30.5 Fatal Variance

A fatal variance exists when the State's evidence differs from a material allegation contained in the indictment or other pleading. A fatal variance between the indictment and the proof at trial is a specific type of insufficiency problem. *See State v. Waddell*, 279 N.C. 442, 445 (1971) ("A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.").

An objection to a variance between the indictment and proof at trial is properly raised by a motion to dismiss for insufficient evidence because there is not sufficient evidence to support the particular charge alleged in the indictment or other pleading. *See State v. Faircloth*, 297 N.C. 100 (1979); *State v. Bell*, 270 N.C. 25 (1967). Such a dismissal precludes the State from further prosecution of the offense charged in the indictment or other pleading because the charged offense has been dismissed for insufficient evidence (*see supra* § 30.4, Effect of Dismissal); but, it ordinarily does not preclude further prosecution of an offense that was not properly pled in the charging document. *See State v. Stinson*, 263 N.C. 283 (1965); *State v. Wall*, 96 N.C. App. 45 (1989); *State v. Johnson*, 9 N.C. App. 253 (1970); *cf. State v. Teeter*, 165 N.C. App. 680 (2004) (double jeopardy bars retrial if indictment would have supported conviction and judge incorrectly dismisses charge for fatal variance).

A fatal variance is not the same as a fatally defective indictment. In a fatal variance case, the indictment is legally sufficient to confer jurisdiction on the trial court, but the State's evidence does not match the material allegations in the indictment. In a defective indictment case, the indictment is legally insufficient to confer jurisdiction on the trial court. While a fatal variance has to be preserved by motion to dismiss, a fatally defective indictment is preserved for appeal without objection at trial.

For further discussion of defective indictments and variances between pleading and proof, including a collection of cases finding fatal variance, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 8, Criminal Pleadings (2d ed. 2013), and Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/03 (UNC School of Government, July 2008).

Practice note: The N.C. Supreme Court has held that a defendant's motion to dismiss did not properly preserve a fatal variance issue for appellate review where the motion was based solely on insufficient evidence and the defense attorney did not specifically assert fatal variance. *See State v. Pickens*, 346 N.C. 628 (1997) (so holding but then addressing issue assuming arguendo that it had been preserved); *see also State v. Hester*, 224 N.C. App. 353 (2012) (finding that defendant waived the right to appellate review of the issue

of a fatal variance where he made only a general motion to dismiss and did not specifically raise the question of variance), *aff'd per curiam*, 367 N.C. 119 (2013). This approach seems at odds with decisions holding that "a fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment." *See State v. Faircloth*, 297 N.C. 100, 107 (1979). It also is difficult to reconcile with cases holding that a pleading that does not support the offense of conviction deprives the court of jurisdiction over that offense, which may not be waived even if no motion is made at the trial level. ***Nevertheless,*** in cases in which you believe there is a fatal variance, you must specifically state that the motion to dismiss for insufficient evidence is based on a fatal variance between the charges alleged in the indictment or other pleading and the evidence presented at trial.

For sample language to use when moving to dismiss based on a fatal variance, see *supra* § 30.3D, Practice note. This language is recommended because it preserves a defendant's motion to dismiss on the grounds of both insufficient evidence *and* fatal variance.