NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CALVIN DELEON TURNER, III, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D18-4281

Opinion filed August 7, 2020.

Appeal from the Circuit Court for Sarasota County; Stephen M. Walker, Judge.

Andrea Flynn Mogensen of The Law Office of Andrea Flynn Mogensen, P.A., Sarasota, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Kiersten E. Jensen, Assistant Attorney General, Tampa, for Appellee.

SMITH, Judge.

Calvin DeLeon Turner, III, appeals his judgment and sentences entered by the trial court after a jury found him guilty of burglary of a structure or dwelling with assault or battery and two counts of attempted lewd or lascivious molestation of a child younger than twelve years of age. Mr. Turner raises five issues in this appeal, the first three of which concern the burglary with assault or battery count. Because we find

issue one dispositive we need not address issues two and three. With regard to issue one, in which Mr. Turner was denied a continuance of the trial after the State materially amended its information and added, on the eve of trial, three additional law enforcement witnesses with knowledge regarding Mr. Turner's burglary with assault or battery charge, we find the trial court abused its discretion. Therefore, we reverse Mr. Turner's burglary with assault or battery conviction and sentence and remand for a new trial on that charge. We affirm the two remaining convictions in all other respects without comment and remand for resentencing based upon a corrected scoresheet.

I

Mr. Turner was initially charged by information with one count of attempted lewd or lascivious molestation on a child younger than twelve years of age pursuant to sections 800.04(5)(b) and 777.04, Florida Statutes (2016), which carried a maximum sentence of up to fifteen years in prison. The charge stemmed from an incident that occurred on or about August 2, 2016, when Mr. Turner visited the home where the eight-year-old child victim lived with her mother and siblings. A friend of the victim's mother had brought Mr. Turner along with her and her young son to the home. From time to time, the mother allowed her friend and her friend's son, who were homeless, to stay at the home. The mother had not invited Mr. Turner to the home on the evening in question, but she knew of Mr. Turner, who was the victim's distant cousin.

Early in the evening, the mother developed a migraine and decided to retire for the night. The friend and Mr. Turner then left the home. However, the friend's son was still at the home. The mother instructed everyone to go to bed and told one of

the siblings to lock the front door; however, the lock did not work properly and so the door remained unlocked through the night.

Later that night, the friend and Mr. Turner returned to the home. The friend slept in the room with the mother while Mr. Turner went into the room where both the victim and her sixteen-year-old sister were sleeping. Mr. Turner reached under the covers and touched the victim's buttocks and genitalia. The sister, who just had fallen asleep while on the phone with her boyfriend, woke up and saw movement under the covers and became suspicious. The sister pulled the victim from the room and asked her what had happened. They woke their mother and shared what had transpired. The mother then charged after Mr. Turner with a golf club and told him to leave the home.

The case progressed and was set for a jury trial to commence on April 30, 2018.[1] On April 23, 2018, the State filed an amended information, adding a count of burglary with assault or battery pursuant to section 810.02, Florida Statutes (2016), and a count of lewd or lascivious molestation of a child younger than twelve under section 800.04(5)(b). Two days later, on April 25, 2018, the State added three new trial witnesses, law enforcement officers who apprehended Mr. Turner after he fled from the home at approximately 3:30 a.m. Mr. Turner moved to continue the trial, arguing because of the material change in his charges, the significant increase in his potential maximum sentence, and the addition of the State's trial witnesses, he needed additional time to prepare his defense. Mr. Turner argued that the new charge of burglary with

[1]Upon the request of the State, the trial court continued the case on August 22, 2017, for purposes of conducting further discovery. Mr. Turner moved to continue trial on February 15, 2018, claiming that due to being in custody in various counties during the pendency of the case below, he did not have adequate time to meet with counsel and prepare his defense.

assault or battery required additional discovery into whether he broke in and entered the home or whether he was an invited guest—facts which he did not develop in defending the original lewd or lascivious molestation charges. The trial court denied Mr. Turner's motion on April 27, 2018.

The three-day jury trial began three days later, on April 30. The jury found Mr. Turner guilty as charged on count one, burglary with battery, and count three, attempted lewd or lascivious molestation. As to count two, the jury found Mr. Turner guilty of the lesser included crime of attempted lewd or lascivious molestation.

II

Mr. Turner challenges his conviction and sentences on numerous grounds; however, we find the first issue regarding his request for a continuance to be meritorious and dispositive and therefore decline to entertain the remaining issues. Namely, Mr. Turner claims the trial court erred in denying his motion to continue where on the eve of trial, the State filed an amended information adding an entirely new burglary with assault or battery charge and added three new law enforcement trial witnesses, leaving him with inadequate time to prepare his defense. We agree.

A trial court's denial of a motion for continuance is reviewed for abuse of discretion. See Jackson v. State, 998 So. 2d 1175, 1176-77 (Fla. 5th DCA 2008) (citing Trocola v. State, 867 So. 2d 1229, 1230-31 (Fla. 5th DCA 2004)). Criminal defendants and counsel are entitled to a reasonable time to prepare for trial, and so while the trial court's decision should generally remain undisturbed, where there is a clear showing that there has been a "palpable" abuse of discretion, that decision will be reversed. Id. at 1177. "The 'common thread' connecting cases finding a 'palpable' abuse of

discretion in the denial of a continuance seems to be that defense counsel must be afforded a reasonable opportunity to investigate and prepare any applicable defenses." Trocola, 867 So. 2d at 1231. Otherwise, the denial of a defendant's right to investigate and prepare a defense amounts to a denial of due process. See Chavez v. State, 48 So. 3d 1022, 1025 (Fla. 2d DCA 2010); Sumbry v. State, 310 So. 2d 445, 447 (Fla. 2d DCA 1975); Turner v. State, 376 So. 2d 429, 430 (Fla. 1st DCA 1979) (holding that the amended information altering the charged offense from a misdemeanor to a felony could not be deemed harmless due to the substantial potential for surprise resulting in the denial of a fair trial to the defendant).

In determining whether a trial court has abused its discretion in denying a defendant's motion for continuance, this court has instructed that we consider the following factors:

> [(1)] whether the movant suffers injustice from the denial of the motion; [(2)] whether the underlying cause for the motion was unforeseen by the movant and whether the motion is based on dilatory tactics; and [(3)] whether prejudice and injustice will befall the opposing party if the motion is granted.

Baron v. Baron, 941 So. 2d 1233, 1235-36 (Fla. 2d DCA 2006) (quoting Myers v. Siegel, 920 So. 2d 1241, 1242 (Fla. 5th DCA 2006)). We also find instructive the additional factors set forth by the First District in McKay v. State, 504 So. 2d 1280 (Fla. 1st DCA 1986), when the motion for continuance specifically raises the ground of insufficient time to prepare:

> [(1)] the time available for preparation, [(2)] the likelihood of prejudice from the denial, [(3)] the defendant's role in shortening preparation time, [(4)] the complexity of the case, [(5)] the availability of discovery, [(6)] the adequacy of counsel actually provided and [(7)] the skill and experience

> of chosen counsel and his pre-retention experience with either the defendant or the alleged crime.

Id. at 1282 (citing United States v. Uptain, 531 F.2d 1281, 1286-87 (5th Cir. 1976)).

III

"[I]t is well settled that 'the state may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant.' " Toussaint v. State, 755 So. 2d 170, 171 (Fla. 4th DCA 2000) (quoting State v. Anderson, 537 So. 2d 1373, 1375 (Fla. 1989)). However, "the changing or adding of an offense in an information is a substantive change evoking prejudice and requiring a continuance." Wright v. State, 41 So. 3d 924, 926 (Fla. 1st DCA 2010). And while the State is permitted to substantively amend a charging information, even during trial and over the objection of the defendant, "[t]here is a significant difference . . . between amending a charged offense and the filing of a new and entirely different offense." Peevey v. State, 820 So. 2d 422, 424 (Fla. 4th DCA 2002) (quoting Green v. State, 728 So. 2d 779, 781 (Fla. 4th DCA 1999)).

In this case, Mr. Turner was presented with the new charge of burglary with assault or battery less than one week before trial was set to begin. Burglary is defined as:

> 1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
> 2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
> a. Surreptitiously, with the intent to commit an offense therein;
> b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or

> c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.

§ 810.02(1)(b).

> Pursuant to section 810.02:
>
> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
> (a) Makes an assault or battery upon any person . . . .

Conversely, attempted lewd or lascivious molestation—Mr. Turner's original charge—involves the attempted "intentional touching in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person sixteen years of age or less, or forcing or enticing a person sixteen years of age or younger to touch the perpetrator." § 800.04(5)(a). The two offenses arise from the same set of facts but require the State to prove completely different elements. See Peevey, 820 So. 2d at 424. As Mr. Turner argued in order to defend against the new charge of burglary with assault or battery, he needed to conduct additional discovery relevant to his reentering the home after he left. Mr. Turner should have been permitted to develop a defense as an invited guest who had the consent to enter the home where he had previously been permitted to enter. See § 810.015(1); Sparre v. State, 164 So. 3d 1183, 1201 (Fla. 2015) (concluding defendant's status as invitee was effectively rescinded and therefore, the State established the elements of burglary); Pilafjian v. State, 210 So. 3d 738, 740 (Fla. 5th DCA 2017) ("Licensed or invited entry into the dwelling or structure is an affirmative defense to a burglary charge."). To compound the

matter, the State belatedly disclosed three new trial witnesses five days before the trial was to begin.

Based upon these facts, the likelihood of prejudice to Mr. Turner was substantial, given that the burglary with assault or battery charge required proof of different elements and exposed him to a life sentence as a first-degree felony, whereas the original charge was a second-degree felony that carried a maximum sentence of fifteen years. Additionally, there is nothing in the record before us to indicate that Mr. Turner engaged in any dilatory practices or was otherwise responsible for shortening his time to prepare for trial. See M.F. v. State, 920 So. 2d 1252, 1254 (Fla. 2d DCA 2006) (reversing and remanding for a new trial where the record indicated the defendant did nothing to delay his time to prepare for trial and was prejudiced by the denial of his motion for continuance); cf. Lawson v. State, 884 So. 2d 540, 546 (Fla. 4th DCA 2004) (holding the trial court is not required to grant a continuance where the defendant has "caused the shortened trial preparation time through his manipulation of the judicial system [and] later claims he is unprepared to go to trial"). Rather, it was the State's filing of new charges and the introduction of three new trial witnesses that prompted Mr. Turner to seek a continuance of his trial. Mr. Turner's inability to conduct discovery regarding the evidence the State sought to introduce through the three law enforcement witnesses at the late hour—after the close of discovery—also prejudiced his ability to defend against the new charge. Therefore, the error here was not harmless and resulted in a violation of Mr. Turner's due process rights to reasonably investigate the offenses for which he is charged and prepare a defense against same. See Scipio v. State, 928 So. 2d 1138, 1149-50 (Fla. 2006) (holding that the appropriate inquiry into

whether error is harmless is whether it "materially hindered the defendant's trial preparation or strategy" (quoting State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995))).

Accordingly, because the trial court abused its discretion in denying Mr. Turner's motion for a continuance, we reverse and vacate Mr. Turner's conviction and sentence for the burglary with assault or battery charge and remand for a new trial on that charge. With regard to Mr. Turner's two remaining convictions, he is entitled on remand to resentencing using a corrected scoresheet that reflects his actual convictions. See e.g., Sanchez v. State, 270 So. 3d 515, 522 (Fla. 2d DCA 2019); Fernandez v. State, 199 So. 3d 500, 502 (Fla. 2d DCA 2016) ("In general, when the vacation of a conviction would result in changes to the defendant's scoresheet, the defendant is entitled to be resentenced using a corrected scoresheet.").

Reversed in part; affirmed in part; remanded.

SILBERMAN and LUCAS, JJ., Concur.