

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON HARBER,

Defendant-Appellant.

UNPUBLISHED

October 26, 2001

No. 222405

Wayne Circuit Court

LC No. 98-009515

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for assault with intent to commit armed robbery, MCL 750.89, and felony-firearm, MCL 750.227b. The trial court sentenced defendant to five years' probation for the assault with intent to commit armed robbery conviction and the mandatory two years' imprisonment for the felony-firearm conviction. We reverse.

Defendant argues that he was denied his constitutional right to be apprised of the charges against him because, after the close of proofs, the trial court sua sponte amended the information to include the new crime of assault with intent to commit armed robbery. We agree.

We review a trial court's ruling to amend an information for an abuse of discretion and will not reverse unless the defendant was "prejudiced in his defense or a failure of justice has occurred." *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982); see MCL 767.76. "In every criminal prosecution, the accused shall have the right . . . to be informed of the nature of the accusation . . ." Const 1963, art 1, § 20. A court may amend an information at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and proofs, as long as the defendant is not prejudiced by the amendment and the amendment does not charge a new crime. *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998); *People v Weathersby*, 204 Mich App 98, 103-104; 514 NW2d 493 (1994); *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987); MCL 767.76. Moreover, MCR 6.112(H) allows an amendment before, during, or after trial unless the amendment would result in unfair surprise or prejudice to the defendant.

Here, the information charged defendant with conspiracy to commit armed robbery, MCL 750.157, and felony-firearm, MCL 750.227b. The bench trial proceeded on those charges and, in her ruling, the trial court judge found the evidence insufficient to convict defendant of

conspiracy to commit armed robbery, but found, beyond a reasonable doubt that defendant committed an assault with intent to commit an armed robbery against his codefendant, Jesse Martinez. MCL 750.89.

We hold that the trial court erred by amending the information to include the assault with intent to commit armed robbery charge because the amendment unfairly surprised and prejudiced defendant. The amendment resulted in insufficient notice to defendant of the nature of the charges against him because it involved a new charge regarding a different victim.

To prove a conspiracy occurred, the prosecutor must show that two or more persons had an express or implied plan or agreement to commit an illegal act or legal act by illegal means. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Here, the agreement involved the commission of armed robbery, the elements of which include: “(1) an assault and (2) a felonious taking of property from the victim’s person or presence (3) while the defendant is armed with a dangerous weapon described in the statute.” *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000). The trial court convicted defendant of assault with intent to commit armed robbery which requires the prosecutor to show: “(1) an assault with force and violence, (2) an intent to steal or rob,” and (3) that defendant was armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991).

Both the crime charged and the amended charge require evidence of an assault while the defendant was armed. We might ordinarily find that these charges are sufficiently similar to place the defendant on notice of the charges against him. However, here, the original charge involved an alleged assault against two by-stander restaurant employees and the amendment charged an assault against Martinez, a codefendant. Because the amendment occurred after the close of proofs, and because it addressed an assault against a different victim, defendant could not properly defend himself regarding the Martinez assault charge.

Had defendant been apprised of the nature of the charge against him, he could have focused his defense on whether he used force and violence against Martinez to perpetrate the armed robbery and whether Martinez had a reasonable apprehension of an immediate battery. Because defendant had no notice that Martinez would be named as a victim, he did not have an opportunity to challenge the evidence on that issue. Further, defendant had no opportunity to present evidence regarding Martinez’ role in the crime or when the alleged assault occurred. The trial court made its findings without a jury and changed the charge to assault sua sponte. Thereafter, trial court denied defendant’s post-judgment motion on this issue without comment and without affording him an opportunity to reopen proofs to cross-examine witnesses concerning, or to present an argument to defend against, the assault charge.

Unlike the facts in *Stricklin*, *supra*, defendant here was not bound over on and convicted of the same crime perpetrated by different means, but was bound over on one charge and convicted of an entirely new charge regarding a different victim. A trial court cannot charge and convict a defendant for a new crime not found within the four corners of the information. *Stricklin*, *supra* at 633. Accordingly, the trial court abused its discretion in amending the information after the close of proofs and defendant’s conviction must be reversed.

Because we reverse defendant's conviction for the underlying felony, we must also reverse his conviction for felony-firearm. *People v Harding*, 443 Mich 693, 716-717; 506 NW2d 482 (1993).¹

Reversed.

/s/ Joel P. Hoekstra

/s/ Henry William Saad

/s/ William C. Whitbeck

¹ Because we reverse defendant's conviction, we need not decide defendant's remaining claims.