

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-878

Filed: 7 April 2015

Hoke County, Nos. 11CRS051708, 13CRS000233, 13CRS000235

STATE OF NORTH CAROLINA

v.

DELANDRE' BALDWIN, Defendant.

Appeal by defendant from judgments entered 10 December 2013 by Judge Richard T. Brown in Superior Court, Hoke County. Heard in the Court of Appeals 6 January 2015.

*Attorney General Roy A. Cooper III, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Amanda S. Zimmer, for defendant-appellant.*

STROUD, Judge.

Delandre' Baldwin ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of attempted first-degree murder, assault with a deadly weapon with the intent to kill and inflicting serious injury ("AWDWIKISI"), and assault inflicting serious bodily injury ("AISBI"). Defendant contends that the trial court erred in (1) denying his motion to require the State to elect the offense upon which it would proceed at trial; (2) admitting defendant's recorded interview with a police detective; (3) failing to instruct the jury on imperfect self-defense; (4)

instructing the jury on wounds inflicted after the victim was felled; and (5) sentencing him for both the AWDWIKISI and AISBI offenses. We find no error in part, vacate in part, and remand for resentencing.

I. Background

On 23 September 2011, Lee Richardson and some of his family members were drinking alcohol together in a vacant lot adjacent to Richardson's mother's house. Around 2:00 p.m., defendant drove to the lot. Defendant bought Richardson a shot and a beer from a man selling alcohol out of his truck.

Shortly thereafter, defendant and Richardson began a fistfight. According to Richardson, the fight began because defendant insulted Richardson for grieving over the recent loss of his father. According to defendant, the fight began because Richardson demanded that defendant buy him another shot and another beer. The fight ended after about five minutes when others were able to separate the two men. After the fight, defendant told his cousin to drive him to his house so that he could get his gun to kill Richardson.

Defendant and his cousin drove away from the lot, and defendant returned about a minute and a half later. Defendant jumped out of his car while Richardson was walking to his mother's house. Richardson's mother told defendant that he should not shoot Richardson. Defendant responded that he was going to kill Richardson. Defendant walked up to Richardson and shot him in the abdomen with a handgun. Richardson fell to the ground, and defendant kicked him in the head.

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Defendant then drove away from the lot. After several days of treatment in the hospital, Richardson recovered from his injuries.

On or about 4 June 2012, a grand jury indicted defendant for attempted-first degree murder. *See* N.C. Gen. Stat. § 14-17 (2011). On or about 8 April 2013, a grand jury indicted defendant for AWDWIKISI and AISBI. *See* N.C. Gen. Stat. §§ 14-32(a), -32.4(a) (2011). On 9 August 2013, defendant moved to require the State to elect the offense upon which it would proceed at trial. At a hearing on or about 20 September 2013, the trial court orally denied this motion.

At trial, defendant testified that he never threatened to kill Richardson. Defendant testified that he returned to the lot after the fistfight to deliver marijuana to another man there. Defendant further testified that he did not pick up a gun from his house; rather, he kept a gun under the driver's seat of his car. Defendant further testified that, in their final confrontation, Richardson approached him and threatened him. Defendant testified that he was afraid that another fight would aggravate a preexisting injury. Defendant also testified that he intended to shoot Richardson in the leg "to slow him down" and denied that he had any intent to kill Richardson.

On or about 10 December 2013, a jury found defendant guilty of all charges. The trial court sentenced defendant to 180 to 225 months' imprisonment for the attempted first-degree murder conviction. The trial court consolidated the AWDWIKISI and AISBI convictions and sentenced defendant to 67 to 90 months'

imprisonment for those convictions. The trial court ordered that defendant serve these sentences consecutively. Defendant gave timely notice of appeal in open court.

## II. Motion to Require the State to Elect

### A. Standard of Review

We review double jeopardy issues *de novo*. *State v. Williams*, 201 N.C. App. 161, 173, 689 S.E.2d 412, 418 (2009).

### B. Analysis

Defendant contends that the trial court erred in denying his motion to require the State to elect the offense upon which it would proceed at trial. Defendant asserts that allowing the State to proceed on the attempted first-degree murder offense and the AWDWIKISI offense subjected him to double jeopardy.

The Fifth Amendment of the U.S. Constitution provides that no person shall be “subject for the same offence to be twice put in jeopardy of life or limb[.]” U.S. Const. amend. V. The right to be free from double jeopardy is also rooted in article 1, section 19 of the North Carolina Constitution as “the law of the land” and in our common law. *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003); *see also* N.C. Const. art. 1, § 19. The double jeopardy clause prohibits (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense. *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682.

In *State v. Tirado*, the North Carolina Supreme Court held that the trial court had not subjected the defendants to double jeopardy when it convicted them of attempted first-degree murder and AWDWIKISI, offenses arising from the same conduct. 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), *cert. denied*, *Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Following *Tirado*, we hold that the trial court did not subject defendant to double jeopardy when it denied his motion to require the State to elect between the attempted first-degree offense and the AWDWIKISI offense. *See id.*, 599 S.E.2d at 534.

### III. Admission of Evidence

#### A. Preservation of Error

Defendant contends that the trial court abused its discretion in admitting defendant's recorded interview with a police detective, because many statements in the interview were inadmissible under North Carolina Rule of Evidence 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2013). At the trial court, defendant made a timely objection to the interview's admission pursuant to Rule 403. The trial court admitted the interview and instructed the jury not to consider any questions or statements made by the detective for the truth of the matter asserted.

Relying on *State v. Howard*, the State contends that defendant failed to preserve this issue, because he makes new arguments on appeal for why the interview is inadmissible under Rule 403. *See* \_\_\_ N.C. App. \_\_\_, \_\_\_, 742 S.E.2d 858, 860 (2013), *aff'd per curiam*, 367 N.C. 320, 754 S.E.2d 417 (2014). But *Howard* is

distinguishable. There, the defendant objected under Rule 403 at trial but argued under Rule 404(b) on appeal. *Id.* at \_\_\_, 742 S.E.2d at 860. In contrast, here, defendant has not changed the specific ground for his objection. Accordingly, we hold that defendant has preserved this issue. *See* N.C.R. App. P. 10(a)(1).

B. Standard of Review

We review a trial court's Rule 403 determination for an abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012); *see also* N.C. Gen. Stat. § 8C-1, Rule 403. "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (quotation marks omitted).

C. Analysis

Defendant contends that the trial court abused its discretion in admitting defendant's recorded interview with the detective, in contravention of Rule 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, [on] an emotional one." *State v. Cunningham*, 188 N.C. App. 832, 836, 656 S.E.2d 697, 700 (2008).

Defendant argues that the recorded interview contained statements that had an undue tendency to suggest decision on an improper basis, specifically defendant's "own assessment of his actions and belief that he deserved to go to jail." But this basis for decision is not improper, and the fact that this evidence is prejudicial to defendant does not make it unfairly so. *See State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (holding that the defendant's admission of guilt was highly probative and not unfairly prejudicial); *Cunningham*, 188 N.C. App. at 836, 656 S.E.2d at 700. We hold that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Accordingly, we hold that the trial court did not violate Rule 403 in admitting this evidence.

### III. Jury Instruction on Imperfect Self-Defense

#### A. Standard of Review

Defendant next contends that the trial court committed plain error in instructing the jury on attempted first-degree murder but failing to instruct the jury on imperfect self-defense and the lesser-included offense of attempted voluntary manslaughter. "For an appellate court to find plain error, it must first be convinced that, absent the error, the jury would have reached a different verdict. The defendant has the burden of showing that the error constituted plain error." *State v. Wade*, 213 N.C. App. 481, 493, 714 S.E.2d 451, 459 (2011), *disc. rev. denied*, 366 N.C. 228, 726 S.E.2d 181 (2012) (citations and quotation marks omitted). Thus, on plain error

review, the defendant must first demonstrate that the trial court committed error, and next “that absent the error, the jury probably would have reached a different result.” *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). “So, if defendant has failed to show that the purported error would have led to a different result, we need not consider whether an error was actually made.” *State v. Larkin*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 764 S.E.2d 681, 685 (2014).

B. Analysis

[I]f defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant’s belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

An imperfect right of self-defense is thus available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so *without* murderous intent, and (2) might have used excessive force. Imperfect self-defense therefore incorporates the first two requirements of perfect self-defense, but not the last two. Murderous intent means the intent to kill or inflict serious bodily harm.

If one brings about an affray with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect



self-defense; and if he kills during the affray he is guilty of murder. If one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter.

*State v. Mize*, 316 N.C. 48, 52-53, 340 S.E.2d 439, 441-42 (1986) (citations and quotation marks omitted).

Here, the State introduced abundant testimony supporting a finding of defendant's murderous intent in his final confrontation with Richardson. Three witnesses testified that after the fistfight, defendant stated that he was going to kill Richardson. Five witnesses testified that, in their final confrontation, Richardson did not threaten or move toward defendant, but defendant walked up to Richardson and shot him. We hold that this evidence of defendant's murderous intent strongly weighs against the application of imperfect self-defense. *See id.* at 52-53, 340 S.E.2d at 441-42. In light of this evidence, we hold that defendant has failed to demonstrate that, had the trial court instructed the jury on imperfect self-defense, the jury probably would have acquitted defendant on the attempted first-degree murder charge. *See Wade*, 213 N.C. App. at 493, 714 S.E.2d at 459; *Larkin*, \_\_\_ N.C. App. at \_\_\_, 764

S.E.2d at 685. Accordingly, we hold that the trial court committed no plain error on this issue. *See Wade*, 213 N.C. App. at 493, 714 S.E.2d at 459; *Larkin*, \_\_\_ N.C. App. at \_\_\_, 764 S.E.2d at 685.

#### IV. Jury Instruction on Wounds Inflicted After Victim Was Felled

##### A. Standard of Review

We review *de novo* a trial court's decision regarding jury instructions. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

##### B. Analysis

Defendant next contends that the trial court erred in instructing the jury that it could consider wounds inflicted after Richardson was felled in determining whether defendant acted with premeditation and deliberation. Defendant specifically asserts that evidence does not support a finding that defendant inflicted wounds on Richardson after Richardson was felled. Here, the trial court gave the following jury instruction:

Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances by which they may be inferred such as lack of provocation by the victim; conduct of the defendant before, during, and after the attempted killing; threats and declarations of the defendant; use of grossly excessive force; or inflictions of wounds after the victim is fallen.

In *State v. Leach*, the North Carolina Supreme Court examined a similar jury instruction and held that the trial court did not err by giving the instruction, "even

in the absence of evidence to support each of the circumstances listed.” 340 N.C. 236, 242, 456 S.E.2d 785, 789 (1995). The Court adopted the following reasoning:

The instruction in question informs a jury that the circumstances given are only illustrative; they are merely examples of some circumstances which, if shown to exist, permit premeditation and deliberation to be inferred. The instruction tells jurors that they “may” find premeditation and deliberation from certain circumstances, “such as” the circumstances listed. The instruction does not preclude a jury from finding premeditation and deliberation from direct evidence or other circumstances; more importantly, it does not indicate to the jury that the trial court is of the opinion that evidence exists which would support each or any of the circumstances listed.

*Id.* at 241-42, 456 S.E.2d at 789. Similarly, the jury instruction here explains that the jury “may” find premeditation and deliberation from certain circumstances, “such as” the circumstances listed. *See id.* at 241, 456 S.E.2d at 789. The instruction does not indicate that the trial court believes that evidence supports each or any of the circumstances listed. *See id.* at 242, 456 S.E.2d at 789. Following *Leach*, we hold that the trial court did not err in submitting this jury instruction. *See id.*, 456 S.E.2d at 789.

## V. Sentencing

### A. Preservation of Error

Defendant contends that the trial court violated his constitutional right to be free from double jeopardy when it sentenced him for both the AWDWIKISI and AISBI

offenses. Defendant did not raise this constitutional issue at the trial court.<sup>1</sup> Relying on *State v. Moses*, defendant argues that this issue is preserved under N.C. Gen. Stat. § 15A-1446(d)(18) (2013). *See* 205 N.C. App. 629, 638, 698 S.E.2d 688, 695 (2010). But the North Carolina Supreme Court has held that a defendant may not raise a constitutional issue, including a double jeopardy issue, for the first time on appeal. *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010); *see also State v. Kirkwood*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 747 S.E.2d 730, 736, *appeal dismissed*, \_\_\_ N.C. \_\_\_, 752 S.E.2d 487 (2013) (rejecting the defendant’s argument that his double jeopardy argument was preserved under N.C. Gen. Stat. § 15A-1446(d)(18)). Accordingly, we hold that defendant has failed to preserve this issue. *See Davis*, 364 N.C. at 301, 698 S.E.2d at 67.

B. North Carolina Rule of Appellate Procedure 2

Defendant next requests that we apply North Carolina Rule of Appellate Procedure 2 and review this double jeopardy issue. *See* N.C.R. App. P. 2 (“To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]”). “The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary.” *State v. Rawlings*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 762

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<sup>1</sup> Although defendant moved to require the State to elect between the attempted first-degree murder and AWDWIKISI offenses, defendant did not raise a double jeopardy argument at trial with respect to the AWDWIKISI and AISBI offenses.

S.E.2d 909, 915, *disc. rev. denied*, \_\_\_ N.C. \_\_\_, 766 S.E.2d 627 (2014). Rule 2 discretion should be exercised “cautiously” and only in “exceptional circumstances.” *Williams*, 201 N.C. App. at 173, 689 S.E.2d at 418. In *Rawlings*, this Court determined that vacating one of the defendant’s convictions would not reduce the defendant’s total sentence, since the trial court had ordered that the sentences run concurrently. \_\_\_ N.C. App. at \_\_\_, 762 S.E.2d at 915. This Court declined to apply Rule 2, because granting the defendant’s requested relief “would not alter the total time defendant is required to serve[.]” *Id.* at \_\_\_, 762 S.E.2d at 915.

Relying on *Rawlings*, the State argues that we should decline to invoke Rule 2, because the purported double jeopardy violation does not prejudice defendant. *See id.* at \_\_\_, 762 S.E.2d at 915. If we were to hold that the trial court subjected defendant to double jeopardy, we would vacate defendant’s AISBI conviction. *See Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685. The State contends that vacating defendant’s AISBI conviction would not reduce his total sentence, because the trial court consolidated defendant’s AWDWIKISI and AISBI convictions into a single sentence. Relying on *State v. Wortham*, defendant responds that vacating his AISBI conviction may reduce his total sentence. *See* 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). In *Wortham*, the North Carolina Supreme Court held that

[s]ince it is probable that a defendant’s conviction for two or more offenses influences adversely to him the trial court’s judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for

resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

*Id.*, 351 S.E.2d at 297. Although defendant concedes that the trial court sentenced him to the to the minimum presumptive range for the AWDWIKISI offense given his prior record level, defendant argues that the purported double jeopardy violation probably influenced the trial court's decision to order that his consolidated sentence for the AWDWIKISI and AISBI convictions run consecutively, rather than concurrently, with his sentence for the attempted first-degree murder conviction. Defendant also argues that the purported double jeopardy violation probably influenced the trial court's decision to find no mitigating factors despite the fact that defendant presented evidence of mitigating factors.

In the event we vacate defendant's AISBI conviction, we must remand this case for resentencing. *See id.*, 351 S.E.2d at 297; *Williams*, 201 N.C. App. at 174, 689 S.E.2d at 419. In *Williams*, this Court invoked Rule 2 and reviewed the defendant's double jeopardy issue. *Williams*, 201 N.C. App. at 173, 689 S.E.2d at 418. After vacating the defendant's conviction for assault by strangulation, this Court followed *Wortham* and remanded the case for resentencing, because the trial court had consolidated that conviction with three other convictions into a single sentence. *Id.* at 174, 689 S.E.2d at 419. In light of *Williams*, we choose to exercise our Rule 2 discretionary power given that on remand the trial court may order that the

remaining sentences run concurrently or may find mitigating factors. *See id.* at 173-74, 689 S.E.2d at 418-19.

Relying on *State v. Goldston* and *State v. Curry*, the State contends that we need not remand for resentencing in the event we vacate defendant's AISBI conviction. *See Goldston*, 343 N.C. 501, 504, 471 S.E.2d 412, 414 (1996); *Curry*, 203 N.C. App. 375, 379, 692 S.E.2d 129, 134, *appeal dismissed and disc. rev. denied*, 364 N.C. 437, 702 S.E.2d 496 (2010). But *Goldston* and *Curry* are distinguishable. In both cases, after vacating one but not all of the convictions in a consolidated sentence, the appellate court left the consolidated sentence undisturbed, because the remaining conviction was for felony murder, which required a life sentence. *Goldston*, 343 N.C. at 504, 471 S.E.2d at 414; *Curry*, 203 N.C. App. at 379, 692 S.E.2d at 134. In contrast, here, the trial court may order that the remaining sentences run concurrently or may find mitigating factors. Accordingly, we choose to exercise our discretionary power to review defendant's sentencing issue. *See Williams*, 201 N.C. App. at 173-74, 689 S.E.2d at 418-19.

#### C. Standard of Review

We review double jeopardy issues *de novo*. *Id.* at 173, 689 S.E.2d at 418. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Jones*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 767 S.E.2d 341, 344 (2014).

#### D. Analysis

The Fifth Amendment of the U.S. Constitution provides that no person shall be “subject for the same offence to be twice put in jeopardy of life or limb[.]” U.S. Const. amend. V. The right to be free from double jeopardy is also rooted in article 1, section 19 of the North Carolina Constitution as “the law of the land” and in our common law. *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682; *see also* N.C. Const. art. 1, § 19. The double jeopardy clause prohibits (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense. *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682. We are concerned here with the third category, as defendant alleges that he received multiple punishments for the same offense.

In *Blockburger v. United States*, the U.S. Supreme Court held that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932). In *Missouri v. Hunter*, the U.S. Supreme Court clarified that the *Blockburger* test is a rule of statutory construction and should not control when there is a clear indication of contrary legislative intent. 459 U.S. 359, 367, 74 L. Ed. 2d 535, 543 (1983). In *State v. Gardner*, the North Carolina Supreme Court explained that

the presumption raised by the *Blockburger* test is only a federal rule for determining legislative intent as to violations of federal criminal laws and is neither binding



on state courts nor conclusive. When utilized, it may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test.

315 N.C. 444, 455, 340 S.E.2d 701, 709 (1986); *see also State v. Bailey*, 157 N.C. App. 80, 87, 577 S.E.2d 683, 688 (2003) (holding that the double jeopardy clause prohibited the defendant from being convicted of the separate crimes of possession of stolen goods and possession of a stolen motor vehicle, because “the [l]egislature did not intend to punish a defendant for possession of the same property twice”).

In *Ezell*, this Court held that the trial court subjected the defendant to double jeopardy by convicting him for assault with a deadly weapon inflicting serious injury (“ADWISI”) under N.C. Gen. Stat. § 14-32(b) and for AISBI under N.C. Gen. Stat. § 14-32.4, offenses arising from the same conduct. *Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685. This Court examined the statutory language of N.C. Gen. Stat. § 14-32.4, which proscribed an assault inflicting serious bodily harm “unless the conduct is covered under some other provision of law providing greater punishment.” *Id.* at 110, 582 S.E.2d at 684 (quoting N.C. Gen. Stat. § 14-32.4 (2001)). This Court held that, because the defendant was convicted for ADWISI, an offense which provided greater punishment than AISBI, the trial court subjected the defendant to double jeopardy by convicting him of AISBI. *Id.* at 111, 582 S.E.2d at 685.

Here, defendant was convicted for AWDWIKISI under N.C. Gen. Stat. § 14-32(a), a Class C felony, and AISBI, under N.C. Gen. Stat. § 14-32.4(a), a Class F

felony. See N.C. Gen. Stat. §§ 14-32(a), -32.4(a) (2011). N.C. Gen. Stat. § 14-32.4(a) proscribes an assault inflicting serious bodily harm “[u]nless the conduct is covered under some other provision of law providing greater punishment[.]” N.C. Gen. Stat. § 14-32.4(a) (2011). Adopting this Court’s reasoning in *Ezell*, we hold that the double jeopardy clause prohibits defendant’s AISBI conviction given this statutory language. See *id.*; *Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685.

Relying on *State v. Hannah*, the State contends that the double jeopardy clause does not prohibit defendant’s AISBI conviction, because AISBI is not a lesser-included offense of AWDWIKISI. 149 N.C. App. 713, 719, 563 S.E.2d 1, 5, *disc. rev. denied*, 355 N.C. 754, 566 S.E.2d 81 (2002). But the State’s reliance on *Hannah* is misplaced. There, this Court held that AISBI is not a lesser-included offense of AWDWIKISI in the context of a lesser-included jury instruction, not double jeopardy. *Id.*, 563 S.E.2d at 5. Although this holding suggests that defendant’s AWDWIKISI and AISBI convictions survive the *Blockburger* test, the presumption raised by this test “may be rebutted by a clear indication of legislative intent” and “when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test.” See *Gardner*, 315 N.C. at 455, 340 S.E.2d at 709. As discussed above, we hold that the statutory language of N.C. Gen. Stat. § 14-32.4(a) evinces a clear indication of legislative intent. See *id.*, 340 S.E.2d at 709; N.C. Gen. Stat. § 14-32.4(a).

The State also relies on *State v. Fernandez* for the proposition that examining legislative intent is unnecessary when two crimes are deemed separate under the

*Blockburger* test. 346 N.C. 1, 19, 484 S.E.2d 350, 361 (1997). But *Fernandez* is distinguishable. There, the North Carolina Supreme Court addressed whether the trial court had subjected the defendant to double jeopardy by convicting him of first-degree murder and first-degree kidnapping. *Id.* at 18, 484 S.E.2d at 361. After holding that the defendant had failed to preserve this issue, the Court stated, in dicta, that the crimes were separate under the *Blockburger* test and that “an analysis of legislative intent [was] not necessary in [that] case[.]” *Id.* at 19, 484 S.E.2d at 361. The first-degree murder and first-degree kidnapping statutes at issue contained no language limiting a defendant’s conviction for both offenses. See N.C. Gen. Stat. §§ 14-17, -39 (1993). In contrast, here, N.C. Gen. Stat. § 14-32.4(a) proscribes an assault inflicting serious bodily harm “[u]nless the conduct is covered under some other provision of law providing greater punishment[.]” N.C. Gen. Stat. § 14-32.4(a); see also *Ezell*, 159 N.C. App. at 109, 582 S.E.2d at 684 (similarly distinguishing *Fernandez*).

Additionally, in *Gardner*, the North Carolina Supreme Court characterized the presumption raised by the *Blockburger* test as “an aid to determining legislative intent” and “neither binding on state courts nor conclusive” and rebuttable “by a clear indication of legislative intent[.]” which “must be respected, regardless of the outcome of the application of the *Blockburger* test.” *Gardner*, 315 N.C. at 455, 340 S.E.2d at 709. Moreover, in *Davis*, the North Carolina Supreme Court recently adopted this Court’s reasoning in *Ezell* and held that the trial court “was not authorized to

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sentence defendant for felony death by vehicle and felony serious injury by vehicle.” 364 N.C. at 304-05, 698 S.E.2d at 69-70. Although the Court discussed this issue in the context of statutory authority, rather than constitutional double jeopardy, its thorough analysis of legislative intent and approval of *Ezell* support our conclusion that the *Blockburger* test does not end our double jeopardy inquiry. *See id.*, 698 S.E.2d at 69-70; *Ezell*, 159 N.C. App. at 109, 582 S.E.2d at 684 (“[W]e are not required to start and end our inquiry with a *Blockburger* analysis of elements.”). Furthermore, in *Williams*, this Court followed *Ezell* and held that the defendant’s convictions violated double jeopardy despite the fact that the convictions survived the *Blockburger* test. *Williams*, 201 N.C. App. at 173-74, 689 S.E.2d at 418-19. Finally, our emphasis on legislative intent is consistent with the U.S. Supreme Court’s double jeopardy jurisprudence. *See Hunter*, 459 U.S. at 366, 74 L. Ed. 2d at 542 (“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”).

Accordingly, we hold that the trial court subjected defendant to double jeopardy by convicting him for both AWDWIKISI and AISBI. *See Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685.

VI. Conclusion

For the foregoing reasons, we hold that the trial court committed no error in convicting defendant for attempted first-degree murder and AWDWIKISI. But we

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*Opinion of the Court*

vacate defendant's AISBI conviction. *See id.*, 582 S.E.2d at 685. We also vacate defendant's consolidated sentence for the AWDWIKISI and AISBI convictions and remand the case for resentencing on defendant's AWDWIKISI conviction. *See Wortham*, 318 N.C. at 674, 351 S.E.2d at 297.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges BRYANT and HUNTER, JR concur.