

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD ROY FULLER II,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 220410

Ottawa Circuit Court

LC No. 97-020855-FC

Before: Doctoroff, Holbrook, Jr., and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to cause great bodily harm less than murder, MCL 750.84; MSA 28.279, and was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of 84 to 240 months' imprisonment. Defendant appeals as of right, and we affirm.

This case arises from an incident in which defendant strangled a seventeen-year-old girl until she almost lost consciousness. The prosecutor originally charged defendant with the crime of assault with intent to cause great bodily harm less than murder, MCL 750.84; MSA 28.279, and defendant waived a preliminary examination on that charge. After plea negotiations proved unsuccessful, the prosecutor amended the information to add the charge of attempted murder, MCL 750.91; MSA 28.286, and the circuit court remanded the case to the district court for a preliminary examination on that charge. The district court refused to bind defendant over on either attempted murder or assault with intent to cause great bodily harm less than murder, reducing the charge to aggravated assault, MCL 750.81a; MSA 28.276(1). The prosecutor appealed to the circuit court, which reversed the district court's decision and remanded to the district court for bindover on the original charges.

Over two years later, on the morning of trial, the circuit court permitted the prosecutor to amend the information and charge defendant with the crime of assault with intent to murder, MCL 750.83; MSA 28.278, instead of the two original charges. Defendant did not receive a preliminary examination on the charge of assault with intent to murder. At the conclusion of defendant's trial, the jury acquitted him of assault with intent to murder, but convicted him of the lesser included offense of assault with intent to cause great bodily harm less than murder.

On appeal, defendant presents three basic arguments why his conviction should be reversed: (1) the circuit court erroneously reversed the district court's refusal to bind defendant over on attempted murder, (2) the circuit court erroneously allowed the prosecutor to amend the information to charge a new offense, on the morning of trial, and (3) the circuit court erroneously admitted expert testimony.

I

Defendant first contends that the trial court erroneously reversed the district court's refusal to bind him over on attempted murder. We disagree.

Although defendant was bound over on the charge of attempted murder, he was never tried on that charge because the prosecutor amended the information on the morning of trial. Therefore, even if we accepted defendant's argument that the circuit court erroneously reversed the district court's decision to dismiss the charge of attempted murder, we cannot fashion a remedy for defendant's claim of error. "Where a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot." *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

However, even if this Court were able to fashion such a remedy, we would uphold the circuit court's decision. "In a preliminary examination, a district court's function is to determine whether the evidence is sufficient to cause an individual marked by discreteness and caution to have a reasonable belief that the defendant is guilty as charged." *People v Justice (After Remand)*, 454 Mich 334, 343; 562 NW2d 652 (1997). The district court's decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed by the circuit court for an abuse of discretion. *Id.* at 344. In conducting such a review, the circuit court must consider the entire record of the preliminary examination. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). The circuit court may not substitute its judgment for that of the district court, and may reverse only if it appears on the record that the district court abused its discretion. *Id.* This Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. *Justice, supra* at 344; *Orzame, supra* at 557. "An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification or excuse for the ruling." *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

Defendant argues that the circuit court erroneously reversed the district court's decision because the prosecutor did not introduce any credible evidence at the preliminary examination that defendant intended to kill the victim. On the contrary, we conclude that the evidence presented at the preliminary examination supports a reasonable belief that defendant intended to kill the victim. The evidence indicated that defendant strangled the victim to the point where the blood vessels in her eyes burst, she could neither breathe nor talk, and she saw black in front of her eyes. The victim testified that she thought that she was going to die, and that defendant did not release her until she gouged his arm with her fingernails, at which point he dropped her to the floor. In addition, the victim testified that defendant told her, immediately before the attack, that he had experienced a dream in which she was the "chosen one" who would be "sacrificed."

Finally, a police officer testified at the preliminary examination that he interviewed defendant about the incident, and that defendant admitted putting the victim in a choke hold until she was gasping for air and her face was red. Defendant told the detective that he did not know why he put the victim in a choke hold, and that he did not remember whether he intended to hurt the victim. Although defendant told the police officer that he “didn’t know” whether he intended to kill the victim, defendant did admit that he had almost killed her. Considering all of the evidence produced at the preliminary examination, we agree with the circuit court’s determination that the evidence regarding defendant’s intent was sufficient to bind him over on charges of attempted murder. Because we agree that the district court abused its discretion in refusing to bind defendant over on the original charges, we would uphold the circuit court’s decision to reverse the district court.

II

Defendant next argues that the trial court erroneously allowed the prosecutor to amend the information on the morning of trial because the amendment denied defendant his statutory right to a preliminary examination on the new charge of assault with intent to commit murder, and because there was insufficient evidence to support the charge, which resulted in a compromise verdict. We disagree.

A

This issue is not preserved for appellate review, for two reasons. First, defendant failed to object to the trial court’s failure to provide him with a preliminary examination on the charge of assault with intent to commit murder. A defendant may not, on appeal, raise errors or irregularities relating to the preliminary examination unless the issue was timely raised prior to or at trial. *People v Sparks*, 53 Mich App 452, 454; 220 NW2d 153 (1974). Because defendant did not raise this alleged error before the trial court, the issue has been waived.

Second, defense counsel expressly agreed with the prosecutor’s decision to charge defendant with the crime of assault with intent to commit murder, apparently as a matter of trial strategy. The following exchange before the trial court demonstrates that defense counsel consented to the amended information:

[The Court:] All right. So we’re proceeding to trial on the assault with intent to murder. And then the lesser included offenses, as may be requested by either party, at the conclusion of the proofs.

* * *

[Defense counsel:] I agree with that, Your Honor. I discussed the matter with [defendant] this morning. I think that the assault with intent to commit murder with its standard jury instructions, is clearly a specific intent crime, and that’s laid out in the instructions.

And he’s better off going to trial on that rather than the other statute [attempted murder] and then having the confusion of the Count II that was present [assault with intent to

cause great bodily harm less than murder]. This way there's the one charge with appropriate lesser included. Again, I've discussed it with [defendant]. He agreed with that analysis, and we're ready to proceed to trial. That's fine with us.

A defendant may not stipulate to a procedure in the trial court and then raise it as an error before this Court. "To hold otherwise would allow defendant to harbor error as an appellate parachute." *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Because defense counsel expressly consented to the amendment of the information, defendant may not challenge that amendment on appeal.

B

Even if this issue were preserved for appeal, we would find that the prosecutor's amendment of the information does not merit reversal of defendant's conviction because the amendment did not cause unacceptable prejudice to defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend.

Defendant argues that the amendment deprived him of his statutory right to a preliminary examination on the charge of assault with intent to murder. Defendant relies on MCL 767.42(1); MSA 28.982(1), which provides that "[a]n information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination." However, the trial court may allow the prosecutor to amend the information at any time before, during, or after the trial, and we may not reverse the trial court's decision to allow the amendment unless we find that the defendant was prejudiced in his defense or that a failure of justice resulted. MCL 767.76; MSA 28.1016.

Defendant argues that his statutory right to receive a preliminary examination was violated because the amended information charged a new offense, relying on *People v Price*, 126 Mich App 647, 650-655; 337 NW2d 614 (1983). In *Price*, this Court held that MCL 767.76; MSA 28.1016 did not permit the prosecutor to amend the information for the purpose of adding a new offense. However, we recognized in *People v Forston*, 202 Mich App 13; 507 NW2d 763 (1993), that our Supreme Court abrogated the *Price* holding in *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

In *Hunt*, our Supreme Court held that a trial court may allow the prosecutor to amend the information with a new charge if the amendment will not cause "unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *Id.* at 364. In that case, the magistrate refused to allow the prosecutor to amend the information to add a new charge at the end of the preliminary examination. Both the circuit court and this Court affirmed that decision. *Id.* at 361. On appeal, the Supreme Court reversed the decision of this Court, determining that the amendment did not cause unacceptable prejudice to the defendant because the preliminary examination testimony supported the new charge, there was no indication that defense counsel's actions at the preliminary examination would have been any different had he known of the new charge, and the prosecutor offered to allow additional questioning of witnesses. *Id.* at 364-365. Therefore, the *Hunt*

Court determined that the prosecutor should have been allowed to amend the information with the new offense. *Id.* at 363-365.

In the present case, the prosecutor added the assault with intent to commit murder charge on the morning of defendant's trial. Defendant argues that he lacked adequate notice to prepare a defense to that charge because he had prepared a defense of voluntary abandonment to the charge of attempted murder, which is not a defense to the charge of assault with intent to commit murder. It is true that attempted murder and assault with intent to commit murder are distinct crimes. A conviction of attempted murder requires the prosecutor to establish that the defendant intended to cause death by "poisoning, drowning, or strangling another person, or by any means *not constituting the crime of assault with intent to commit murder.*" MCL 750.91; MSA 28.286, (emphasis added). A conviction of assault with intent to commit murder requires the prosecution to establish "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). These two crimes are mutually exclusive because the attempt statute "is designed to proscribe and punish those attempts at murder not within the ambit of the assault with intent to murder statute, because of the lack of an assault." *People v Smith (On Rehearing)*, 89 Mich App 478, 483; 280 NW2d 862 (1979), citations omitted.

However, defendant was originally charged with *both* attempted murder and assault with intent to commit great bodily harm less than murder. The latter crime is a lesser included offense of assault with intent to commit murder. *People v Pollick*, 448 Mich 376, 378; 531 NW2d 159 (1995); *People v Cooper*, 236 Mich App 643, 650; 601 NW2d 409 (1999). Therefore, we disagree that the amended information deprived defendant of a previously valid defense. Rather, the amended information changed the level of intent with which defendant was charged. Instead of an intent to cause great bodily harm less than murder, the amended information charged defendant with an intent to murder. All of the witnesses and testimony remained the same, and defendant has not indicated how defense counsel's actions would have been different at the preliminary examination, had he known of the new charge.

Based on the above facts, we conclude that the amendment did not cause "unacceptable prejudice to defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *Hunt, supra* at 364. This conclusion is especially warranted because defense counsel neither moved to quash the amended information nor moved for a directed verdict; rather, defense counsel expressly agreed with the prosecutor's decision to charge defendant with assault with intent to commit murder. "A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court" because "[t]o hold otherwise would allow defendant to harbor error as an appellate parachute." *Fetterley, supra* at 520.

C

Defendant also argues that the trial court erroneously submitted the charge of assault with intent to commit murder to the jury because the prosecution failed to present sufficient evidence of intent to kill, and therefore caused the jury to reach a compromise verdict.

Defendant relies on the following holding from *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975), as support for his argument that he suffered unfair prejudice because the jury was allowed to consider the charge of assault with intent to commit murder:

[W]here a jury is permitted consideration of a charge unwarranted by the proofs there is always prejudice because a defendant's chances of acquittal on any valid charge is [sic] substantially decreased by the possibility of a compromise verdict. For this reason it is reversible error for a trial judge to refuse a directed verdict of acquittal on any charge where the prosecution has failed to present evidence from which the jury could find all elements of the crime charged.

Unfortunately for defendant, our Supreme Court overruled the *Vail* holding in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998), noting that “*Vail* is premised on the unwarranted assumption that jurors do not follow their instructions not to compromise their views.” *Id.* at 485. Because jurors are presumed to follow their instructions, the jurors in the instant case presumably followed their instructions not to compromise their views. *Id.* at 486.

Defendant does not contend that the charge on which he was convicted, assault with intent to cause great bodily harm less than murder, was improperly submitted to the jury. As our Supreme Court has stated: “[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury.” *Graves, supra* at 486-487. Accordingly, defendant is not entitled to relief on his claim that the charge of assault with intent to murder was improperly submitted to the jury. *Id.*

III

Finally, defendant argues that the trial court erroneously denied his motion to exclude the testimony of the forensic pathologist, Dr. Stephen Cohle, who testified for the prosecution. We disagree.

At the hearing on the motion to exclude Dr. Cohle's testimony, defendant argued that Dr. Cohle never examined the victim, and therefore his testimony was speculative and lacked a sound medical or scientific basis. Also, defendant argued that because the prosecutor never revealed the substance of Dr. Cohle's testimony in a pre-trial report, defendant was unable to adequately prepare for cross-examining Dr. Cohle. The prosecutor argued that Dr. Cohle qualified as an expert witness to testify regarding a fact in issue, i.e., the amount of force and the time required to sustain that amount of force to cause the victim's injuries. The prosecutor conceded that Dr. Cohle did not submit a report containing the substance of his opinion testimony. However, the prosecutor gave defendant permission to unilaterally contact Dr. Cohle regarding his trial testimony.

The trial court denied defendant's motion to exclude Dr. Cohle's testimony without prejudice, noting that the prosecutor gave defense counsel permission to have unilateral contact with the witness. Further, the trial court ordered that defense counsel would have the chance to speak with the witness to determine the exact nature of his trial testimony, and that if defense counsel detected any unanticipated

problems with his testimony, defense counsel would have the opportunity to voir dire the witness outside the jury's presence to determine if there was a foundation for his testimony.

Defendant essentially argues that the expert's testimony should have been excluded from evidence because he provided the only testimony that defendant intended to kill the victim. However, in *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986), our Supreme Court addressed the admissibility of expert testimony under MRE 702:

The determination of when such testimony is admissible lies within the discretion of the trial court and will vary according to the area at issue and the particular facts of the case. Generally, the testimony must assist the jury in understanding the evidence or the factual issues, and the witness must have sufficient qualifications "as to make it appear that his opinion or inference will probably aid the trier in the search for truth."
[Citation omitted.]

In the instant case, the prosecutor sought to introduce Dr. Cohle's testimony regarding the type of injury the victim sustained, the amount of force applied to her neck, and the amount of time required to sustain that amount of force to cause her eye injury, in order to assist the jury in determining whether the victim's injury was caused accidentally or intentionally. It is well established that expert opinion testimony will not be excluded merely because it concerns an ultimate issue. *Smith, supra* at 106; MRE 704. Because Dr. Cohle's testimony assisted the jury in understanding the nature of the victim's eye injury, including the degree of sustained force required to cause the injury, we conclude that the trial court did not abuse its discretion when denying defendant's motion to exclude that testimony.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski