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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1063

Filed: 20 June 2017

Anson County, Nos. 15 CRS 50345, 50376

STATE OF NORTH CAROLINA

v.

WILLIAM CHAVIS DUNLAP, JR.

On writ of certiorari to review judgment entered 24 September 2015 by Judge James G. Bell in Anson County Superior Court. Heard in the Court of Appeals 30 May 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Bircher, for the State.

Richard Croutharmel for defendant-appellant.

ELMORE, Judge.

Defendant William Dunlap appeals by writ of certiorari from a judgment entered upon jury verdicts finding him guilty of assault with a deadly weapon (“AWDW”), discharge of a weapon into an occupied vehicle, and possession of a firearm by a felon. We vacate and remand for resentencing.

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Around midnight on 27 March 2015, Brent Little was driving with his girlfriend when he saw a silver car approaching in the opposite direction. A man was hanging outside its passenger-side window and as the silver car approached, the man fired two gunshots at Little's vehicle. The muzzle flash from the two shots illuminated the man's face. It was defendant. Little recognized him from previous encounters. The silver car continued to drive past in the opposite direction.

Little stopped his vehicle at a nearby gas station. The bullets penetrated the front of his vehicle; fluid leaked from the radiator. Officer Alex Sherwood of the Wadesboro Police Department ("WPD") heard the gunshots and responded to the scene. Little reported to Officer Sherwood that defendant had shot at his vehicle.

WPD Officer Kyle Randall overheard the "shots fired" radio report and drove to defendant's house to investigate. The silver car was parked in the driveway. Defendant's father spoke to Officer Randall and told him that defendant was not at home. Defendant's father called defendant, who arrived a few minutes later with the owner of the silver car. Officer Randall placed defendant under arrest.

Defendant was indicted for AWDW; discharging a weapon into an occupied, moving vehicle; and possession of a firearm by a felon. Beginning 22 September 2015, defendant was tried by a jury in Anson County Superior Court. After the presentation of evidence, the trial court held a charge conference with the parties. The State submitted an instruction for the discharging a weapon offense that omitted

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any reference to a moving vehicle. The trial court's instructions regarding the offense also did not indicate the vehicle was required to be moving.

On 24 September 2015, the jury returned verdicts finding defendant guilty of AWDW, "discharge weapon in occupied vehicle," and possession of a firearm by a felon. The trial court arrested judgment on the AWDW conviction, consolidated the two remaining convictions for judgment, and sentenced defendant as a Class D felon to 59 to 83 months of imprisonment. Defendant appeals.

Defendant argues that the trial court erred by imposing judgment for the Class D felony of discharging a firearm into an occupied, moving vehicle because the jury convicted him of the Class E felony of discharging a firearm into an occupied vehicle. We agree.

The critical distinction between the Class E felony offense described under N.C. Gen. Stat. § 14-34.1(a) and the Class D felony offense described under N.C. Gen. Stat. § 14-34.1(b) is that the latter, elevated offense requires an additional element, namely that the vehicle be "in operation" at the time of the shooting.

State v. Galloway, 226 N.C. App. 100, 104, 738 S.E.2d 412, 414 (2013).

In this case, neither the court's instructions nor the verdict rendered reflected that the jury found that Little's vehicle was in operation at the time of the shooting. Therefore, the jury's verdict supported only a conviction of the Class E felony offense of discharging a weapon into an occupied vehicle. *See* N.C. Gen. Stat. § 14-34.1 (2015). Because the jury's verdict only supported Class E punishment, the trial court

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erred by sentencing defendant as a Class D felon. Accordingly, we vacate the judgment¹ and remand to the trial court for resentencing on the correct offense. *See State v. Townsend*, 99 N.C. App. 534, 539, 393 S.E.2d 551, 554 (1990) (“Where a verdict is returned convicting a defendant of a misdemeanor, but the judgment incorrectly reflects a conviction for a felony, the case must be remanded to correct the judgment and make it consistent with the verdict.” (internal quotations and citation omitted)); *State v. Durham*, 74 N.C. App. 121, 124, 327 S.E.2d 312, 315 (1985) (“The case must therefore be remanded to the [superior court] to correct the judgment and make it consistent with the verdict.” (citation omitted)).

The State contends that *Durham* and *Townsend* are inapplicable because, unlike the present case, those cases did not involve an instructional error. We fail to see how the State’s concession to an additional error² by the trial court compels a different disposition. In accordance with *Durham* and *Townsend*, the trial court’s judgment is vacated and the case is remanded for resentencing.

VACATED AND REMANDED FOR RESENTENCING.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).

¹ Because defendant’s convictions were consolidated for judgment, the entire judgment must be vacated. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (remanding a consolidated judgment for resentencing where one of the charges was vacated).

² While the State concedes the trial court’s instruction was erroneous, it contends the error was harmless.