STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2008
v	No. 275837 Kent Circuit Court
EVERETT CHARLTON CARPENTER, Defendant-Appellant.	LC No. 06-005481-FC

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for armed robbery, MCL 750.529, and carrying a concealed weapon (CCW), MCL 750.227. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 10 to 20 years' imprisonment for armed robbery, and 3 to 5 years' imprisonment for CCW. We affirm.

On May 21, 2006, defendant robbed the Kohl's Department Store near Woodland Mall in Grand Rapids. As he fled the store, with Kohl's loss prevention personnel in pursuit, defendant removed a multi-tool from his pocket, attempted to pull out a knife blade with his teeth, and threatened that he would cut his pursuers. After leading a chase through part of the mall, defendant jumped into a courtesy van parked outside a nearby Ramada Inn. Defendant was thereafter arrested. He was originally charged only with armed robbery. But, just before jury selection, the prosecutor sought permission to amend the information to include a CCW charge, which the trial court granted over defendant's objection.

Defendant first argues on appeal that the trial court erred when it allowed the prosecutor to amend the information just before trial, because he was unfairly surprised by the new charge. We review a trial court's decision to deny or grant a motion to amend an information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). Where a trial court's decision is within the range of reasonable and principled outcomes permitted under the law, it is not an abuse of discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Even where a trial court's decision related to a pleading or procedure is an abuse of discretion, the error will not warrant reversal unless the error resulted in a miscarriage of justice or was inconsistent with substantial justice. *McGee*, *supra* at 693.

Under MCL 767.76, "[a] trial '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.'" *People v Fortson*, 202 Mich App 13, 15; 507 NW2d 763 (1993). Although this statute refers to indictments, it also applies to an information. *McGee*, *supra* at 687. Similarly, under MCR 6.112(H), "[t]he court before, during or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." Although at one time these rules were construed to restrict amendments to cure errors, it is now well-established that it is permissible to add a charge to an information as long as there is no "'*unfair* surprise, *inadequate* notice, or an *insufficient* opportunity to defend.'" *Fortson*, *supra* at 16, quoting *People v Hunt*, 442 Mich 359, 364-365; 501 NW2d 151 (1993). This Court has further explained that, in cases where the information is amended at the end of the preliminary examination, there is no unfair surprise if the evidence presented at the preliminary hearing supports the added charge. *McGee*, *supra* at 691.

We conclude that the trial court did not abuse its discretion when it allowed the prosecutor to amend the information. Defendant was not unfairly surprised or prejudiced by the addition of the CCW charge to the information. It is illegal for a person to "carry a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument of any length, or any other dangerous weapon . . . concealed on or about his person . . . ." MCL 750.227. The preliminary examination testimony revealed that defendant carried a multi-tool that contained at least one knife, and that he threatened store personnel while holding the knife. Although a utility knife may ordinarily have peaceful uses, if defendant carried or used it as a weapon, it could constitute a dangerous weapon within the meaning of MCL 750.227. See *People v Vaines*, 310 Mich 500, 505-506; 17 NW2d 729 (1945) (noting that whether an article or instrument was carried or used as a weapon is a question of fact for the jury). The preliminary examination testimony also revealed that defendant "pulled the knife," and that Henry Miel, a Kohl's employee, did not see the knife until defendant brought it to his teeth to open it. A reasonable inference from this description of events is that defendant concealed the weapon until he opened it and threatened the store's employees. Therefore, the facts surrounding the information charging armed robbery, which were elicited at the preliminary examination, also support the CCW charge.

On appeal, defendant fails to articulate how he was prejudiced by the addition of the CCW charge. He did not request a preliminary hearing on the CCW charge. He merely objected to the additional charge. He also did not request a continuance so that he could prepare to defend against the new charge. He simply has not shown that his defense would have changed if he knew in advance about the CCW charge. Thus, defendant has failed to show that there was any prejudice or a miscarriage in justice related to the late addition of the CCW charge, and reversal is not warranted. *McGee*, *supra* at 693. Although defendant may have been surprised by the amendment, the surprise was not unfair because the factual basis for the CCW charge was established during the preliminary hearing. *McGee*, *supra* at 691; *Hunt*, *supra* at 363.

Defendant next argues on appeal that counsel was ineffective because he failed to object to the make-up of the jury pool, which only contained one African-American, who was ultimately dismissed for cause. Because there was no evidentiary hearing related to this claim at the trial court, our review of this issue is limited to mistakes that are apparent from the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Defendant's right to effective assistance of counsel is guaranteed under the Sixth Amendment. US Const, Am VI. Under Michigan law, counsel is presumed effective and it is the defendant's burden to show that (1) counsel's performance fell below objective standards of

reasonableness, and (2) that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

The Sixth Amendment also guarantees a defendant's right to an impartial jury drawn from a fair cross-section of the community. See *People v Smith*, 463 Mich 199, 202-203; 615 NW2d 1 (2000). "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion from the jury selection process." *Id.* African-Americans are considered a "distinctive group" for purposes of the fair-cross-section analysis. *People v Hubbard (After Remand)*, 217 Mich App 459, 473; 552 NW2d 493 (1996). Underrepresentation may be measured by measuring the disparity between how many of the distinctive group are in the jury array and how many are in the community. *Id.* at 474. Finally, "systematic exclusion" is more than one or two incidents of a venire being disproportionate. *Id.* at 481. However, the requirement that a defendant be tried by a fair cross-section of his community does "not guarantee that any particular jury 'actually chosen must mirror the community. . . .'" *Smith*, *supra* at 214 (Cavanagh, J, concurring), quoting *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975). An objection to the array of the jury is timely if it is made before the jury has been sworn and impaneled. *Hubbard*, *supra* at 465.

Considering counsel's actions in light of the facts available on the record, there is insufficient evidence to conclude that defense counsel acted below an objective standard of reasonableness with respect to the jury venire. The record does not indicate the ethnicity of any of the venire members. There is no data on the record to show the proportion of African-Americans within the community as compared with other ethnic backgrounds. And, there is no evidence on the record of systematic exclusions of African-Americans from jury pools in Kent County. In contrast, the record does show that defense counsel carefully questioned prospective jurors and skillfully tested potential jurors' reaction to the proposed defense theory. Moreover, defendant has failed to show that he was prejudiced by this alleged failure of counsel. Therefore, we conclude that counsel was not ineffective.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski
/s/ Jane M. Beckering