

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEE FRANK,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 249151
Alpena Circuit Court
LC No. 02-005783

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree home invasion, MCL 750.110a(2), and felonious assault, MCL 750.82, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was originally charged with one count of first-degree home invasion, entry without permission, and felonious assault. At trial, the evidence showed that defendant entered complainants' apartment on two occasions. On the first occasion, he entered without permission after one complainant opened the door. He was expelled, but then shortly thereafter kicked open the locked door of the apartment and swung cutting shears at complainants.

After the close of proofs, the prosecution moved to amend the information to add a second count of first-degree home invasion based on the second incident in which defendant kicked open the door of complainants' apartment. The trial court granted that motion, but denied defendant's motion to dismiss the charge of felonious assault on the ground that conviction of both, that charge and first-degree home invasion, would violate the constitutional prohibitions against double jeopardy. The jury acquitted defendant of one count of first-degree home invasion, i.e., the original charge alleging entry without permission, but convicted him of the added count of first-degree home invasion and of felonious assault.

Defendant argues that the trial court abused its discretion by granting the motion to amend the information to add a second count of first-degree home invasion. We disagree. An information may be amended before, during, or after trial to cure a defect, imperfection, or omission in form or substance, including a variation between the information and the proofs, as long as the defendant is not prejudiced by the amendment. MCL 767.76; MCR 6.112(H). An amendment may add a new charge. *People v Fortson*, 202 Mich App 13, 15; 507 NW2d 763 (1993). However, an amendment should be disallowed if it causes unacceptable prejudice to the

defendant due to unfair surprise, inadequate notice, or inadequate opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). We review a trial court's decision to grant or deny a motion to amend an information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003).

Originally, defendant was charged with one count of first-degree home invasion based on the theory that he entered complainants' apartment without permission after the door was opened, and with felonious assault based on the theory that he brandished cutting shears at complainants. The charge of felonious assault was based on defendant's alleged conduct after he kicked in the door of complainants' apartment and entered the residence a second time. The nature of the allegations in the original information placed defendant on notice that the prosecution intended to allege that he entered complainants' residence on two separate occasions by different methods. Defendant's theory was that he never entered complainants' apartment. We find that defendant was not unfairly surprised by the amendment, and was not deprived of the opportunity to defend against the new charge. *Hunt, supra; Fortson, supra* at 16-17.

Next, defendant contends that his convictions violate double jeopardy principles. Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. These guarantees protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). In the case of multiple punishments, the defendant's protected interest is "in not having more punishment imposed than that intended by the Legislature." *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). The protection is a limit on courts and prosecutors, and not on the Legislature's power to define crimes and fix punishments. Whether separate punishments for multiple offenses violates the prohibition against double jeopardy depends upon whether the Legislature intended to authorize cumulative punishments. *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003). A double jeopardy issue presents a question of law that we review de novo on appeal. *Herron; supra*.

Defendant argues that his conviction of both first-degree home invasion and felonious assault constituted multiple punishments for the same offense, and thus violated the constitutional prohibitions against double jeopardy. Again, we disagree. The first-degree home invasion statute provides that the imposition of a penalty for home invasion "does not bar imposition of a penalty under any other applicable law." MCL 750.110a(9). By authorizing the imposition of a penalty for both first-degree home invasion and another crime, the Legislature expressed an intent to allow multiple punishments. *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003) (holding that convictions for first-degree home invasion and larceny of a firearm, stemming from the home invasion, did not violate double jeopardy principles). Defendant's conviction of both first-degree home invasion and the imposition of separate sentences for those offenses did not violate the constitutional prohibitions against double jeopardy.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski