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IN THE
COURT OF APPEALS OF INDIANA

JUAN CARLOS FLORES (a/k/a FRANCISCO FLORES),	)	
Appellant-Defendant,	)	
vs.	)	No. 49A02-0908-CR-778
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
The Honorable Stanley Kroh, Commissioner
Cause No. 49G03-0903-FB-35609

March 25, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Juan Carlos Flores ("Flores") was convicted in Marion Superior Court of Class B felony burglary. The trial court sentenced Flores to eight years with two years suspended. Flores appeals and argues that there is a fatal variance between the charging information and the evidence presented at trial.

We affirm.

Facts and Procedural History

On February 17, 2009, Alicia Medina ("Medina") walked her children to school. She returned home approximately ten minutes later to find signs of forced entry. Her daughter was crying and told her that Flores and another man had knocked on the door and when she did not open the door, they forced the door open. Medina realized that the men were still in her house and saw them leave through the back door with items from her house. The men drove away in Flores's vehicle. Medina recognized Flores from an earlier meeting. Later, Medina saw Flores's girlfriend wearing jewelry Medina believed stolen from her house.

On April 16, 2009, the State charged Flores with Class B felony burglary and Class D felony theft. The information mistakenly alleged that the crimes were committed on February 27, 2009 rather than February 17, 2009. Flores waived his right to a jury trial. During the bench trial, Flores did not object to the variance between the charging information and the evidence presented. After Flores presented his case, the trial court noted the variance between the information and the evidence but determined that the variance was not fatal. Flores did not object to the variance at this time or seek any other remedy. The trial court found Flores guilty as charged, vacated the Class D felony theft

conviction and sentenced Flores to eight years with two years suspended. Flores now appeals.

Discussion and Decision

Flores argues that the ten-day difference between the date alleged in the charging information and the evidence presented at trial was a fatal variance that prevented him from presenting a full and robust defense. "A variance is an essential difference between the pleading and the proof." Mitchem v. State, 685 N.E.2d 671, 677 (Ind. 1997) (quotation omitted). "Not all variances between allegations in the charge and the evidence at the trial are fatal." Id. (quotation omitted). To ascertain whether a variance between the proof at trial and a charging information or indictment is fatal, we employ the following test:

> (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby;
>
> (2) will the defendant be protected in the future criminal proceeding covering the same event, facts, and evidence against double jeopardy?

Id. (quoting Harrison v. State, 507 N.E.2d 565, 566 (Ind. 1987)).

Generally, a contemporaneous objection is required to preserve an issue for appeal. Rembusch v. State, 836 N.E.2d 979, 982 (Ind. Ct. App. 2005) trans. denied. Flores failed to object to the variance contemporaneously despite the opportunity to do so. We therefore deem the issue waived for lack of a timely objection.

Waiver notwithstanding, the variance between the date alleged in the charging information and the date as established at trial is not fatal. While Flores may contend that he would have been able to better bolster his own credibility, the evidence presented by

the State was overwhelming. At trial, the victim, Medina, "provided the physical description, eye-witness testimony, hearsay evidence of what her daughter saw and vehicle descriptions. She went and retrieved license plate numbers and claimed to have observed the stolen items later in the possession of associates of the defendant." Appellant's Br. p. 11. Flores has not shown that he was misled by the variance in date, nor has he shown that he was prejudiced by the variance. The variance between the charging information and the evidence presented at trial was not fatal.

Affirmed.

BARNES, J., and BROWN, J., concur.