STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS MICHAEL URSUY,

Defendant-Appellant.

UNPUBLISHED
February 12, 1999

No. 202968
Saginaw Circuit Court
LC No. 96-012321 FC

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Following a jury trial, defendant was convicted of accessory after the fact to armed robbery (hereinafter" accessory after the fact"), MCL 750.505; MSA 28.773. He was sentenced as an habitual offender, fourth offense, to two to fifteen years' imprisonment. We reverse and remand for a new trial.

Defendant argues that the trial court erred when it instructed the jury on the crime of accessory after the fact. Defendant asserts that the prosecution's late request for the jury instruction deprived him of adequate notice that he would have to defend against the crime, which he argues is not a cognate lesser included offense of armed robbery. The prosecution concedes both that accessory after the fact is not a cognate lesser included offense of armed robbery, and that the instruction at issue was improper. Nevertheless, the prosecution argues that reversal is unwarranted given that pursuant to MCL 767.76; MSA 28.1016,[1] the charge of accessory after the fact could have been added to the information. The prosecution also argues that defendant has failed to show how he would have proceeded differently at trial had he been notified earlier that he would be facing the accessory after the fact charge.

We are unpersuaded by the prosecution's argument. Although the prosecution could have amended the information before trial, see *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993); *People v Fortson*, 202 Mich App 13, 17; 507 NW2d 763 (1993), it did not do so. Further, under the circumstances, we conclude that it is reasonable to assume that defendant would have

approached trial with a different strategy had he been informed at a proper time that he would need to defend against the accessory after the fact charge. By giving the instruction after the close of proofs, defendant was effectively denied the opportunity to defend against the accessory after the fact charge.[2] See *People v Adams*, 202 Mich App 385, 392; 509 NW2d 530 (1993).[3] As the *Adams* Court wisely observed, "once the trial is completed, or even nearly completed, it is difficult, if not impossible, for the defendant to adjust his trial strategy to encompass the newly added offense." *Id.* at 391.

We also find the prosecution's reliance on *Hunt* and *Fortson* to be misplaced. In both of those cases, the Courts were faced with the issue of whether an information could be amended after a preliminary examination, but *before* the presentation of proofs at trial. *Hunt, supra* at 363-365; *Fortson, supra* at 15-17. Characterizing the giving of the disputed jury instruction in the case at hand as an "amendment," the prosecution urges this Court to stretch the rule of *Hunt* and *Fortson* so that it will encompass the situation at hand. We reject this invitation. Such an extension of the *Hunt/Fortson* rule would, in effect, eviscerate a defendant's right to meet the charges being brought against him.

Therefore, we hold that the giving of the accessory after the fact instruction was error requiring reversal. Because we are reversing and remanding for a new trial, it is unnecessary for us to address defendant's remaining issues on appeal.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie

[1] MCL 767.76; MSA 28.1016 reads in pertinent part:

> The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury.

[2] There is no indication in the record, and the prosecution does not contend that the instruction request came at a stage during the proceedings when defendant would have had ample time to prepare to defendant against it.

[3] *Adams* involved the giving of a jury instruction for a lesser included cognate offense of the crime originally charged. *Adams, supra* at 387. As previously noted, both parties in the case at hand agree

that accessory after the fact is not a cognate lesser included offense for armed robbery. In the context of the circumstances that existed in *Adams*, the Court

> conclud[ed] that where a prosecutor seeks to add a cognate lesser included offense that is dissimilar to the charged offense, and the information does not suggest the need to prepare a defense against that cognate lesser included offense, *and notice to the defendant does not come until after the prosecutor begins to present evidence*, the trial court should not grant the prosecutor's request for an instruction on that cognate lesser included offense. [*Id.* at 391-392 (emphasis added).]