

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-347

Filed: 7 January 2020

Cleveland County, No. 17 CRS 056086

STATE OF NORTH CAROLINA

v.

PERRIAN CORZELL LITTLEJOHN, Defendant.

Appeal by Defendant from judgment entered 6 September 2018 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 30 October 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Forrest P. Fallanca, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.*

MURPHY, Judge.

Defendant, Perrian Littlejohn, appeals his felony conviction of obtaining property by false pretenses that resulted in a suspended sentence of 6 to 17 months. Defendant's first issue on appeal is that the trial court should have granted his motion to dismiss for insufficient evidence at the close of the State's evidence

(renewed at the conclusion of all evidence) as there was a fatal variance between the indictment's description of an Xbox 360 and the evidence presented at trial of an Xbox One. The State responds that the fatal variance issue was not preserved for appellate review and we agree. If a defendant "allege[s a] variance between the indictment and the evidence at trial [and] base[s] his [or her] motions at trial solely on the ground of insufficient evidence[, then the defendant] has failed to preserve this argument for appellate review." *State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997). That is what happened here.

Further, Defendant requests that if we find the issue is not preserved, then we should exercise our discretion in accordance with Rule 2 of the Rules of Appellate Procedure. After careful consideration, we decline to accept Defendant's invitation to excuse his failure to preserve the same at trial. *State v. Campbell*, 369 N.C. 599, 604, 799 S.E.2d 600, 603 (2017) (remanding a case "to the Court of Appeals so that it may independently and expressly determine whether, on the facts and under the circumstances of [a] specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend Rule 10(a)(1), and consider the merits of defendant's fatal variance argument"). Therefore, Defendant's appeal of the fatal variance issue is dismissed.

Finally, Defendant requests that if we decline to invoke Rule 2, then we should find his trial counsel was ineffective and that he was denied his constitutional right

to effective assistance of counsel. “To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674 (1984)). However, “[i]t is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits [only] when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Burton*, 251 N.C. App. 600, 604, 796 S.E.2d 65, 68 (2017) (quoting *State v. Turner*, 237 N.C. App. 388, 395, 765 S.E. 2d 77, 83 (2014). “[S]hould [we] determine that IAC claims have been prematurely asserted on direct appeal, [we] dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent motion for appropriate relief proceeding.” *State v. Stimson*, 246 N.C. App. 708, 713, 783 S.E.2d 749, 752 (2016) (quoting *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (alterations omitted).

Defendant’s brief raises technological issues that are not a part of the record and would strain our concepts of judicial notice as it pertains to the difference between an Xbox 360 and an Xbox One. *See generally, State v. Cannon*, 370 N.C. 487, 809 S.E. 2d 567 (2018) (Mem) (disavowing our “taking of judicial notice of the

STATE V. LITTLEJOHN

*Opinion of the Court*

prevalence of Wal-Mart stores in Gastonia and in the area between Gastonia and Denver, as well as of the ‘ubiquitous nature of Wal-Mart stores’”). Therefore, we decline to reach this issue and dismiss without prejudice as to Defendant’s ability to file a motion for appropriate relief in the trial court.

DISMISSED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).