

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN A. PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

May 28, 2002

No. 230897

Wayne Circuit Court

LC No. 99-009754

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f). After a bench trial, defendant was convicted of assault with intent to cause great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to sixty days in jail and five years of probation. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred when it constructively amended the information by convicting him of assault with intent to cause great bodily harm. However, defendant did not object to the constructive amendment of the information. Therefore, in order to avoid forfeiture of this unpreserved issue on appeal, defendant must demonstrate the occurrence of plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Once defendant has satisfied this requirement, we must exercise discretion in deciding whether to reverse. *Id.* “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* (Internal punctuation omitted).

In this case, defendant was charged with first-degree criminal sexual conduct. However, during closing argument, the prosecutor argued that the trial court should consider either third-degree criminal sexual conduct, MCL 750.520d, or assault with intent to cause great bodily harm, MCL 750.84. The trial court convicted defendant of assault with intent to cause great bodily harm.

MCR 6.112(H), pertaining to the amendment of an information, states:

The 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. On motion, the court must strike unnecessary allegations from the information.

Similarly, MCL 767.76 provides, 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.

Both the court rule and statute plainly state that a trial court can amend an information, even after trial. See also *People v Stewart (On Remand)*, 219 Mich App 38, 44; 555 NW2d 715 (1996); *People v Weathersby*, 204 Mich App 98, 103-104; 514 NW2d 493 (1994). The only limitation is that the defendant cannot be unfairly surprised or prejudiced by the amendment. MCR 6.112(H). See also *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). “Prejudice occurs when the defendant does not admit guilt and is not given a chance to defend against the crime.” *Id.*

Defendant argues that the trial court cannot amend the information to add a new charge. However, in *People v Fortson*, 202 Mich App 13, 15-17; 507 NW2d 763 (1993), we recognized that our Supreme Court, in *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993), abandoned this limitation. We explained:

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. *Until recently, this section had been construed to allow amendments to cure errors in the indictment, but not to allow an amendment that would add a new charge. Recently, however, our Supreme Court peremptorily reversed a refusal to allow an amendment proposed at the end of the preliminary examination that would have added a new charge.*

* * *

[T]he question then bec[ame] whether the amendment requested by the prosecution would have caused unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend, in other words, whether defendant had a fair opportunity to meet the charges against him. [*Fortson, supra* at 15-16 (citations and quotations omitted; emphasis added).]

Therefore, defendant is incorrect that the trial court cannot amend an information to charge a new crime. Nevertheless, we must still decide whether the amendment resulted in unfair surprise, inadequate notice, or an insufficient opportunity to defend against the charges.

Defendant argues that he was prejudiced because the amendment was made after trial, the amendment was a “drastic modification,” and defendant had no opportunity to defend against the charges. As previously stated, the fact that the amendment was made after trial does not automatically indicate prejudice. MCL 6.112(H) and MCL 767.76 both contemplate amending an information after trial. Therefore, defendant must demonstrate something more specific which prejudiced his defense.

Further, we do not find that the amendment was a “drastic modification” which deprived defendant of an opportunity to defend against the charges. Defendant was originally charged with first-degree criminal sexual conduct, under the following statutory language:

A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

* * *

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, “to retaliate” includes threats of physical punishment, kidnapping, or extortion. [MCL 750.520b(1)(f).]

Therefore, defendant was charged with committing a sexual penetration by force or coercion, including the threat or use of physical force or violence.

In comparison, the statute describing the offense of assault with intent to cause great bodily harm provides:

Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars. [MCL 750.84.]

Therefore, assault with intent to cause great bodily harm “requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997).

Here, we do not find a “drastic modification” because the first-degree criminal sexual conduct charge stemmed from the victim’s testimony that defendant used force and coercion to commit the crime. In fact, the victim’s testimony at trial indicated that defendant choked her and put a pillow over her head. The victim also testified that defendant held her down on the bed while he sexually assaulted her. Thus, in this case, the charged crime and the crime of which defendant was ultimately convicted were not so dissimilar that defendant was deprived of notice or the opportunity to defend against the charges.

Further, we cannot discern, nor does defendant explain, how his defense would have differed, had he been given earlier notice of the assault charge. At trial, the defense theory was that the incident never occurred. This defense was applicable regardless of whether defendant was facing charges of criminal sexual conduct or assault with intent to cause great bodily harm. More specifically, we note that defendant’s wife, who was also the victim’s mother, testified that the victim was untrustworthy and untruthful. Defense counsel extensively questioned the victim about the alleged incident, including how she sustained her injuries. Defense counsel also focused on the victim’s prior allegations of sexual abuse. Thus, defendant did actually present a defense to the allegation that he assaulted the victim. Because defendant was neither unfairly surprised nor given an insufficient opportunity to defend against the charges, defendant has not demonstrated error. Further, defendant has not shown that any error that might have occurred affected his substantial rights.

Next, defendant argues that defense counsel was ineffective because she did not object to the amendment of the information. As previously discussed, we do not believe that defendant’s due process rights were violated by the trial court’s amendment of the information. Therefore, we do not believe that defense counsel acted unreasonably by failing to object to the trial court’s amendment of the information. Indeed, trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White