings in *Oregon v. Elstad,* 470 U.S. 298, 105 S. Ct. 1285 (1985) and *State v. Barlow*, 330 N.C. 133, 409 S.E.2d 906 (1991), "even a post-*Miranda* warning statement should be suppressed if it was tainted by a pre-warning statement obtained by the police through 'coercive' or 'improper' tactics."

In *Elstad*, the United States Supreme Court determined whether the Fifth Amendment requires suppression of a confession that is the fruit of an earlier statement obtained in violation of *Miranda*. The defendant in *Elstad* made incriminating

statements without the benefit of *Miranda* warnings and then subsequently made incriminating statements after having been fully advised of and having waived his *Miranda* rights. *Elstad*, 470 U.S. at 301, 105 S. Ct. at 1288-89. The *Elstad* Court held the following:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any *actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will*, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Id. at 309, 105 S. Ct. at 1293 (emphasis added).

In *Barlow*, the issue before the Court was whether "the Fifth and Fourteenth Amendments of the United States Constitution mandated suppression of defendant's videotaped confession, made after she waived her *Miranda* rights, solely because the confession was preceded by incriminating statements made by defendant without the benefit of *Miranda* warnings." *Barlow*, 330 N.C. at 134, 409 S.E.2d at 907. Our Court noted that "it is only where an earlier inadmissible confession is coerced or given under circumstances calculated to undermine the

suspect's ability to exercise his or her free will that the Fifth Amendment mandates that fruits of the confession, such as the videotaped confession in this case, must be suppressed." *Id.* at 139, 409 S.E.2d at 910. Because "defendant's statements to the police made without benefit of *Miranda* warnings were not coerced and were not given under circumstances calculated to undermine her ability to exercise her free will[,]" our Court held that the subsequent confession, "given after proper *Miranda* warnings, was knowingly and voluntarily given by defendant" and admissible. *Id.* at 142, 409 S.E.2d at 912.

Our Court has held that certain factors are to be considered in determining the voluntariness of a confession:

> Among these factors are whether the defendant was in custody when he made the statement; the mental capacity of the defendant; and the presence of psychological coercion, physical torture, threats, or promises. However, voluntariness is determined in light of the totality of the circumstances surrounding the confession. The presence or absence of one or more of these factors is not determinative.

Id. at 140-41, 409 S.E.2d at 911 (citations omitted).

In the case before us, defendant's first incriminating statements were made without the benefit of *Miranda* warnings, while she was handcuffed, and in the presence of several officers. However, there were no indications of psychological

coercion, physical torture, threats, or promises and no evidence that defendant's mental capacity was deficient or impaired in any way. Based on the totality of the circumstances, we are unable to hold that defendant's first incriminating statements were coerced or given under circumstances calculated to undermine her ability to exercise her free will.

Defendant was subsequently taken down to the sheriff's office and interviewed by Detective Lancaster. She was advised of her *Miranda* rights prior to being questioned, defendant indicated she understood these rights, and defendant voluntarily agreed to make a statement to Detective Lancaster. Defendant's statement was transcribed by Deputy Lancaster.

Pursuant to the holdings in *Barlow* and *Elstad*, defendant's subsequent statement, given after proper Miranda warnings, was knowingly and voluntarily given. Therefore, defendant's custodial statement was not tainted and was admissible at trial.

Because the custodial statement was admissible, we are unable to hold that defense counsel's failure to move to suppress defendant's custodial statement was "deficient". Accordingly, defendant's argument is overruled.

IV.

In her third argument, defendant asserts that the trial court erred by admitting Galbreath's written statement as a recorded recollection because Galbreath never indicated that she lacked sufficient recollection to testify. We disagree.

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion." *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004). The North Carolina's Rules of Evidence provide that "hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802. Pursuant to Rule 803(5), the following is not excluded by the hearsay rule:

> Recorded Recollection – A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

N.C. Gen. Stat. § 8C-1, Rule 803(5).

> In order to admit "recorded recollection" pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(5), the party offering the recorded recollection must show that the proffered document meets three foundational requirements: (1) The document must pertain to matters about which the declarant once

> had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined [and adopted] . . . when the matters were fresh in [her] memory.

State v. Love, 156 N.C. App. 309, 314, 576 S.E.2d 709, 712 (2003) (citation omitted).

At trial, the State asked Galbreath, "[d]o you not remember anything about that particular day?" Galbreath answered in the negative. Galbreath testified that she remembered talking to the police on 19 September 2010 and giving a statement that same day. Galbreath also testified that she had a chance to review her written statement and make changes to it before signing her name on the statement.

Based on the foregoing, the State was able to establish that Galbreath's written statement dealt with matters about which she once had knowledge; Galbreath no longer remembered anything about 19 September 2010; and Galbreath had the opportunity to examine and adopt the written statement. Because the State met all three foundational requirements, the trial court did not abuse its discretion by admitting Galbreath's written stated as recorded recollection. Defendant's argument is overruled.

V.

At the close of the State's evidence, defense counsel made a motion to dismiss all the charges against defendant which was denied by the trial court. Defendant now argues that there was insufficient evidence to support all four counts of discharging a firearm into an occupied vehicle in operation. Specifically, she argues that there was insufficient evidence to support more than two counts of firing into Galbreath's vehicle and that there was insufficient evidence to show that more than two counts occurred while the occupied vehicle was "in operation." We disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Miles*, __ N.C. App. __, __, 733 S.E.2d 572, 573 (2012) (citation omitted).

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.
>
> The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

State v. Bumgarner, 147 N.C. App. 409, 412, 556 S.E.2d 324, 327 (2001) (citations omitted). "[T]he trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State[.]" *Miles*, __ N.C. App. at __, 733 S.E.2d at 574. "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (citation omitted).

Here, defendant was convicted on four counts of discharging a firearm into an occupied vehicle in violation of N.C. Gen. Stat. § 14-34.1(b), a Class D felony. The elements of the more general offense, N.C. Gen. Stat. § 14-34.1(a), a class E felony, of discharging a firearm into occupied property are "(1) willfully and wantonly discharging (2) a firearm (3) into property [(i.e. any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure)] (4) while it is occupied." *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995) (citation omitted). The elevated offense defendant was convicted of violating, pursuant to N.C.G.S. § 14-34.1(b), "requires an additional element, namely that the vehicle be 'in operation' at the time

of the shooting." *State v. Galloway*, __ N.C. App. __, __, 738 S.E.2d 412, 414 (2013).

Defendant argues that her custodial statement admitted only two shots fired level at Galbreath's vehicle. However at trial, the evidence tended to show that prior to the 19 September 2010 there were no bullet holes in Galbreath's car. The State presented four photographs of Galbreath's vehicle after the incident, exhibit numbers 4, 19, 20, and 21. Detective Lancaster testified that there was a hole in the driver's side rear quarter panel of Galbreath's vehicle in State's exhibit 19, a hole in the driver's taillight lens of Galbreath's vehicle in State's exhibit 20, an indentation caused by a firearm above the registration plate of Galbreath's vehicle in State's exhibit 21, and a hole in the radiator of Galbreath's vehicle in State's exhibit 4.

It is well established that each shot fired at Galbreath's vehicle constituted a separate offense. *See State v. Hagans*, 188 N.C. App. 799, 806, 656 S.E.2d 704, 709 (2008). Viewing the evidence in the light most favorable to the State, there was substantial evidence of four holes in Galbreath's car and therefore, substantial evidence to support four counts of discharging a firearm into a vehicle.

Next, defendant argues that there was insufficient evidence that Galbreath's vehicle was moving each time the shots were fired into her vehicle. Although a violation of N.C.G.S. § 14-34.1(b) requires that the vehicle be "in operation" at the time of the shooting, the plain language of the statute does not require the victim's vehicle to be in motion as defendant suggests and the statute does not define the phrase "in operation." "[I]n construing a statute, undefined words should be given their plain meaning." *State v. Watson*, 169 N.C. App. 331, 337, 610 S.E.2d 472, 477 (2005) (citation omitted). "Operation" is defined as "the quality or state of being functional or operative." *Webster's Third New International Dictionary* (1961).

Our review indicates that at trial, the State asked Galbreath "Now, when this shooting was going on, were you actually driving down the road?" Galbreath answered this question in the affirmative. Furthermore, defendant's statement to the police included the following, in pertinent part:

> I started driving the car into Pleasant Acres. I saw [Cannon] riding with [Galbreath]. I tried to stop Sam and talk with him. Sam kept going. I pointed the gun into the air and fired three shots into the air. [Galbreath] kept driving. I leveled the gun off at the car; I fired twice.

Applying the plain meaning of "operation" to the case before us and viewing the evidence in the light most favorable to the State, we hold there was sufficient evidence to support a finding that defendant's shots were fired while Galbreath's vehicle was "in operation."

Therefore, we hold that the trial court did not err by denying defendant's motion to dismiss all charges. Defendant's arguments are overruled.

VI.

In her sixth argument, defendant contends that the trial court committed plain error by failing to instruct on the lesser included offense of shooting into an occupied vehicle in violation of N.C. Gen. Stat. § 14-34.1(a), a Class E felony.

Because defendant did not object to the trial court's failure to instruct on this lesser included offense, we review defendant's argument under the plain error rule. *State v. Beamer*, 339 N.C. 477, 483, 451 S.E.2d 190, 194 (1994).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has

> "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

> In determining when a lesser-included offense is required, our Supreme Court held in *State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002) that: Under North Carolina and federal law a lesser included offense instruction is required if the evidence would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater. The test is whether there 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. Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required.

State v. Dyson, 165 N.C. App. 648, 654, 599 S.E.2d 73, 77 (2004) (citations and quotation marks omitted).

Defendant argues that the evidence was conflicting or absent in regards to whether Galbreath's car was moving at the time defendant fired into the vehicle. However, as we discussed in Issue V, although a violation of N.C.G.S § 14-34.1(b)

requires that the victim's vehicle be "in operation," the plain meaning of the word "operation" is defined as "the quality or state of being functional or operative." *Webster's Third New International Dictionary* (1961). Therefore we reject defendant's argument that pursuant to N.C.G.S. § 14-34.1(b), Galbreath's vehicle had to be moving during the shooting.

A violation of N.C.G.S. § 14-34.1(b) requires the following elements: (1) willfully and wantonly discharging (2) a firearm (3) into a dwelling or any vehicle, aircraft, watercraft, or other conveyance (4) while it is occupied and (5) in operation. *See Rambert*, 341 N.C. at 175, 459 S.E.2d at 512 (citation omitted) and *see Galloway*, __ N.C. App. at __, 738 S.E.2d at 414; N.C.G.S. § 14-34.1(b).

As also discussed in Issue V, the State's evidence established that Galbreath answered in the affirmative to the following question, "Now, when this shooting was going on, were you actually driving down the road?" In addition, defendant's statement to the police stated the following, in pertinent part:

> I started driving the car into Pleasant Acres. I saw [Cannon] riding with [Galbreath]. I tried to stop Sam and talk with him. Sam kept going. I pointed the gun into the air and fired three shots into the air. [Galbreath] kept driving. I leveled the gun off at the car; I fired twice.

Based on the foregoing, we hold that the State's evidence was positive as to the element of Galbreath's vehicle being "in operation" at the time of the shooting and that there was no contradictory evidence relating to this element. In conclusion, the trial court was not required to instruct on a lesser included offense and defendant's argument is overruled.

VII.

In her next argument, defendant asserts that the trial court erred by entering judgment not supported by the verdict. Specifically, defendant argues that the verdict failed to include the element of whether Galbreath's vehicle was "in operation" as N.C.G.S. § 14-34.1(b) provides.

"Normally, where the defendant appeals based on the content of the verdict sheet but failed to object when the verdict sheet was submitted to the jury, any error will not be considered prejudicial unless the error is fundamental." *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003) (citation omitted).

"Although the statutes do not specify what constitutes a proper verdict sheet, they contain 'no requirement that a written verdict contain each element of the offense to which it refers.'" *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d

237, 240 (2002) (citation omitted). "A verdict is deemed sufficient if it 'can be properly understood by reference to the indictment, evidence and jury instructions." *Wiggins*, 161 N.C. App. at 592, 589 S.E.2d at 409 (citation omitted).

Here, defendant was charged with four separate counts of violating N.C.G.S. § 14-34.1(b). The indictments properly stated that Galbreath's vehicle "was in motion and operation" as to each of the four offenses. The State presented evidence that Galbreath's vehicle was "in operation" through the testimony of Galbreath and defendant's written statement. The trial court adequately instructed the jury that the State must prove that Galbreath's vehicle was in operation beyond a reasonable doubt for each of the four separate counts. On the verdict form, the jury returned a verdict of "[g]uilty of felonious discharging a weapon into an occupied property." Taking into consideration the record, including the indictment, evidence, and instructions, it is clear that the element of Galbreath's vehicle being "in operation" was at issue and that defendant's verdicts were properly understood. *See State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986) (stating that "[t]he record, including the indictment and the instructions, makes it abundantly clear, beyond mistake by the jury, that

knowing possession of goods stolen from [victim] was at issue"). Defendant's arguments are overruled.

VIII.

Lastly, defendant argues that there is a material clerical error in the consolidated judgment form for counts three and four. We agree.

A clerical error is defined as "[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (citing Black's Law Dictionary 563 (7th ed. 1999). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. May*, 207 N.C. App. 260, 263, 700 S.E.2d 42, 44 (2010) (citation omitted).

The record indicates that the trial court judge stated the following in court:

> As to count one in the Indictment . . . I am going to sentence [defendant] to a minimum of sixty-six and a maximum of eighty-nine months in the North Carolina Department of Corrections[.]

> As to count two, . . . I'm going to sentence her to a minimum of sixty-six and maximum of eighty-nine months in the North Carolina Department of Corrections, and that sentence shall run at the expiration of the sentence imposed in count one.
>
> Counts three and four . . . as to that sentence, consolidating those, . . . [defendant] shall serve a minimum of sixty-six and a maximum of eighty-nine months in the North Carolina Department of Corrections, and I'm going to run those *concurrent with . . . count two.*

(emphasis added). However, in the judgment and commitment form for consolidated counts three and four, the trial court checked a box indicating that "[t]he sentence imposed above shall begin at the expiration of the sentence imposed in [count two]."

Based on the foregoing clerical error, we remand to the trial court for correction of the clerical error in the judgment and commitment form for counts three and four.

No error in part; remand for correction of clerical error in part.

Judges HUNTER, (ROBERT C.) and GEER concur.

Report per Rule 30(e).