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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-0242

Lance Lamar Moore

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-16-1078)

PER CURIAM.

The appellant, Lance Lamar Moore, appeals his convictions for third-degree domestic violence based on third-degree assault, see § 13A-6-132, Ala. Code 1975 ("domestic-violence

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assault"), and for third-degree domestic violence based on menacing ("domestic-violence menacing"), see § 13A-6-132, Ala. Code 1975. Moore was sentenced to one year's imprisonment for each conviction, and those sentences were to run consecutively. Moore was also ordered to pay a \$100 bail-bond fee for each count, a \$500 victim-compensation assessment, and a \$500 fine.

The evidence at trial indicated the following. Moore and Patrice Legrone were in a dating relationship from 2013 through part of 2015. According to Legrone, about two months into the relationship, Moore began getting violent with her. During much of that time, Moore lived with Legrone in Huntsville. In June 2015, however, Moore went to live with some of his relatives.

On June 12, 2015, Moore telephoned Legrone and told her that he wanted to see her. When Moore arrived at Legrone's residence, he went to her car and looked through some papers. He then went to her front door. Legrone stated that she was hesitant to let Moore in because he appeared very agitated.

When Legrone opened the front door, Moore pushed his way in and demanded Legrone's cellular telephone to see with whom

she had been communicating. According to Legrone, Moore told her that if she did not give him the phone, he would beat her. When Legrone hesitated, Moore began hitting her in the face and head until she finally gave him the phone.

Legrone testified that after Moore went through the messages on her phone, he began beating her again. Legrone said that she tried to get away from Moore by running upstairs but that he came up behind her, pinned her to her bed, and put his hands around her neck. Although Legrone tried to escape by running into her bathroom, Moore followed her, grabbed her, slammed her around the bathroom, and hit her in the face. He then strangled Legrone until she lost consciousness.

When Legrone regained consciousness, she left the bathroom and saw Moore sitting at the kitchen table again going through messages on her cellular telephone. As she tried to calm Moore down, Moore grabbed a kitchen knife, held it to her side, and said, "Bitch, I will kill you." (R. 101, 103-104.) Legrone testified that she was afraid for her life.

Legrone testified that she tried to escape by running toward the garage but that Moore caught up with her and slammed her into the clothes dryer. According to Legrone,

Moore eventually stopped beating her after he became exhausted. She also said that, in order to calm him down, she told him that she would marry him. Moore then left and Legrone drove to a nearby gas station and telephoned the police.

Moore testified in his own defense. He admitted that he went to Legrone's house on June 12. He testified that he and Legrone fought after he confronted her about her "messaging around." According to Moore, he found evidence that Legrone had been "sexting" another man.¹ (R. 224-26.) He testified that Legrone hit him first and that it, "you know, went from there." (R. 226.) He admitted to slapping Legrone, but he denied strangling her or threatening her with a knife. He denied that Legrone ever lost consciousness. He testified that Legrone had pulled the knife and had tried to cut him with it, although he said the knife had only scratched him. He offered into evidence a shirt with a slash mark.

Law-enforcement officers documented Legrone's injuries, which included black eyes, injured lips, bruises on her chin and her neck, an injured nose, loose teeth, and injured

¹Moore explained: "If y'all don't know, ['sexting' is] where there are [messages with] body shots of their selves showing it to the people on the receiving end." (R. 226.)

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sinuses. Legrone testified that she was in pain for two weeks. She also stated that she obtained a protective order against Moore and moved to Georgia to "start her life over." (R. 107-08.)

On March 11, 2016, the Madison County Grand Jury indicted Moore on one count of domestic violence by strangulation, see § 13A-6-138, Ala. Code 1975; one count of domestic-violence assault, see § 13A-6-132, Ala. Code 1975; and one count of domestic-violence menacing, see § 13A-6-132, Ala. Code 1975. Moore's trial began on September 26, 2017. The next day, the jury found him guilty of the domestic-violence-menacing and domestic-violence-assault charges. The jury acquitted Moore of the charge of domestic violence by strangulation or suffocation.

On October 23, 2017, Moore was sentenced to one year's imprisonment on each conviction. On November 22, 2017, he filed a motion for a new trial. That motion was denied on December 4, 2017, following a hearing. Moore filed a timely notice of appeal.

I.

Moore contends that his convictions and sentences for

domestic-violence assault and domestic-violence menacing violate principles of double jeopardy.² (Moore's brief, pp. 11-13.) The record, however, does not affirmatively establish that a double-jeopardy violation, in fact, occurred in this case. Id.

"'The Fifth Amendment's Double Jeopardy Clause protects against a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after conviction, and against multiple punishments for the same offense.' Woods v. State, 709 So. 2d 1340, 1342 (Ala. Crim. App. 1997). 'The clause applies to "multiple punishment" because, if it did not apply to punishment, then the prohibition against "multiple trials" would be meaningless; a court could achieve the same result as a second trial by simply resentencing a defendant after he has served all or part of an initial sentence.' United States v. Fogel, 829 F.2d 77, 88 (D.C. Cir. 1987)."

Lanier v. State, [Ms. CR-17-0429, July 13, 2018] ____ So. 3d ____, ____ (Ala. Crim. App. 2018) (emphasis added). In Birdsong v. State, [Ms. CR-15-1381, July 7, 2017] ____ So. 3d ____, ____ (Ala. Crim. App. 2017), this Court stated:

"In Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the United

²Moore did not raise this specific double-jeopardy claim--that he had been convicted of multiple offenses based on the same act--until he filed his motion for a new trial. That claim, however, is not subject to the ordinary rules regarding preservation and waiver. See, e.g., Powell v. State, 854 So. 2d 1206, 1207 (Ala. Crim. App. 2002).

States Supreme Court announced a two-pronged test for addressing this issue. First, the threshold inquiry under Blockburger is whether the alleged statutory violations arose from the same act or transaction. Id. at 304. Second, if the offenses did arise from the same act or transaction, then we must determine whether each offense requires proof of an additional fact which the other does not. Id. If each offense does not require proof of an additional fact that the other does not, then double jeopardy applies. Id. On the other hand, "if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Id."

With regard to the first prong from Blockburger, this Court has previously stated that, "[a]lthough a single crime cannot be split up into multiple offenses, ... '[w]hen the same conduct ... may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.'" Shelton v. State, 521 So. 2d 1035, 1037 (Ala. Crim. App. 1987) (holding that the elements of the robbery occurred when the defendant made a demand and threatened the victim with a weapon, whereas the attempted first-degree assault occurred as the victim was escaping). The State argues that the evidence in this case demonstrates each conviction arose out of different acts. (State's brief, p. 17.) Specifically, the State argues that the facts underlying the domestic-

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violence-assault conviction occurred when Moore beat Legrone until she was unconscious. Id. When Legrone regained consciousness sometime later and approached Moore, Moore grabbed a kitchen knife and threatened to kill Legrone. (R. 101-04.) The State contends that the incident involving the knife formed the basis for the domestic-violence-menacing conviction and thus was separate and distinct from the domestic-violence assault. (State's brief, p. 17.)

The indictment charging Moore with domestic-violence assault and domestic-violence menacing reads, in relevant part:

"Count 2

"The Grand Jury of said County charge, that before the finding of this Indictment, LANCE LAMAR MOORE, whose name is unknown to the Grand Jury other than as stated, did, with intent to cause physical injury to another person, cause physical injury to another person, to-wit: Patrice Legrone, the said Patrice Legrone being a ... person who ... had a dating ... relationship with the defendant, in violation of Section 13A-6-132 of the CODE OF ALABAMA, against the peace and dignity of the State of Alabama.

"Count 3

"The Grand Jury of said County charge, that before the finding of this Indictment LANCE LAMAR MOORE, whose name is unknown to the Grand Jury other than as stated, did, commit the crime of Menacing in violation of Section 13A-6-23 of the CODE OF

ALABAMA, in that the said defendant did, by physical action, to-wit: pulled a knife and poked the victim multiple times while threatening to kill her, intentionally place or attempt to place another person, to-wit: Patrice Legrone, in fear of imminent serious physical injury, and the victim being a ... person who ... had a dating ... relationship with the defendant, in violation of Section 13A-6-132 of the CODE OF ALABAMA, against the peace and dignity of the State of Alabama."

(C. 12.)

The circuit court gave the following instructions to the jury for the charges quoted above:

"A person commits the crime of domestic violence in the third degree if he commits the crime of assault in the third degree and the victim is a person who had a dating relationship with the defendant.

"To convict, the State must prove beyond a reasonable doubt each of the following elements:

"One, that the Defendant, Lance Moore, caused physical injury to any person, namely, Patrice Legrone;

"Two, that the Defendant acted with intent to cause physical injury to another person, and;

"Three, that the victim, Patrice Legrone, has or had a dating relationship with the Defendant.

". . . .

"A person commits the crime of domestic violence in the third degree if he commits the crime of menacing third degree and the victim is a person who has or had a dating relationship with the Defendant.

"To convict, the State must prove beyond a reasonable doubt each of the following elements:

"That the Defendant, Lance Moore, intentionally placed or attempted to place another person in fear of physical injury;

"Two, that the Defendant intended to place a person or other people in fear of eminent, serious physical injury, and

"Three, that the Defendant--I'm sorry, the victim, Patrice Legrone, has or had a dating relationship with the defendant."

(R. 290-92.)

Legrone's testimony was extensive and detailed. She testified, in relevant part:

" Q. Do you know about how many times he hit you in the face?

"A. Maybe five or six in the first--we went through different parts of the house fighting. The living room and the kitchen are kind of connected. So we went--we started out in the living room when he came through the door and we sat down to talk.

"It ended up with me giving him the phone. He went through the phone for awhile. He ran upstairs. He chased me upstairs. He beat me upstairs. He grabbed me around my neck. He choked me upstairs.

"And his signature move was to cover--because he knows I hated it--he would cover my nose and cover my mouth at the same time and kind of muzzle me to the floor.

"Q. Let me back up a little bit. You said he hit you multiple times in the face?

"A. Yes.

"Q. Where in the house were you when that happened?

"A. In the kitchen.

"Q. And did he hit you anywhere else on your body?

"A. Yes.

"Q. Where else on your body did he hit you?

"A. I had bruises on my arms. I had bruises on my legs. I fell a couple of times. I was trying to break away from him. I tried to break for the garage. I tried to break for the back door. I tried to jump out of my bedroom window. And he is a big man and I could not get past him.

"Q. So did the assault start in the living room?

"A. It started in the kitchen. The conversation took place in the living room. The hitting started in the kitchen.

"Q. And where did you move to after you were in the kitchen? Where was the next part of the house?

"A. I ran upstairs trying to get away. He came up there behind me."

". . . .

"Q. Okay. So you start out in the kitchen. Then you said you went upstairs?

"A. Yes.

"Q. And why were you going upstairs?

"A. I knew when he started going through my phone, it was going to be more, he was not going to stop and he did not stop.

"Q. So were you trying to get away from him?

"A. I was trying to get away from him.

"Q. Did he follow you upstairs?

"A. He did.

"Q. And did he touch you in any way upstairs?

"A. He strangled me upstairs.

"Q. Where upstairs were you?

"A. On the bed.

"Q. In the bedroom?

"A. Yes.

"Q. And when you say he strangled you, what did he do?

"A. He grabbed my neck with all his might and he put all of his weight on me until I could--no more.

"Q. Were you lying down on the bed when that happened?

"A. Yes.

"Q. Did he have you pinned to the bed?

"A. Yes.

"Q. Did anything happen as a result of him getting you by the neck? Did you lose consciousness or anything like that?

"A. Not upstairs. After we fought upstairs, I came downstairs trying to get away. I ended up being trapped in the bathroom. He put me in the bathroom. There was blood all over the walls. I cannot remember totally what happened. But when I came to, I opened the door, he was sitting at the kitchen table still going through my phone.

"I spoke to Mr. Moore after this incident and I said, do you even remember? And he said, no, I don't remember.

"Q. You said that--did he strangle you somewhere else beside in the upstairs bedroom?

"A. In the bedroom and in the bathroom, the downstairs bathroom.

"Q. Did you lock yourself in the bathroom or did he lock you in the bathroom?

"A. He locked me in the bathroom.

"Q. Did he strangle you before or after he locked you in?

"A. Before.

"Q. And so tell me, how did he strangle you in the bathroom?

"A. He had me against the wall. He slammed me all around the bathroom. He punched me all around the bathroom.

"Q. And so was he slapping you with an open hand?

"A. Open hand, closed hand.

"Q. And where on your body was he hitting you?

"A. In my face mainly. In my face.

"Q. And did you--when he strangled you in the bathroom, did you lose consciousness or anything like that?

"A. Yes.

"Q. Do you have any idea how long you were out?

"A. I don't know.

"Q. What did you do when you regained consciousness in the bathroom?

"A. He had to unlock the door in order for me to get out. He--when I cracked the door open because I didn't know if he was still there or not. I didn't know what happened. I just seen the blood on the wall and I was like, oh, my, God, what happened?

"I opened the door. He is sitting at the kitchen table with his back to me still going through my phone. I said, Lance, please, please. I came close to him trying to calm the situation. He grabbed a knife and he said, 'Bitch--excuse me--I will cut you. I will cut you.' He had the knife to my side. He never touched me with the knife, but he scared the death out of me.

"Q. What kind of knife was it?

"A. A kitchen knife.

"Q. And where when he had the knife to your side, where in the kitchen were you?

"A. Over the sink.

"Q. And where was he in relation to you?

"A. He was at my side over the sink.

"Q. Standing next to you?

"A. Yes.

"Q. So he threatened you with the knife in the kitchen and he strangled you in the bedroom and the bathroom?

"A. Yes.

"Q. He punched you and hit you in the bathroom, the bedroom and the kitchen, is that correct?

"A. And in the washroom.

"Q. Okay.

"A. I had an injury to my nose. Which I went to the hospital--from me trying to run away from him. I ran past the bathroom, past the washroom trying to get to the garage. I made it to the garage. But I couldn't get it open in time. He grabbed me and pulled me back in and grabbed the back of my head and smashed it into the dryer.

"Q. He smashed your head?

"A. He smashed my whole head two or three times into the dryer. And I just started screaming, I just can't believe you, I just can't believe you.

"We had a good relationship until he started doing whatever it was that he was doing, that he admitted to me. His lawyer don't want me to say it, but he knows. He admitted to me.

"Q. When he was choking you, was he using one hand or two?

"A. One.

"Q. Do you remember feeling any sensations while

he was choking you before you blacked out?

"A. I felt a tingling in my face. I thought he was going to kill me. I have never been through anything that traumatized me in my life.

"Q. And you said that the knife he picked up in the kitchen, it was a kitchen knife. Can you describe how big it is?

"A. It was a medium sized kitchen knife. He was just trying to scare me. He had it to my side. After he had it to my side, he said again, 'B, I will kill you.'

". . . .

"Q. And you say he threatened to kill you. Were you worried that he would, in fact, try to kill you?

"A. Yes.

"Q. And you said that he rammed your head into the clothes dryer--

"A. Yes.

". . . .

"Q. Was he saying anything to you while he was hitting you or punching or running you into the wall?

"A. Not really. Just when it was over, when it was almost over, I could just see him getting tired. He was so--he was exhausted. He was drained. So he sat on the couch and he said, 'We are going to get married. Go clean your F-ing face up. You can't go down there with them people thinking something is wrong with you. Go clean yourself up. We are going to get married. I'll be back.'

"Earlier he had took my keys. So when he got ready to leave, he dropped the keys. He got in his car that was running the whole time. This man whooped me for hours until he got tired. His car was still running. I'm screaming for the neighbors, anybody. Nobody could hear me.

"Q. So you said this assault lasted for hours?

"A. Yes. Yes. It was nighttime when it started. It was daytime by the time I grabbed my keys off the ground and got in my car and ran to the nearest gas station to call the police.

"Q. And how did the assault stop? Did he--

"A. He got exhausted. And he just sat down and I guess his high was going down or whatever and he just calmed--he just calmed down.

"Q. And were you doing anything during this time to attempt to leave the home or attempt to stop the assault?

"A. I had enough. I was still. I was still.

"Q. You were holding still?

"A. Yes. I didn't know what to do. I didn't know to come to him or to fight. I didn't know what to do. So when he kept saying, 'We're going to get married, we're going to get married,' I said, 'Okay, okay.' And when I agreed and calmed down. That's when he left.

"Q. And were you fighting him off or hitting him in any way when all of this happened?

"A. I started fighting him. But the more I fought him, the worse it got for me.

(R. 96-106 (emphasis added).)

Legrone's detailed testimony included several allegations that could have supported both (1) the element of menacing, as charged by the circuit court, that Moore "intended to place [Legrone] in fear of eminent, serious physical injury" and (2) the element of assault in the domestic-violence-assault charge. Thus, Moore's convictions do not implicate the first part of the Blockburger inquiry: whether the challenged violations--domestic-violence assault and domestic-violence menacing--arise from the same act or transaction.

Even if, however, the convictions involved the same act or transaction under the first prong of Blockburger, Moore still would not be entitled to relief because each offense required proof of an additional fact that the other did not.

Section 13A-6-132(a), Ala. Code 1975, provides, in relevant part:

"(a) A person commits domestic violence in the third degree if the person commits the crime of assault in the third degree pursuant to Section 13A-6-22; [or] the crime of menacing pursuant to Section 13A-6-23 ... and the victim is a ... person with whom the defendant ... had a dating relationship, as defined in Section 13A-6-139.1, with the defendant."

(Emphasis added.) Section 13A-6-22(a)(1), Ala. Code 1975, provides that a person commits third-degree assault if "[w]ith

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the intent to cause physical injury to another person, he causes physical injury to any person." (Emphasis added). Section 13A-6-23(a), Ala. Code 1975, provides that "[a] person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury." (Emphasis added.)

Under the statutory provisions quoted above, each offense requires proof of at least one element that the other does not. Domestic-violence menacing requires proof that Moore intentionally placed or attempted to place Legrone in fear of imminent serious physical injury, which is not an element of domestic-violence assault. Domestic-violence assault requires proof that Moore, with the intent to cause physical injury, caused physical injury to Legrone, which is not an element of domestic-violence menacing. Thus, the second prong of the Blockburger test is not implicated, and Moore is not entitled to relief on this issue.

II.

Moore argues that the circuit court erred in refusing his request to instruct the jury on the domestic-violence-menacing charge that the State was required to prove how Moore

allegedly put Legrone in fear of imminent serious physical injury--specifically, he asked for the jury to be instructed, as the indictment alleged, that the jury must find that he had "pulled a knife and poked the victim multiple times while threatening to kill her." (C. 12.) Moore contends that, under the circumstances, the circuit court's refusal to give the requested jury instruction improperly amended the indictment as to the domestic-violence-menacing charge. (Moore's brief, pp. 8-10.)

The indictment charged, in relevant part, that Moore committed domestic-violence menacing when he, "by physical action, to-wit: pulled a knife and poked the victim multiple times while threatening to kill her, intentionally place[d] or attempt[ed] to place ... [the victim] in fear of imminent serious physical injury." (C. 12.) In order to convict Moore of the offense as charged in the indictment, the jury would have been required to find that Moore intentionally placed Legrone in fear of imminent serious physical injury by using a knife to poke Legrone while he threatened to kill her. The trial court, however, broadly instructed the jury that it could find Moore guilty of domestic-violence menacing if it

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found that Moore had "intentionally placed or attempted to place another person in fear of imminent physical injury" and had "intended to place a person or other people in fear of eminent serious physical injury" (R. 292), and it repeated that instruction when the jury asked to be reinstructed. (R. 318-19.)

The trial court's instructions improperly amended the indictment by omitting an essential element of the offense, i.e., physical action,³ thereby allowing Moore to be found guilty based on proof of fewer facts than alleged in the indictment, cf., Williams v. State, 701 So. 2d 832 (Ala. Crim. App. 1997), and, under the unique facts and circumstances in this case, opening the door for the jury to find Moore guilty of domestic-violence menacing based on the same act for which it found Moore guilty of domestic-violence assault. Therefore, the court's refusal to instruct the jury on the offense of domestic-violence menacing as that offense was charged in the

³Section 13A-6-132(a), Ala. Code 1975, provides that "[a] person commits domestic violence in the third degree if the person commits ... the crime of menacing pursuant to Section 13A-6-23." Section 13A-6-23(a), Ala. Code 1975, provides that "[a] person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury."

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indictment prejudiced Moore's substantial rights and warrants reversal of that conviction. See Rule 13.5(a), Ala. R. Crim. P. ("The court may permit a charge to be amended without the defendant's consent, at any time before verdict or finding, if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." (emphasis added)).

Moore's conviction and sentence for domestic-violence assault are affirmed; his conviction and sentence for domestic-violence menacing are reversed; and the cause is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Kellum, Cole, and Minor, JJ., concur in the result. Windom, P.J., concurs in part and dissents in part, with opinion, which McCool, J., joins.

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WINDOM, Presiding Judge, concurring in part and dissenting in part.

I agree with the main opinion's affirmance of Moore's conviction and sentence for third-degree domestic violence (assault). I, however, respectfully dissent from the portion of the main opinion that reverses Moore's conviction and sentence for third-degree domestic violence (menacing).

Moore raised the following objection to the trial court's instructions on third-degree domestic violence (menacing):

"One last exception, Your Honor, the indictment for specifically the menacing charge, includes extra language specifying the means in which the State is alleging this occurred. Specifically that it was done with a knife, menacing with a knife basically.

"And it is my understanding of the law that because the State has specified in the indictment the means that they are required to prove those means. And I would request that you instruct the jury that that is essentially an element of what the State is required to prove."

(R. 310.) This argument was carried forward in Moore's brief on appeal. Moore asserts:

"In Alabama, 'The law is, as has been universally held, if an indictment contains an unnecessary averment, yet being alleged it becomes necessary for the State to prove it, and there should be no conviction without such proof.' Smith v. State, 551 So. 2d 1161 (Ala. Crim. App. 1989) citing Weatherly v. State, 30 So. 2d 484 (Ala. Crim. App. 1947). 'It has been definitely settled that even an unnecessary allegation, but which is

descriptive of the identity of that which is legally essential to the charge, ... must be proven as laid.' Id. citing Hayes v. State, 31 So. 2d 306 (Ala. Crim. App. 1947). However, our Alabama case law is clear that there must be a material variance between indictment and proof before a conviction will be overturned for that reason. Id."

(Moore's brief, at 9.)

The main opinion holds that the trial court's instructions omitted an essential element of the offense -- physical action.⁴ Moore, however, made no such argument below. Instead, Moore's objection indicated that he viewed the physical action alleged in the indictment to be "extra language" or "essentially an element" of the offense. The above-quoted portions of Moore's brief reiterate that argument, referring to "unnecessary averments" and "unnecessary allegation[s]" in the indictment that nonetheless needed to be proven at trial.

The argument advanced below by Moore dealt not with an

⁴"A person commits domestic violence in the third degree if the person commits ... the crime of menacing pursuant to Section 13A-6-23 ... and the victim ... has or had a dating relationship ... with the defendant." §13A-6-132(a), Ala. Code 1975. "A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury." § 13A-6-23(a), Ala. Code 1975 (emphasis added).

amendment to the indictment, but rather with a variance between the allegations in the indictment and the evidence adduced at trial. Variance and amendment are related yet distinct concepts. United States v. Flynt, 15 F.3d 1002, 1005 (11th Cir. 1994) ("When the evidence at trial or the court's jury instructions deviate from what is alleged in the indictment, two distinct problems can arise -- constructive amendment or variance." (citations omitted)). Although Moore briefly asserts on appeal that the "trial court improperly amended the indictment" (Moore's brief, at 10), his objection at trial was insufficient to preserve this specific claim for appellate review. See Ex parte Coulliette, 857 So. 2d 793, 794 (Ala. 2003) ("'Review on appeal is restricted to questions and issues properly and timely raised at trial.'" Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989).").

Further, his claim of variance, which was raised below and appears to be asserted on appeal, is without merit. "The term variance, for purposes of an objection in a trial, means a variance between pleadings and proof, not a variance between pleadings and instructions." Ash v. State, 843 So. 2d 213, 216 (Ala. 2002) (citations omitted), overruled on other

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grounds by Ex parte Seymour, 946 So. 2d 536 (Ala. 2006).

I do not believe Moore preserved for review a claim that the trial court's instructions constituted an amendment to his indictment for third-degree domestic violence (menacing). Furthermore, I believe his claim of variance, which was argued below, is without merit. Therefore, I respectfully dissent from the portion of the main opinion that reverses Moore's conviction and sentence for third-degree domestic violence (menacing).

McCool, J., concurs.