NO. COA10-285

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v. Moore County
No. 09 CRS 3

JEREMY SHAQUAN CHAVIS

Appeal by defendant from judgment entered 1 October 2009 by Judge R. Stuart Albright in Moore County Superior Court. Heard in the Court of Appeals 13 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Kevin G. Mahoney, for the State.

Charlotte Gail Blake for defendant-appellant.

MARTIN, Chief Judge.

Defendant Jeremy Shaquan Chavis appeals from a judgment dated 1 October 2009, entered upon a jury verdict finding him guilty of common law robbery. The trial court sentenced defendant in the presumptive range to a term of sixteen to twenty months imprisonment, to run at the expiration of all sentences which defendant was then presently obligated to serve.

The State's evidence at trial tended to show that on the evening of 19 October 2008, two men wearing masks approached Margarita Isabella Garcia ("Garcia") as she opened the door to her apartment. One of the men walked up to her and pulled out what she

believed was a gun. Garcia gave the man her purse and the men fled.

Garcia phoned the police and was able to give a general description of the two men who robbed her. Later that night officers took Garcia to a restaurant parking lot where two men were standing. Garcia identified the men as the same men who robbed her based on their heights and what they were wearing. Officers later recovered her purse from a trash can located near her apartment. A co-defendant, Anthony Rogers, testified for the State that he and defendant robbed Garcia with a gun and took her purse and cell phone. Defendant did not testify or otherwise present any evidence at trial.

Defendant argues the trial court lacked subject matter jurisdiction to enter the judgment against him because there was a fatal variance between the indictment and the evidence presented at trial. Defendant contends that a fatal variance exists because the indictment names the victim as "Margarita Isabel Garcia" while one of the State's witnesses at trial testified the name on the victim's driver's license was "Margarita Isabella Garcia Bahena." But defendant has waived this argument by failing to properly raise the issue at trial.

It is well established that a "'defendant in a criminal action may raise the question of variance between the indictment and the proof by a motion'" to dismiss the charges against him. *State v. Skinner*, 162 N.C. App. 434, 446, 590 S.E.2d 876, 885 (2004) (quoting *State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924

(1962)). This Court has recently held that when a defendant desires to raise this issue in a motion to dismiss made at trial, he must specifically state as the grounds for the motion to dismiss that there was a fatal variance between the allegations in the indictment and the evidence presented at trial. *State v. Curry*, ___ N.C. App. ___, ___, 692 S.E.2d 129, 137 (2010) (citing *Skinner*, 162 N.C. App. at 446, 590 S.E.2d at 885). Where a defendant fails "to argue a variance between his indictment and the evidence presented at trial or even to argue generally the sufficiency of the evidence . . . to the trial court, he has waived this issue for appeal." *Id.* at ___, 692 S.E.2d at 138 (citing N.C.R. App. P. 10(a)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.")). *See State v. Tellez*, ___ N.C. App. ___, ___, 684 S.E.2d 733, 736 (2009) ("It is well-established that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.") (internal citations and quotation marks omitted)).

At trial, defendant moved to dismiss the charges against him at the close of the State's evidence. Defendant's entire argument in support of his motion was:

> If Your Honor please, at the end of the State's evidence the defendant would make a motion to dismiss on the ground of insufficiency of the evidence.

I don't care to be heard further.

Defendant contends a challenge to the sufficiency of the indictment can be made at any time. *See State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 ("[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court.") (citations omitted), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001). But defendant mischaracterizes his argument. He is not challenging the facial validity of the indictment, but rather that there was a fatal variance between the allegations in the indictment and the proof offered at trial. Such a variance in proof, even if it exists, does not deprive the trial court of its jurisdiction, and defendant is required to have raised this issue at trial to preserve it for review on appeal. As defendant did not state as grounds for his motion to dismiss that a variance existed between his indictment and the evidence presented at trial, he has waived review of this argument and we must dismiss his appeal.

However, even if this argument had been properly preserved, this Court has held that a "sufficient similarity" between the name of the victim as alleged in the indictment and the name of the victim as established at trial will usually suffice to avoid a fatal variance, provided "that the proof at trial matched the allegations in the indictment in all other respects . . . [and] the defendant was not surprised or placed at any disadvantage in preparing his defense to the crimes charged in the indictment."

State v. Cameron, 73 N.C. App. 89, 92, 325 S.E.2d 635, 637 (1985), *disc. review denied*, 315 N.C. 592, 341 S.E.2d 31 (1986). At trial, the victim testified that her name was "Isabel Garcia." Other witnesses referred to her as "Ms. Garcia," and as "Marguarita Isabella Garcia." The names "Margarita Isabel Garcia" and "Margarita Isabella Garcia Bahena" are sufficiently similar to identify the victim of the crime. No fatal variance exists between the allegation of the victim's name in the indictment and the identity of the victim as proven at trial.

No Error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).