

NO. COA14-561

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v.

Johnston County  
Nos. 12 CRS 50721, 735

DEXTER DURANE HENRY

Appeal by Defendant from judgment entered 30 October 2013  
by Judge Thomas H. Lock in Johnston County Superior Court. Heard  
in the Court of Appeals 6 October 2014.

*Attorney General Roy Cooper, by Assistant Attorney General  
Teresa M. Postell, for the State.*

*William D. Spence for Defendant.*

STEPHENS, Judge.

Defendant Dexter Durane Henry was convicted in Johnston  
County Superior Court of one count of possession of cocaine and  
one count of resisting a public officer. He then pled guilty to  
having attained habitual felon status. Defendant appeals from  
the trial court's denial of his motion to suppress evidence that  
he alleges was obtained in violation of his Fourth Amendment  
rights, as well as from the trial court's denial of his motions

to dismiss the charges against him for insufficient evidence and fatal variances between the indictment and the evidence presented at trial. After careful review, we hold that the trial court did not err in denying Defendant's motion to suppress or either of his motions to dismiss.

*Facts and Procedural History*

On 5 March 2012, Defendant was indicted on one count of possession of cocaine and one count of resisting a public officer, arising from an altercation that ensued after Defendant's vehicle was stopped for a safe movement violation along Buffalo Road in Johnston County on 1 February 2012. The evidence introduced at Defendant's trial, which began on 28 October 2013, tended to show that, at approximately 10:00 a.m. on 1 February 2012, Johnston County Sheriff's Deputy Greg Collins ("Deputy Collins") was patrolling for traffic violations when he saw a gray Hyundai suddenly come to a complete stop in the middle of a blind curve. The posted speed limit was 45 miles per hour, and Deputy Collins later testified that he and three or four other motorists behind the Hyundai were forced to stop abruptly to avoid hitting it. While the cars were stopped, Deputy Collins watched as a female ran out from a cemetery beside the road and climbed into the Hyundai's passenger seat.

At that point, Deputy Collins ran a check on the vehicle's license plate, which "came back to a leased vehicle" from Charlotte. When the Hyundai continued driving north, Deputy Collins followed it for about a mile, then activated his blue lights to conduct a traffic stop as the car turned into a driveway.

As Deputy Collins approached the driver's side of the vehicle, he looked around at his surroundings to ensure his own safety and confirmed that nothing had been thrown on the ground from the vehicle. Then Deputy Collins reached the driver's side door and recognized Defendant as the driver, based on "a lot of involvement dealing with him" on multiple occasions involving narcotics during Deputy Collins's previous employment with the Selma Police Department. Deputy Collins noticed Defendant "seemed nervous" and "was sitting there shaking." When Deputy Collins asked Defendant for his license and registration, Defendant reached over with his left hand to open the vehicle's glove box while keeping his right arm in a position where Deputy Collins could not see it. Then Deputy Collins asked Defendant where he and his female passenger were going; Defendant said nothing but his passenger said they were headed to an ATM, which struck Deputy Collins as odd, given that the car had been

traveling in the opposite direction of the closest available ATM. The passenger replied that Defendant was driving her to pick up her ATM card, but Deputy Collins noticed that although they claimed to be friends, neither Defendant nor his passenger appeared to know each other's names.

After Deputy Collins asked Defendant to step out of the vehicle, he "noticed there was something in [Defendant's] right hand, [but] couldn't tell what it was" because Defendant had his right hand "closed with his thumb and index finger rubbing it together" in a clinched fist. Deputy Collins asked Defendant if he was holding his car keys, but Defendant said they were still in his car, which Deputy Collins confirmed. Deputy Collins asked Defendant multiple times to open his hand, but Defendant repeatedly refused. This led Deputy Collins to suspect Defendant might be carrying a weapon, so he ordered Defendant to turn around and place his hands on top of the vehicle in order to conduct a *Terry*-style frisk. See *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). When Defendant partially complied with this order but still refused to drop what was in his hand, a scuffle ensued, which was captured by the video camera in Deputy Collins's patrol car and during which Deputy Collins "was able to get both [Defendant's] hands up above the car and pin

[Defendant] against the car." At that point Defendant "started lunging across the cab of the vehicle and extending his right hand" but still refused to open it and "kept saying there's nothing in my hand." Eventually, Deputy Collins "took [Defendant] off his balance, spun him around and dropped him, put him on the ground[,] " where the two men continued to struggle. After refusing still more requests to open his hand, Defendant stated, "there's a tissue in my hand," but nevertheless refused to drop it until Deputy Collins "had to force [Defendant's] right hand behind his back and forcibly removed the item that was in his hand." The item Defendant had been holding was, in fact, a tissue.

Deputy Collins placed Defendant under arrest for resisting a public officer, then conducted a search incident to arrest to ensure that Defendant had no weapons. Once the immediate area was secured, Deputy Collins continued his search and found a plastic baggie containing an off-white rocky substance near the left rear driver's side of the vehicle where he and Defendant had been struggling. Subsequent SBI testing showed the substance to be approximately 0.55 grams of crack cocaine.

Before his trial, Defendant filed a motion to suppress the evidence against him, alleging it was the fruit of an

unreasonable search that violated his Fourth Amendment rights. Although he did not object to the constitutionality of the traffic stop, Defendant contended Deputy Collins lacked reasonable suspicion to conduct a *Terry* frisk, arguing primarily that the mere fact of his previous drug convictions was insufficient to justify a search for contraband. However, at a hearing on 29 October 2013, Deputy Collins testified that he had initiated a *Terry* frisk out of concern for officer safety because, in addition to Defendant's suspicious behavior inside the car, he knew Defendant was a convicted felon, he knew Defendant's prior convictions involved drug offenses, and he knew, based on his training and experience, that drug offenders often possess weapons. Deputy Collins further testified that he knew, based on his training and experience, that "[w]eapons come in all different sizes and shapes . . . [,] a lot of times they [are] conceal[ed,]" and "[a] weapon is most dangerous in a person's hand."

In addition to Deputy Collins's testimony about his concern for officer safety, the trial court also considered this Court's decision in *State v. Summey*, 150 N.C. App. 662, 564 S.E.2d 624 (2002). In *Summey*, we held that officers who stopped a vehicle reported to have just been involved in a drug transaction did

not violate the Fourth Amendment when they forced a passenger who had suspiciously hidden her hand underneath a piece of fabric to open her hand, based in part on their training that "until [the officers] see an open palm they have reason to believe a suspect could be armed with a weapon." *Id.* at 667, 564 S.E.2d at 628. Here, given the totality of the circumstances, the trial court concluded that Deputy Collins did have reasonable suspicion to conduct a *Terry* frisk and, accordingly, denied Defendant's motion to suppress.

Later that same day, a jury found Defendant guilty of the Class I felony of possession of cocaine and the Class 2 misdemeanor of resisting, delaying, or obstructing a public officer. On 30 October 2013, Defendant pled guilty to having attained habitual felon status, thereby enhancing his punishment for the felony possession conviction from Class I to Class E.<sup>1</sup> Defendant was sentenced within the presumptive range for a Class E habitual felon at his prior record level to an active term of 38 months minimum and 58 months maximum imprisonment, with the sentence for his Class 2 misdemeanor conviction consolidated therein. Defendant gave timely oral notice of appeal.

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<sup>1</sup> In the transcript of plea, Defendant reserved his right to appeal "all other matters."

*I. Motion to Suppress*

Defendant first argues that the trial court erred in denying his motion to suppress the crack cocaine, which he alleges Deputy Collins obtained as the result of an unreasonably intrusive search. Specifically, Defendant alleges his Fourth Amendment rights were violated because Deputy Collins used excessive force in taking Defendant to the ground and opening his hand, which resulted in an unreasonable seizure. We disagree.

This Court has set forth the appropriate standard of review for a motion to suppress as follows:

It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which [the] defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

*State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724, appeal dismissed, \_\_\_ N.C. \_\_\_, 664 S.E.2d 311 (2008) (citations, internal quotation marks, and brackets omitted). However, our



Supreme Court has made clear that, "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); see also N.C.R. App. P. 10(a)(1) (providing the process by which issues are preserved for appellate review). Where a theory argued on appeal was not raised before the trial court, the appellate court will not consider it because "[a] defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004). While recognizing "the fact that these evidentiary rules may seem at times technical," our Supreme Court has explained that the rationale for them is "bottomed on strong policy foundations and on the principle that the trial judge is present at the trial, and to him is entrusted the conduct of the trial." *State v. Ward*, 301 N.C. 469, 478, 272 S.E.2d 84, 89 (1980).

In the present case, Defendant's argument to this Court is that the trial court erred in denying his motion to suppress

because Deputy Collins used excessive force, rendering the search unconstitutionally intrusive and the subsequent seizure unreasonable. In support of his argument, Defendant cites *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966) (holding that a substantially intrusive search may render a seizure unreasonable), and also attempts to distinguish the facts of this case from those present in *Summey* by emphasizing that the actions and conduct of Deputy Collins were more forceful and more intrusive than those of the officer who merely applied pressure to the back of the female defendant's hand to force it open in *Summey*. Defendant's argument before the trial court, however, was that Deputy Collins lacked reasonable suspicion that Defendant was armed and dangerous to justify a *Terry* frisk for weapons. Although the trial court gave Defendant an opportunity to distinguish this case from the facts present in *Summey*, Defendant never raised the issue of excessive force to the trial court.

Because Defendant failed to raise excessive force as an issue in the trial court at the hearing on his motion to suppress, the issue is not properly before this Court on appeal, and we therefore will not consider it. See *Eason*, 328 N.C. at

420, 402 S.E.2d at 814; *Benson*, 323 N.C. at 321, 372 S.E.2d at 519.

Moreover, by failing to raise it on appeal, Defendant has also waived his original argument that Deputy Collins lacked reasonable suspicion for a *Terry* frisk. In any event, given this Court's holding in *Summey* and the totality of the circumstances present here, we conclude the trial court was correct in finding there was reasonable suspicion to conduct a *Terry* frisk. In *Summey*, police officers had been informed that the vehicle the defendant was riding in had recently been involved in a drug transaction, saw the defendant hide her hand "in such a manner which was clearly indicative of her having either a small weapon or drugs closed in her palm[,] " and asked her to open it multiple times "to alleviate their concern that she might be concealing a weapon" before forcing her to open her hand. 150 N.C. App. at 669, 564 S.E.2d at 629. In the present case, Deputy Collins knew Defendant had prior convictions for drug offenses, observed Defendant's nervous behavior inside his vehicle, and saw him deliberately conceal his right hand and refuse to open it despite repeated requests. Furthermore, he knew from his training and experience that people who deal in narcotics frequently carry weapons, and that many weapons are small enough

to conceal within a person's hand. Thus, like the officers in *Summey*, Deputy Collins had a reasonable suspicion to conduct a *Terry* frisk for weapons to ensure his safety.

Furthermore, even if Defendant had properly preserved his excessive force argument for appellate review, it too would fail in light of our decision in *Summey*. In applying the framework set forth by the United States Supreme Court in *Schmerber*, the *Summey* Court concluded that the officers' "use of pressure to open [the] defendant's hands was justifiable in view of the officers' need to ensure that [the] defendant was not in possession of a weapon capable of inflicting injury" and found no evidence indicating the amount of force used was so overly intrusive as to render the seizure unreasonable. *Id.* In the present case, although Deputy Collins used more force than the officers in *Summey* did, our case law indicates that his actions were not so unreasonably intrusive as to violate Defendant's Fourth Amendment rights. *See, e.g., State v. Smith*, 342 N.C. 407, 464 S.E.2d 45 (1995), *cert. denied*, 517 U.S. 1189, 134 L. Ed. 2d 779 (1996) (holding that requiring the defendant to pull his pants down in the middle of an intersection so that police might search for cocaine was not intolerable in intensity and scope such that the search was unreasonably intrusive); *State v.*

*Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995) (holding police officer's application of pressure to the defendant's throat causing him to spit out three plastic baggies containing crack cocaine was not unreasonably intrusive in light of the risk of losing evidence and the potential health risk to the defendant). Accordingly, we hold that the trial court did not err in denying Defendant's motion to suppress.

*II. Motion to Dismiss for Insufficient Evidence*

Defendant next argues that the trial court erred in denying his motion to dismiss the charge of possession of cocaine at the close of all the evidence on the grounds that the State failed to present sufficient evidence to establish every element of the offense charged. Specifically, Defendant alleges that the State's evidence was insufficient to prove that he actually or constructively possessed the cocaine Deputy Collins found after their struggle on the ground near the rear driver's side of Defendant's rental car. We disagree.

In reviewing a defendant's challenge to a denial of his motion to dismiss based on insufficient evidence, this Court determines "whether the State presented substantial evidence in support of each element of the charged offense." *State v. Barnhart*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 724 S.E.2d 177, 179 (2012)

(citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000) (citation omitted). In determining whether substantial evidence exists, "the question for the trial court is not one of weight, but of the sufficiency of the evidence." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). Moreover, "[i]n this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citation and internal quotation marks omitted). Thus, "contradictions and discrepancies do not warrant dismissal of the case [but instead] are for the jury to resolve." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted). Even circumstantial evidence "may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Mann*, 355 N.C. at 301, 560 S.E.2d at 781. Where the evidence presented is circumstantial, the court must consider "whether a reasonable inference of [the]

defendant's guilt may be drawn from the circumstances" and if it does, "then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation and internal quotation marks omitted; alterations in original). Ultimately, "if substantial evidence exists to support each essential element of the crime charged and that [the] defendant was the perpetrator, it is proper for the trial court to deny the motion." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). However, if the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

Our Supreme Court has held that "[t]o obtain a conviction for possession of a controlled substance, the State bears the burden of proving two elements beyond a reasonable doubt: (1) [the] defendant possessed the substance; and (2) the substance was a controlled substance." *State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007). Possession may be either actual or

constructive. See *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). "Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both the power and intent to control its disposition or use, even though he does not have actual possession." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation and internal quotation marks omitted). If a controlled substance is found "on premises under the defendant's control, this fact alone may be sufficient to overcome a motion to dismiss and to take the case to the jury." *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993). If, however, the defendant does not have exclusive control of the premises, then "other incriminating circumstances must be established for constructive possession to be inferred." *Id.* Nevertheless, this Court has held that "[t]he State is not required to prove that the defendant owned the controlled substance, or that [the] defendant was the only person with access to it." *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citation omitted). Indeed, "the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the



jury in concluding that the same was in his possession." *State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972) (citation and internal quotation marks omitted).

In the present case, Defendant argues the trial court erred in denying his motion to dismiss because he did not have exclusive control of the premises where the cocaine was found and the State failed to establish "other incriminating circumstances" sufficient to infer constructive possession. To support his argument, Defendant relies on our Supreme Court's holding in *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967), that a strong suspicion of constructive possession alone is not sufficient to survive a motion to dismiss. *Id.* at 311, 154 S.E.2d at 344. Defendant correctly notes that his car was stopped at the residence of his female passenger, which was not a premises under his exclusive control, and emphasizes that the State presented no DNA or fingerprint evidence to link him directly to the baggie of crack cocaine Deputy Collins found there. Defendant further contends that neither his nervousness, his prior drug convictions, nor the fact Deputy Collins had reasonable suspicion to search him for weapons provides evidence of his actual or constructive possession, and he also suggests that the crack cocaine could just as easily have been dropped on

the ground by his female passenger, or even tossed there by a passing motorist. Although he concedes that the location the baggie was found at the rear driver's side of his vehicle where he struggled with Deputy Collins is indeed an incriminating circumstance, Defendant maintains that this amounts to no more than "mere association or presence[] linking [him] to the [crack cocaine]" and that more is required to establish constructive possession under these circumstances given this Court's decision in *Alston*. 131 N.C. App. at 519, 508 S.E.2d at 318.

However, Defendant's argument ignores crucial distinctions between the facts of his case and those present in the cases he cites, such as *Alston* and *Chavis*, where the evidence was held insufficient to establish constructive possession. In *Alston*, we held the trial court erred in denying the defendant's motion to dismiss the charge that he was a felon in possession of a firearm because the handgun in question was purchased and owned by his wife and there was no other evidence he ever possessed it apart from the fact it was found lying on the console next to his seat in a car he did not own that his wife was driving. 131 N.C. App. at 519, 508 S.E.2d at 319. In *Chavis*, our Supreme Court held there was no constructive possession where police saw a defendant walking on a sidewalk wearing a hat that was later

found discarded nearby containing marijuana because there was no evidence the marijuana was in the hat when the defendant possessed it, nor did the officers see him remove or discard the hat. 270 N.C. at 311, 154 S.E.2d at 344. The common thread that runs through these and similar cases is that the police never saw the defendant possess or discard the contraband which, because it was found in an area that the defendant did not maintain exclusive control over, could have been present there as the result of possession by someone else. See also, e.g., *State v. Lindsey*, 219 N.C. App. 249, 725 S.E.2d 350, reversed and remanded on other grounds, 366 N.C. 325, 734 S.E.2d 570 (2012) (reversing conviction for constructive possession where an officer observed the defendant flee his vehicle through a restaurant parking lot but did not witness him taking any action consistent with disposing of marijuana and cocaine in two separate locations in the parking lot from which drugs were recovered); *State v. Acolaste*, 158 N.C. App. 485, 581 S.E.2d 807 (2003) (reversing conviction for constructive possession where police lost sight of the defendant while chasing him through an area over which he did not maintain exclusive control, saw him make a throwing motion toward some bushes, but found nothing

there and instead recovered drugs from the roof of a detached garage located in the opposite direction from the bushes).

By contrast, in the present case, there is far less room to doubt that the baggie of crack cocaine came directly from Defendant's clinched right fist. During the hearing on Defendant's motion to suppress, the trial court extensively reviewed video footage of the traffic stop taken by the camera in Deputy Collins's squad car, which showed that while the two men were struggling on the ground, Defendant's hand dropped something that looked like an "off-white rock substance" that "bounce[d] and hit the ground" in the same location beside the rear driver's side of the vehicle where Deputy Collins found the baggie of crack cocaine. Although the video did not show the baggie at the precise instant it came out of Defendant's hand or as it fell through the air, Deputy Collins did testify that he checked the area immediately before his initial contact with Defendant and found nothing, and there was no evidence that anyone else had access to the area between that time and the time Deputy Collins found the crack cocaine. Considered collectively with the location where the crack cocaine was found, which even Defendant concedes is an incriminating circumstance, and given Defendant's refusal to open his hand

after repeated requests, we conclude the State provided evidence of additional incriminating circumstances sufficient to establish an inference of constructive possession and to survive Defendant's motion to dismiss. Moreover, when taken in the light most favorable to the State, the video also provides at least circumstantial evidence of actual possession sufficient to support a reasonable inference of Defendant's guilt and send the case to the jury. See *Scott*, 356 N.C. at 596, 573 S.E.2d at 869. Therefore, because the State presented evidence "which places [Defendant] within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession," see *Harvey*, 281 N.C. at 12-13, 187 S.E.2d at 714, we hold that the trial court did not err in denying Defendant's motion to dismiss the charge of possession of cocaine based on insufficient evidence.

### *III. Fatal Variance*

Finally, Defendant argues that the trial court erred in denying his motion to dismiss the charge of resisting, obstructing, or delaying a public officer due to what he alleges are fatal variances between the indictment and the evidence introduced at trial. We disagree.

It is well established that "[a] defendant must be convicted, if at all, of the particular offense charged in the indictment" and that "[t]he State's proof must conform to the specific allegations contained" therein. *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985). Thus, "a fatal variance between the *allegata* and the *probata*" is properly the subject of a motion to dismiss for insufficiency of the evidence to sustain a conviction. *State v. Nunley*, 224 N.C. 96, 97, 29 S.E.2d 17, 17 (1944). The rationale for this rule is "to insure that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). However, not every variance is fatal, because "[i]n order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *Id.* (citation omitted). This Court has previously recognized that "an indictment for the charge of resisting an officer must: 1) identify the officer by name, 2) indicate the official duty being discharged, and 3) indicate generally how [the] defendant

resisted the officer." *State v. Swift*, 105 N.C. App. 550, 553, 414 S.E.2d 65, 67 (1992).

In the present case, Defendant moved to dismiss at the close of the State's evidence based on fatal variance because "the indictment alleged that [he] had refused to drop what was in his hands (plural) and the evidence at trial showed [he] had refused to drop what was in his right hand (singular)." Defendant contends the trial court erred in denying his motion because this variance was material since it involved an essential element of the offense charged, specifically the manner in which he resisted Deputy Collins. Essentially, Defendant's argument is premised on the logic that because a fatal variance must be material, and a material variance must involve an essential element, any variance that involves an essential element must be material and therefore fatal. This argument is without merit.

Contrary to Defendant's logic, this Court's case law makes clear that not every variance that involves an essential element of the offense charged is necessarily material. For example, in *State v. McKoy*, this Court rejected a defendant's argument that there was a fatal variance between the indictments against him for second-degree rape and second-degree sexual offense and the

evidence introduced at his trial because even though the indictments identified the victim by her initials, they failed to state her full name and were not punctuated by periods, which he contended were essential elements because both offenses must be committed against "another person." 196 N.C. App. 650, 653, 675 S.E.2d 406, 409, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009). In upholding the conviction, the *McKoy* Court emphasized that the fatal variance rule was not intended as a get-out-of-jail-free card for setting aside convictions based on hyper-technical arguments, and ultimately rooted its holding in the rule's rationale that indictments must "provide[] sufficient notice to [the d]efendant for [the d]efendant to prepare his defense and protect him from double jeopardy." *Id.* at 659, 675 S.E.2d at 412.

Here, Defendant attempts to support his argument with citations to our holdings in *State v. Skinner*, 162 N.C. App. 434, 590 S.E.2d 876 (2004) and *State v. Langley*, 173 N.C. App. 194, 618 S.E.2d 253 (2005), *disc. review denied*, 360 N.C. 366, 630 S.E.2d 447 (2006). These cases are easily distinguished from the present facts insofar as they demonstrate what actually makes a variance "material." In *Skinner*, this Court found a fatal variance where the defendant was tried for assault with a



deadly weapon based on an indictment that did not correctly identify what type of deadly weapon he used to commit the assault; although the indictment alleged that he beat the victim with his hands, the evidence introduced at trial showed that he beat the victim with a hammer. 162 N.C. App. at 445, 590 S.E.2d at 884. In *Langley*, we found a fatal variance where the defendant was indicted for possession of a firearm by a felon but the evidence introduced at trial showed he actually possessed a sawed-off shotgun, which under our State's then-extant scheme for classifying firearms could not constitute sufficient proof of the offense charged. 173 N.C. App. at 196, 618 S.E.2d at 255. In both cases, these variances were material because they fundamentally altered the nature of the offense charged, which disadvantaged their respective defendants in preparing for their trials and, if uncorrected, could have potentially exposed them to double jeopardy.

In sum, we conclude that the alleged fatal variance urged by Defendant—the difference between “hand” (singular) and “hands” (plural)—is more like the *McKoy* victim's unpunctuated initials than the difference between “hand” vs. “hammer” in *Skinner* or the difference between “handgun” vs. “sawed-off shotgun” in *Langley*. It is difficult to discern how the mistaken

addition of the letter "s" prevented the indictment from providing Defendant sufficient notice of the general manner in which he resisted Deputy Collins or how it could leave Defendant exposed to double jeopardy. Further, apart from his bald assertion that the variance was material, Defendant offers no elaboration as to any prejudice he might have suffered as a result. We therefore conclude that the trial court did not err in denying his motion to dismiss for fatal variance.

Defendant also attempts to raise a second fatal variance argument, contending that although the indictment alleged that Deputy Collins was attempting to discharge an official duty by conducting a traffic stop, the evidence at trial proved that the traffic stop was already over before any resistance by Defendant occurred. However, because Defendant did not specifically raise this argument before the trial court, it has not been properly preserved for appellate review. See *Eason*, 328 N.C. at 420, 402 S.E.2d at 814; see also N.C.R. App. P. 10(b)(1). In his brief, Defendant attempts to invoke this Court's jurisdiction pursuant to Rule 2 of our Rules of Appellate Procedure, but even if we agreed to suspend or vary our typical requirements, Defendant's argument would fail. This Court has previously held that a traffic stop is not terminated until after the officer returns

the driver's license or other documents to the driver. See *State v. Kincaid*, 147 N.C. App. 94, 555 S.E.2d 294 (2001); *State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990). In the present case, although Defendant had provided his license and registration, Deputy Collins had not yet returned them at the time he ordered Defendant out of his vehicle to conduct a *Terry* frisk for weapons. Because the traffic stop had not yet ended, we find no fatal variance between the indictment and the evidence presented on this ground either.

NO ERROR.

Chief Judge MCGEE and Judge DIETZ concur.