

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH JOHN LAVERNE,

Defendant-Appellant.

UNPUBLISHED
February 19, 2009

No. 281147
Kalamazoo Circuit Court
LC No. 07-000326-FC

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit murder, MCL 750.83, conspiracy to commit murder, MCL 750.157a, two counts of first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, extortion, MCL 750.213, witness intimidation, MCL 750.122(7)(c), obstruction of justice, MCL 750.505, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of life imprisonment for the assault with intent to commit murder conviction, 50 to 75 years for the conspiracy conviction, 25 to 50 years for one first-degree home invasion conviction, 16-1/2 to 50 years for the other first-degree home invasion conviction, 4 to 15 years for the felonious assault conviction, 10 to 30 years for the extortion conviction, 12-1/2 to 30 years for the witness intimidation conviction, and 2 to 10 years for the obstruction of justice conviction, those sentences to be served consecutive to four concurrent two-year terms of imprisonment for the felony-firearm convictions. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm defendant's convictions and sentences but remand for correction of defendant's judgment of sentence.

Defendant's convictions arise from a conspiracy between him and Lynette Pontius to kill Martin Campbell. Campbell was involved in a bitter custody dispute with Pontius concerning their seven-year-old daughter, Alicia, and Campbell was ultimately awarded custody. Thereafter, on February 6, 2007, a man driving a black SUV struck Elizabeth Brannan's vehicle from behind as she pulled into her garage. Brannan was Campbell's girlfriend, and the couple lived together with Alicia and Brannan's four young children. The man got out of the SUV and demanded to know Campbell's whereabouts. He was wearing a mask and pointing a gun at her. When one of Brannan's children entered the garage, the man fled.

Two days later, the same man entered Campbell and Brannan's home and fired at least three or four gunshots at Campbell before the gun jammed. Brannan was also present at the time

of the attack. The perpetrator then repeatedly struck Campbell's head with the gun before running out of the house. Campbell received gunshot wounds to his shoulder, right leg, and left hand. Defendant admitted committing the offenses in a statement given to the police and sent several incriminating letters while incarcerated and awaiting trial. In his statement to the police, he maintained that Pontius hired him to kill Campbell.

Defendant first argues that the trial court abused its discretion by permitting the prosecutor to amend the information during trial to add the extortion, witness intimidation, and obstruction of justice charges when no preliminary examination had been held on the charges. We review for an abuse of discretion of the trial court's decision on a motion to amend information. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). An abuse of discretion exists when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007), lv den 480 Mich 1076 (2008).

MCL 767.67 states:

No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit. 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. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefore and no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted.

Thus, any information may be amended before, during, or after trial unless doing so would unfairly surprise the defendant or prejudice his defense. *People v McGhee*, 268 Mich App 600, 629; 709 NW2d 595 (2005); *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). See also, MCR 6.112(H). In determining whether an amendment to information would unacceptably prejudice a defendant, a court must consider whether the amendment would cause unfair surprise, provide inadequate notice, or result in an insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

In *McGee*, *supra* at 688-689, 693, this Court upheld the amendment of information adding an additional charge because the defendant could not establish unfair surprise or prejudice. In that case, the defendant reported to the police that her boyfriend had used her ATM card to withdraw money from her bank account without her permission. At her boyfriend's preliminary examination, however, she testified that she lied to the police when she reported that her boyfriend did not have her permission to use her ATM card. *Id.* at 685. The defendant was originally charged with making a false police report of a felony and waived her preliminary examination with respect to that charge. *Id.* at 689. Thereafter, on the first day of trial, the trial court permitted the prosecutor to add an alternative charge of perjury, of which the defendant was convicted. *Id.* at 685-686. In holding that the addition of the perjury charge did not unfairly surprise or prejudice the defendant, this Court reasoned that the defendant did not specify how the additional charge prejudiced her or how additional time to prepare or a preliminary examination on the added charge would have benefited her defense. *Id.* at 687, 692-693.

In this case, defendant has not established unfair surprise or prejudice as a result of the amendment of the information. As the prosecutor argued during trial, evidence regarding defendant's threatening letter to Campbell was admissible because it demonstrated defendant's consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996), reh den 454 Mich 1211 (1997). Further, the evidence showed that defendant wrote the letter, signed it, and sent it to Campbell from the prison where he was incarcerated before trial. The evidence was also admissible under MRE 401 because it tended to establish defendant's identity as the perpetrator. Therefore, irrespective of the amendment of information, the jury would have been apprised of the letter. Thus, defendant being fully apprised of its existence cannot claim surprise by its content. Moreover, as in *McGee*, defendant fails to indicate how additional time to prepare to defend against the added charges would have assisted his defense. Thus, he has not shown that the amendment of the information caused unfair surprise or provided inadequate notice or an insufficient opportunity to defend. *Hunt*, *supra* at 364.

Defendant also argues that the trial court never obtained jurisdiction over the extortion, witness intimidation, and obstruction of justice charges because those charges were never the subject of a preliminary examination and the conduct giving rise to those charges occurred well after his bindover on the original charges. A preliminary examination is a procedure established by statute, MCL 766.1 *et seq.*, and court rule, MCR 6.110(A), and "[a]n accused does not have a constitutional right to a preliminary examination[.]" *McGee*, *supra* at 695. Here, defendant waived his preliminary examination on the original charges, and, upon the filing of the magistrate's return after the waiver, the circuit court acquired jurisdiction over defendant and this case. *Id.* at 695-696. Thereafter, the court was authorized to amend the information unless doing so would unfairly surprise or prejudice defendant. *Id.* at 696. Because we have concluded that the amendment did not unfairly surprise or prejudice defendant, the trial court did not abuse its discretion by allowing the amendment, and the court had jurisdiction over the added charges. *Id.* at 696-697. Further, because a jury convicted defendant of the added charges based on proof beyond a reasonable doubt, defendant cannot show that had a preliminary examination on these charges been conducted, the prosecutor would not have been able to establish the lesser probable cause standard applicable to preliminary examinations. *Id.* at 696-698. Therefore, defendant cannot establish that any alleged error warrants reversal. *Id.* at 698-699.

Defendant next contends that the trial court erred when it failed to sever the added charges from the original charges. Because defendant failed to request that the charges be severed, our review of this issue is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Id.* at 763, 774; *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

MCR 6.120(B) permits a trial court to sever offenses charged in a single information "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B) provides in relevant part:

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

Here, the original and added charges were properly tried in a single trial because they arose from a series of connected acts or a series of acts constituting parts of a single scheme or plan to kill Campbell. The original charges involved the conspiracy to kill Campbell and included defendant's assault of Brannan in her garage on February 6, 2007, and his attempt to kill Campbell on February 8, 2007. The added extortion, witness intimidation, and obstruction of justice charges involved defendant's July 2007 letter to Campbell in an effort to influence his testimony at trial. The letter directed Campbell and Brannan to testify that the perpetrator was not defendant, but was younger and shorter than defendant and had a different build. It also threatened death to Campbell and his family if Campbell failed to testify as directed. Thus, the added charges involved defendant's efforts to avoid punishment for his efforts to kill Campbell. Accordingly, all 12 charges against defendant were related in that they stemmed from a series of connected acts or a series of acts constituting part of a single scheme. In addition, evidence regarding the original charges was necessary in order to explain the extortion, witness intimidation, and obstruction of justice charges. Therefore, it would have been a waste of judicial resources and unnecessarily inconvenient for the witnesses to try the added charges separately from the original charges. MCR 6.120(B)(2).

Defendant relies on *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977), in which our Supreme Court held that the defendant was entitled to separate trials on his charges of selling heroin to an undercover police officer. The defendant sold heroin to the same undercover officer

on two occasions, 12 days apart. *Id.* at 143-145. The Court reasoned that the sales did not constitute the same conduct or a series of acts connected together and were not part of a single scheme or plan. *Id.* at 149, 152-153. The facts of this case present a much different scenario than the two isolated drug sales in *Tobey*. Here, the offenses were all connected and were related to the conspiracy to kill Campbell, including avoiding punishment for the conspiracy and actions taken in furtherance of the conspiracy. Thus, defendant has failed to establish plain error.

Defendant next argues that the prosecutor committed misconduct by repeatedly eliciting testimony regarding his incarceration. Because defendant did not preserve this issue for appellate review by objecting to such testimony in the trial court, our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763-765.

Defendant correctly argues that references to a defendant's incarceration are generally inadmissible. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). In the circumstances of this case, however, evidence involving defendant's incarceration was relevant under MRE 401 to establish his identity as the perpetrator and his conspiracy with Pontius. Defendant wrote several incriminating letters while incarcerated and awaiting trial. In his letters, he made admissions, such as, "I would do it all over again and I would have my backup weapon," and "my only regret was that the piece of sh_t gun jammed and I couldn't finish what I went there for." Moreover, in the letter he wrote to Campbell, defendant referenced the fact that Brannan tried to protect Campbell after the gun jammed and defendant began striking Campbell with the weapon. This fact, along with defendant's references to other circumstances of the shooting, convinced Campbell that defendant was the perpetrator. Defendant also referenced the conspiracy with Pontius in a letter to Randy McCue and referred to a "third party" in his letter to Campbell. Much of the testimony involving defendant's incarceration was foundational and established that defendant was the person who wrote the incriminating letters. Thus, the evidence made defendant's identity as the perpetrator and his conspiracy with Pontius "'more probable . . . than it would be without the evidence.'" MRE 401." *People v Hall*, 433 Mich 573, 583; 447 NW2d 580 (1989). Because the evidence involving defendant's incarceration was admissible under MRE 401, MRE 404(b) was not implicated. *Id.* at 583-584. In addition, claims of prosecutorial misconduct may not be predicated on a good-faith attempt to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), lv den 463 Mich 886 (2000).

Moreover, to the extent that the references to defendant's incarceration did not assist in establishing his identity as the perpetrator or his conspiracy with Pontius, defendant has failed to establish plain error affecting his substantial rights. Defendant declined an opportunity to wear civilian clothing on the last day of trial and instead testified while wearing his prison attire. He maintained, "There's not a person in this courtroom that don't know I'm in prison." Defendant wore civilian clothing on the preceding two days of trial. Further, defendant admitted that he shot Campbell and testified, "everybody in this courtroom knows, or should know, that I'm guilty of this crime." He further stated, "I can't even say if I had it to do over again I wouldn't do it. But I do not feel sorry for doing it. I mean it's part of what I do." Therefore, considering defendant's testimony, along with his incriminating letters and his statement to the police, he has failed to establish that any references to his incarceration constituted plain error affecting his substantial rights. Defendant has similarly failed to demonstrate a reasonable probability that, had counsel objected to the references to his incarceration, the result of the proceeding would

have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Therefore, counsel was not ineffective for so failing to object.

Defendant next argues that this Court should remand this case to the trial court to correct his judgment of sentence to indicate that his life sentence for assault with intent to commit murder is parolable. Defendant contends that his judgment of sentence erroneously indicates that his life sentence is nonparolable. The prosecutor concedes that this error constitutes plain error affecting defendant's substantial rights. Accordingly, we remand this case to the trial court for correction of defendant's judgment of sentence to indicate that defendant's life sentence for assault with intent to commit murder is parolable.

Affirmed, but remanded for correction of the judgment of sentence.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Stephen L. Borrello