

NO. COA14-559

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.

Wake County
No. 12 CRS 216735

MATTHEW STEPHAN COAKLEY

Appeal by defendant from judgments entered 21 November 2013
by Judge William R. Pittman in Wake County Superior Court.
Heard in the Court of Appeals 9 October 2014.

*Attorney General Roy Cooper, by Special Deputy Attorney
General Mary L. Lucasse, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate
Defender Emily H. Davis, for Defendant.*

BELL, Judge.

Matthew Stephan Coakley ("Defendant") appeals from
judgments sentencing him to an active term of 72 to 99 months
imprisonment for malicious maiming and to a consecutive term of
24 to 41 months imprisonment suspended with supervised probation
for assault with a deadly weapon inflicting serious injury and

assault inflicting serious bodily injury. On appeal, Defendant contends that the trial court erred by (1) instructing the jury that it could convict him under North Carolina's malicious maiming statute if it found that he had "disabled" Mr. Clark's eye; (2) instructing the jury on a theory of malicious maiming that was not included in the indictment; and (3) entering judgment for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury. After a careful review of the record and applicable law, we conclude that Defendant's first two contentions lack merit. We agree with Defendant on his third ground for appeal and therefore arrest judgment on the conviction for assault inflicting serious bodily injury and remand this case to the trial court for resentencing.

I. Factual Background

A. State's Evidence

On 7 July 2012, Denny Clark ("Mr. Clark") went to The Brickhouse, a sports bar located in Raleigh, North Carolina, to visit his girlfriend, Reina Diaz ("Ms. Diaz"), and watch an Ultimate Fighting Championship ("UFC") fight on pay-per-view. The Brickhouse had four large projector screens and eight flat screen televisions around the bar. On the night in question, the bar was filled to capacity.

Around 10:00 p.m., Mr. Clark was standing in the area next to the booth where Defendant was sitting. Mr. Clark heard Defendant cursing and demanding that he move out of Defendant's line of sight. Mr. Clark stated that he could not move anywhere else because of the crowded environment. This brief encounter ended shortly thereafter. Later that evening, Mr. Clark ran into his former co-worker, Zachary Smith ("Mr. Smith"), and told him about the incident with Defendant.

Around 1:00 a.m., Mr. Clark and Mr. Smith went to the restroom. Defendant and his friend, William Phillips ("Mr. Phillips"), also went into the restroom. When Mr. Clark exited the restroom stall, he saw Defendant and Mr. Phillips in the restroom. Defendant was staring at Mr. Clark with his fist clenched and a tense look on his face. Mr. Clark stated, "[R]eally, over a T.V.?" Defendant proceeded to repeatedly punched Mr. Clark in his eye. Mr. Clark was knocked unconscious and woke up on the floor of the restroom. He told Mr. Smith to go after Defendant and call the police. Mr. Smith ran out of the restroom and told Ms. Diaz to call the police. He then went outside and saw Defendant attempting to leave. Defendant was prevented from leaving the premises when a police vehicle blocked his path.

Mr. Clark was transported to Duke Hospital via ambulance. Tyler Clark ("Tyler"), Mr. Clark's brother, received a call from Ms. Diaz around 2:00 a.m. asking him to come to the hospital because his brother had been badly injured in a fight. Mr. Clark was not given any pain medication during his initial medical treatment and Tyler testified that he could hear his brother screaming from the other side of the door.

At the emergency room, Mr. Clark presented with severe trauma to and zero light perception in his left eye. He had a large scleral laceration from his cornea along the posterior side of his eyeball into his retina. The on-call resident was able to suture a large portion of the laceration but could not reach the back side of the eye where the laceration ended. As a result, the posterior of Mr. Clark's eye remained open. Mr. Clark's retina was also completely detached. Dr. Michael Richard ("Dr. Richard"), an optic plastic surgeon who treated Mr. Clark, testified that it was not possible to repair the damage to Mr. Clark's eye, which he described as "a devastating injury." Dr. Richard further testified that he consulted with a retina specialist who agreed with Dr. Richard that the injury was irreparable. According to Dr. Richard, Mr. Clark was at risk of developing calcium build-up on the wall of his injured eye, a condition called phthisis bulbi. If Mr. Clark were to

develop this condition, the eye would begin to atrophy and Mr. Clark would experience extreme pain. Dr. Richard also feared the onset of sympathetic ophthalmia, a condition that results from the body's immune system attacking the healthy eye due to fluids from the damaged eye seeping into the healthy eye. After observing Mr. Clark for approximately one month, Dr. Richard determined that Mr. Clark would never regain his vision and made the decision to surgically remove Mr. Clark's eye on 5 October 2012.

B. Defendant's Evidence

At trial, Defendant testified as follows: Defendant had practiced Brazilian Jujitsu and amateur cage-fighting for approximately six years.¹ Defendant trained in Brazilian Jujitsu "a couple times a week."

On the date of the incident, Defendant went to The Brickhouse with his girlfriend to meet friends from his training gym and watch the UFC fight. Defendant testified that prior to his encounter with Mr. Clark, two individuals had blocked his view of the projector screen on which he was watching the fight. Defendant had asked them to move and they complied. When Mr.

¹ Although at the time of trial, Defendant also practiced Muy Thai, which included mastering powerful strikes, he had not begun training in this martial arts practice at the time of the altercation.

Clark stood in that same location, Defendant informed him that he had just asked two other individuals to move out of his way. Mr. Clark replied that Defendant could watch the UFC fight on one of the several other televisions. After the two of them "went back and forth" with more words, a waitress told Mr. Clark to move.

When the UFC fight ended, Defendant and Mr. Phillips went to the restroom. While in the restroom, Mr. Phillips asked Defendant about the confrontation with Mr. Clark. As Defendant began to describe the incident, he "hear[d] some snickering in one of the stalls." While Defendant was waiting to wash his hands, Mr. Clark came out of the bathroom stall and walked towards Defendant. Defendant put his hands up in response. According to Defendant, Mr. Clark "grab[bed] [Defendant] by the throat, squeeze[d] [his] neck and start[ed] pushing [him] . . . against the wall." Defendant took a step back, "popped" Mr. Clark's elbow away from him, and struck Mr. Clark in the face. Mr. Clark attempted to strike Defendant, but Defendant evaded the punch and pushed Mr. Clark into a corner, facing the wall. Mr. Clark began to elbow Defendant on the top of his head and the back of his neck. Defendant buried his head in Mr. Clark's underarm and hit Mr. Clark three more times with his left fist

until Mr. Clark stopped fighting back. Defendant pushed Mr. Clark away from him and left the bathroom.

C. Procedural History

A warrant for Defendant's arrest was issued on 25 July 2012. On 10 September 2012, Defendant was indicted on charges of malicious maiming, assault with a deadly weapon inflicting serious injury, and assault inflicting serious bodily injury. The case came on for trial on 19 November 2013 in Wake County Superior Court. On 21 November 2013, the jury returned verdicts finding Defendant guilty of all charges. The trial court sentenced Defendant to an active term of 72 to 99 months imprisonment for his malicious maiming conviction. Defendant was also sentenced to a consecutive suspended term of 24 to 41 months imprisonment for assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury. Defendant gave notice of appeal in open court.

II. Jury Instructions

Defendant's first argument is that the trial court erred by disjunctively instructing the jury that it could convict him of malicious maiming if it found that he had "disabled or put out" Mr. Clark's eye. Defendant asserts that the "disabling" of an eye does not support a conviction for malicious maiming under N.C. Gen. Stat. § 14-30 because the statute requires physical

removal of the victim's eye. Alternatively, Defendant argues that "disabling" includes temporary injuries and injuries less serious than the total loss of use of the eye. As such, Defendant contends, the trial court's jury instruction deprived him of his right to a unanimous jury verdict under N.C. Const. Art. I because (1) it permitted the jury to convict him under a theory unsupported by the statute; and (2) it was impossible to determine whether the jury relied on the proper theory when it found him guilty of malicious maiming.

A. Appealability and Standard of Review

We note that Defendant failed to object to the jury instructions given by the trial court. "As a general rule, [a] defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985); see also N.C.R. App. P. 10(a). When, however, "the error violates [the] defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal." *Id.* "Issues of unanimity have usually arisen in the appellate courts when the trial court gave a disjunctive jury instruction." *State v. Davis*, 188 N.C. App. 735, 740, 656 S.E.2d 632, 635, *cert. denied*, 362 N.C. 364, 664

S.E.2d 313 (2008). Therefore, this issue is properly preserved for appeal.

Having concluded that this matter is properly before us, we must determine the appropriate standard of review. "Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations and internal quotation marks omitted). Arguments made on appeal "challenging the trial court's decisions regarding jury instructions are reviewed *de novo*." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). We note, however, that utilizing a *de novo* standard of review only determines whether an error has occurred. Defendant failed to argue whether the error will be subject to a harmless error analysis and, if so, which party bears the burden of proof on appeal.

This Court has held that

[w]here the error violates a defendant's right to a unanimous jury verdict under Article I, Section 24, we review the record for harmless error. The State bears the burden of showing that the error was harmless beyond a reasonable doubt. An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction.

State v. Wilson, 363 N.C. 478, 487, 681 S.E.2d 325, 331 (2009) (citations and internal quotation marks omitted). Thus, we apply a harmless error analysis to Defendant's contention that the trial court's instruction violated his right to a unanimous jury verdict.

The North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. While our Courts have found that disjunctive jury instructions may jeopardize this right, our Supreme Court has held that not every disjunctive jury instruction violates this constitutional right. *State v. Lyons*, 330 N.C. 298, 299, 412, S.E.2d 308, 310 (1991).

In *Lyons*, our Supreme Court noted the difference between disjunctive jury instructions on alternative acts that will establish an element of the charged offense and disjunctive jury instructions that allow the jury to find a defendant guilty based on one of two underlying acts, *either of which is in itself a separate offense*. 330 N.C. 298, 299, 412 S.E.2d 308, 310 (1991). The former type of jury instruction does not violate a defendant's right to jury unanimity while this latter type of instruction may be fatally ambiguous if it is impossible to determine whether the jury unanimously found that the

defendant committed one particular offense. *Id.* at 302-03, 412 S.E.2d at 312. Our Supreme Court stated that even those cases in which the jury was instructed on two underlying acts, each of which is a separate offense, are subject to a harmless error analysis, as "[a]n examination of the verdict, the charge, the initial instructions by the trial judge to the jury . . . , and the evidence may remove any ambiguity created by the charge." *Id.* at 307, 412 S.E.2d at 315 (alteration in original)(citation and quotation marks omitted). The Court cautioned that a case "where an examination of the whole of the trial leads to a conclusion that any ambiguity raised by the flawed instructions is removed" is exceptional. *Id.* at 309, 412 S.E.2d at 315.

B. "Physical Removal" Requirement

In the case *sub judice*, Defendant was charged with malicious maiming under N.C. Gen. Stat. § 14-30, which makes it a Class C felony "[i]f any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure." N.C. Gen. Stat. § 13-40 (2013). The trial court instructed the jury, in pertinent part, as follows:

The Defendant has been charged with malicious maiming. For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant disabled

or put out Denny Clark's eye, thereby permanently injuring him.

* * *

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant, with malice aforethought, unlawfully, and with the intent to maim Denny Clark disabled or put out Denny Clark's eye, thereby permanently injuring him, it would be your duty to return a verdict of guilty.

In his brief, Defendant first argues that by allowing the jury to return a guilty verdict if it found that Defendant had *either* disabled or put out Mr. Clark's eye, the trial court gave a fatally disjunctive instruction because the evidence did not support a finding that Defendant "put out or removed any eye in the altercation." Although Defendant abandoned this position during oral argument and the State offered a persuasive argument that the term "put out" does not require proof of physical removal, we nonetheless address this question, as it currently stands unanswered by our case law.

Although the term "put out" is reasonably interpreted to involve the physical removal of the eye, the New Oxford American Dictionary defines to "put someone's eyes out" to mean to "blind someone, typically in a violent way." The New Oxford American Dictionary 1378 (2nd ed. 2005). Therefore, it is fair to conclude that the statute is ambiguous on its face and subject

to two different reasonable interpretations. When "a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation and quotation marks omitted).

The offense of malicious maiming was first codified in North Carolina in the Seventeenth Century, originating from the common law crime of mayhem. See *State v. Bass*, 255 N.C. 42, 47, 120 S.E.2d 580, 584 (1961). In *Bass*, our Supreme Court recognized that the common law definition of mayhem encompassed "violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself, or to annoy his adversary." *Id.* at 45, 120 S.E.2d at 582. The focus of the crime was on the disabling effect on the victim, rather than the physical acts that took place. See *id.* (recognizing that "cutting off his ear, or nose, or the like, are not held to be mayhems at common law[] because they do not weaken but only disfigure him").

Additionally, we find guidance from other jurisdictions that have interpreted similar maiming statutes. For example, under California law, "[e]very person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip,

is guilty of mayhem." Cal. Penal Code § 203 (2014). In interpreting the statute, the California Court of Appeals held that "[t]he expression 'puts out an eye' means the eye has been injured to such an extent it cannot be used for the ordinary and usual practical purposes of life." *People v. Green*, 130 Cal. Rptr. 318, 319 (1976) (citation and internal quotation marks omitted).

Similarly, Texas courts require the "total destruction of the sight of an eye" to constitute maiming under the Texas statute. *Phillips v. State*, 143 S.W.2d 591, 592 (1940). Although the California court defined maiming to include something less than total blindness, while the Texas court required total destruction of sight, neither required the physical removal of the eye in order to support a conviction of maiming.

We agree with the holdings in these jurisdictions that the total loss of eyesight, without actual physical removal, is sufficient to support a finding that an eye was "put out" and, therefore, is sufficient to support a conviction for malicious maiming under N.C. Gen. Stat. § 14-30. Therefore, this portion of Defendant's argument is without merit.

C. Scope of the Term "Disabled"

In the second part of his first argument, Defendant contends that because the term "disabled an eye" may encompass less serious injuries than total loss of vision, and because it was impossible to tell upon which theory the jury based its conviction, he should be granted a new trial.

Defendant relies on our Supreme Court's decision in *State v. Pakulski* as standing for the proposition that a trial court commits reversible error when it instructs a jury on disjunctive theories of a crime and one of the theories is improper. 319 N.C. 562, 356 S.E.2d 319 (1987). The defendant in *Pakulski* was convicted of first-degree murder pursuant to the felony murder rule, with felony breaking or entering and armed robbery as the predicate felonies. 319 N.C. at 564, 356 S.E.2d at 321. On appeal, the defendant argued that there was insufficient evidence to support a conviction for either underlying felony and that he was deprived of his constitutional right to a unanimous jury verdict when the trial court instructed the jury disjunctively on both offenses as the predicate for the felony murder charge. *Id.* Our Supreme Court concluded that, although there was sufficient evidence to submit the armed robbery charge to the jury, there was insufficient evidence to submit the charge of felony breaking or entering to the jury. *Id.* at 571-73, 356 S.E.2d at 325-26. In addressing whether the error was

harmless, the Court held that it "will not assume that the jury based its verdict on the theory for which it received a proper instruction" if "the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted." *Id.* at 574, 356 S.E.2d at 326. The Court added as a caveat that such an approach only applies to circumstances in which it could not "discern from the record the theory upon which the jury relied." *Id.*

Defendant relies on the language quoted above as support for his position that this Court should grant him a new trial due to the lack of clarity in the record as to which theory – disabling or putting out – the jury relied on in convicting him under N.C. Gen. Stat. § 14-30. We find Defendant's reliance on *Pakulski* misplaced, as the Court in *Pakulski* stated:

Because we must remand the case for a new trial on the first-degree murder charges for insufficiency of the evidence as to breaking or entering committed with the use of a deadly weapon, we need not address defendants' contentions concerning error in the charge relating to the use of the deadly weapon or unanimity of the verdict upon submission of the case on alternative theories.

Id. at 574, 356 S.E.2d at 326-27 (emphasis added). While we agree that the plain meaning of the term "disabled" may include temporary injuries as well as injuries not resulting in complete

loss of vision, the facts before this Court in the present case do not require us to decide whether partial or temporary blindness constitutes malicious maiming under N.C. Gen. Stat. § 14-30.

Although Defendant contends that the term "disabled" is open to an interpretation that is both factually and legally inconsistent, and that such ambiguity was so severe that it created a fatally ambiguous jury verdict, the facts of this case do not support this contention. The evidence in the record showed that Mr. Clark completely lost his eyesight because of Defendant's actions.² Defendant would have us conclude that, despite the evidence before it, the jury interpreted the term "disabled" to mean something less than complete blindness and that some jurors convicted Defendant under this improper theory. We find this argument to be unsupported by the evidence

² Additionally, Defendant has offered no argument or support for a contention that he did not cause the removal of Mr. Clark's eye. Despite the fact that Mr. Clark's eye was physically removed by his treating doctor, the testimony at trial clearly established that the removal was a medical necessity and was a direct result of the actions of Defendant. Defendant has not convinced this Court that causation was not established. Therefore, we cannot conclude that, for purposes of N.C. Gen. Stat. § 14-30, a defendant has not "put out" the eye of a victim if the victim's eye is so severely damaged that it is rendered useless, but preserved for aesthetic purposes. Such a situation has the same practical effect as a situation in which the victim's treating physician decides to remove the injured eye.

presented at trial. We hold that because the evidence presented at trial only supported one interpretation of the term "disabled," and such an interpretation was legally sufficient to sustain a conviction under N.C. Gen. Stat. § 14-30, the trial court did not commit reversible error in its instruction to the jury.

Even assuming, without deciding, that the trial court erred by instructing the jury on an improper theory of disabling to support a conviction of malicious maiming, we believe any such error was harmless beyond a reasonable doubt. The evidence regarding the extent of Mr. Clark's injuries was overwhelming and undisputed. Therefore, we are able to unequivocally discern from the record that the jury based its verdict on a finding that Mr. Clark suffered a total and permanent loss of sight in his eye as a result of the assault by Defendant. Thus, we conclude that the instructions given to the jury were not "fatally ambiguous, thereby resulting in an uncertain verdict in violation of defendant's right to a unanimous verdict." *Lyons*, 330 N.C. at 301, 412 S.E.2d at 311. This argument is overruled.

III. Conviction Under a Theory Not Alleged in Indictment

Next, Defendant argues that the trial court committed plain error when it allowed him to be convicted under a theory of malicious maiming that was not alleged in the indictment.

According to Defendant, because the indictment alleged malicious maiming by "putting out" Mr. Clark's eye and the trial court instructed the jury on both putting out and disabling, he is entitled to a new trial. For the following reasons, we disagree.

A. Standard of Review

Defendant did not object to the instruction on malicious maiming at trial. Therefore, this Court reviews for plain error and Defendant bears the burden of "showing that such an error rises to the level of plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial," meaning that the defendant must establish that "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 518, 723 S.E.2d at 324 (citation and internal quotation marks omitted).

B. Substantive Legal Analysis

The indictment charging Defendant with malicious maiming alleged, in pertinent part, that:

Defendant named above unlawfully, willfully, and feloniously did with malice *put out an eye of Denny Clark*, with the intent to maim or disfigure that person, and as a result did permanently injure the eye of that

person.

(emphasis added). As previously noted, the trial court permitted the jury to convict Defendant if it believed, beyond a reasonable doubt, that he had "disabled or put out Denny Clark's eye."

Our Supreme Court has held that instructions that permit the jury "to predicate guilt on theories of the crime which were not charged in the bill of indictment and which [are] not supported by the evidence at trial" constitutes plain error. *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) (citation and quotation marks omitted). In *Tucker*, the Court found plain error where, "[a]llthough the state's evidence supported [the court's] instruction, the indictment [did] not." *Id.* at 537, 346 S.E.2d at 420. Thus, it is clear that instructing a jury on a theory of an offense not alleged in the indictment may constitute plain error.

Although the indictment charging Defendant with malicious maiming only stated that Defendant "put out" Mr. Clark's eye while the jury instructions stated that Defendant had "disabled or put out" his eye, we agree with the State that this distinction is illusory. As we stated earlier in this opinion, the term "disabled," as applied to the facts in this case, can only be interpreted to mean total loss of sight. The trial

court did not instruct the jury that it could find Defendant guilty if he "partially" or "temporarily disabled" Mr. Clark's eye. Further, the trial court's rationale for using another term in addition to "put out" is found in a review of the trial transcript.

The State requested that the trial court use the pattern jury instruction for malicious maiming, which included the term "disabled." The State explained that this request was to prevent the jury from becoming "confused since the eye isn't literally falling out on the floor in the bathroom." This explanation is consistent with our holding that the eye does not have to be physically removed from its socket in order to constitute maiming under N.C. Gen. Stat. § 14-30. The purpose of the language in the instruction was to clarify that permanently blinding Mr. Clark was sufficient to prove malicious maiming. We therefore conclude that the trial court did not instruct the jury on a theory that was not alleged in the indictment.³ Defendant is not entitled to relief on this ground.

IV. Judgment and Sentence on Two Assault Convictions

³ Again, we note that we do not decide whether the State was *required* to show total blindness to prove maiming. Such a decision is not necessary under the facts of this case.

Defendant's final argument on appeal is that the trial court erred by sentencing him for both assault inflicting serious bodily injury and assault with a deadly weapon. The State concedes that the court acted contrary to the statutory mandate by entering judgment and sentencing Defendant on both assault offenses.⁴ We agree.

First, we note that Defendant failed to object to this issue at trial. However, as Defendant has alleged a failure to comply with a statutory mandate, we nonetheless review the issue. See *State v. Jamison*, __ N.C. App. __, __, 758 S.E.2d 666, 671 (2014).

Issues of statutory construction are questions of law, reviewed *de novo* on appeal. "Under a *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citations and quotation marks omitted). In the case *sub judice*, Defendant was charged with and convicted of two assault offenses arising out of the incident on 8 July 2012: (1) assault inflicting serious bodily injury under N.C. Gen. Stat. § 14-32.4(a); and (2) felonious assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. §

⁴ Although the State initially conceded the issue in its brief, it held a position during oral argument that, although the sentence should be vacated, the judgment should stand.

14-32(b). N.C. Gen. Stat. § 14-32.4(a) prohibits punishment of any person convicted under its provisions if "the conduct is covered under some other provision of law providing greater punishment." N.C. Gen. Stat. § 14-32.4(a) (2013). Here, Defendant's conduct pertaining to his charge for and conviction of assault with a deadly weapon inflicting serious injury was covered by the provisions of N.C. Gen. Stat. § 14-32(b), which permits a greater punishment than N.C. Gen. Stat. § 14-32.4(a). See N.C. Gen. Stat. § 14-32(b) (2013).

Contrary to the statutory mandate, the trial court entered a consolidated judgment for both assault convictions. Therefore, we arrest judgment on Defendant's conviction of inflicting serious bodily injury and remand for resentencing on Defendant's conviction of felonious assault with a deadly weapon inflicting serious injury. See *State v. McCoy*, 174 N.C. App. 105, 116, 620 S.E.2d 863, 871 (2005), *disc. review denied*, ___ N.C. ___, 628 S.E.2d 8 (2006).

V. Conclusion

For the reasons set forth above, we conclude that the trial court did not err by instructing the jury on two different theories of malicious maiming. However, we conclude that the trial court erred by entering judgment and sentencing Defendant on both assault convictions. Therefore, judgment against

Defendant on the charge of assault inflicting serious bodily injury is arrested and remanded to the trial court for resentencing. Judgment on Defendant's malicious maiming conviction remains undisturbed.

NO ERROR in part, JUDGMENT ARRESTED AND REMANDED in part.

Judges GEER and STROUD concur.