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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2020
v	No. 349735 Genesee Circuit Court
CORTEZ DEONTE SCALES, Defendant-Appellant.	LC No. 18-042720-FC

Before: JANSEN, P.J., and FORT HOOD and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury found defendant, Cortez Deonte Scales, guilty of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), two counts of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, two counts of assault with a dangerous weapon (felonious assault), MCL 750.82, and six counts of possessing a firearm when committing a felony (felony-firearm), second offense, MCL 750.227b. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 25 to 37½ years' imprisonment for armed robbery, 290 months to 37½ years' imprisonment for first-degree home invasion conviction, 25 to 37½ years' imprisonment for the AWIGBH convictions, 100 months to 15 years' imprisonment for the felonious assault convictions; to be served concurrently with each other and consecutive to five years' imprisonment for the felony-felony firearm convictions, which were also to be concurrent with each other. Defendant appeals by right. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On April 27, 2017, defendant and three other people unlawfully entered a residential house. Defendant was unarmed, but the other three held four victims at gunpoint, struck them in the head with pistols, and stole numerous items from the victims' house including a small safe, video games, money, cell phones, and marijuana.[1] Defendant was unmasked during the incident. One of the victims testified that defendant appeared to be in charge of the other assailants. Although

[1] These other three individuals pleaded guilty and are not a part of this appeal.

defendant was the only one who came into the house without a gun, whenever he told the other assailants to do something, they obeyed his orders. Within a few days, AT, one of the victims, identified one of the assailants through Facebook because he recalled playing basketball with that assailant. AT also identified defendant and the others.

A preliminary examination was held on February 27, 2018. The prosecutor filed an information against defendant on March 19, 2018, and initially charged him with armed robbery, felony-firearm, and first-degree home invasion. On the same day, the prosecutor filed a notice of intent to seek an enhanced sentence under MCL 769.13, i.e., fourth-offense habitual status. Defendant moved to suppress his identification at a photographic lineup, arguing, in relevant part, that it was impermissibly suggestive because two of the victims participated in its creation. On December 18, 2018, the prosecutor moved to amend the information to add four counts of AWIGBH or, alternatively, four counts of felonious assault; and four corresponding counts of felony-firearm. The prosecutor argued that the preliminary examination testimony supported the additional charges and that they would neither unfairly surprise nor prejudice defendant. Defendant argued that the amendment was improper because the evidence showed that he never physically possessed a gun and did not commit any of the alleged assaults. The prosecutor noted that it was pursuing an aiding and abetting theory for the defendants who did not physically assault the victims. Defendant stipulated to taking testimony regarding that addition at an evidentiary hearing the trial court was already going to hold regarding his motion to suppress, rather than "dragging this out even longer" by remanding for another preliminary examination. The trial court held the evidentiary hearing, following which it granted the prosecutor's motion to amend and denied defendant's motion to suppress.

After the hearing but before the trial court's decision, the prosecutor filed an amended notice of its intent to seek a habitual-fourth sentence enhancement pursuant to MCL 769.12. The prosecutor listed the same four felony convictions as with the first notice. It also provided that, because defendant's subsequent felony was a "serious crime" under MCL 769.12(6)(c), defendant faced a mandatory minimum sentence of 25 years if convicted. The notice stated that the prosecution had already informed defendant that he was subject to sentence enhancement under MCL 769.12 as a fourth-offense habitual offender, and the amendment was intended to "clarify[] that the penalty would include a mandatory minimum 25 year sentence pursuant to MCL 769.12(1)(a)." Defendant moved to quash the notice, arguing that it was untimely under MCL 769.13, which requires that the notice of an enhanced sentence be filed within 21 days either of the arraignment or information filing (if the arraignment is waived); and it impermissibly increased his possible punishment. The trial court denied defendant's motion because the amendment added nothing more than a clarification of the sentence he would have faced irrespective of the amendment.

Defendant now appeals and challenges the trial court's decision on the amended information, the photographic lineup, and the second notice of an enhanced sentence.

II. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision on a motion to amend the information. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the]

principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "The proper interpretation and application of statutes and court rules is a question of law, which this Court reviews de novo." *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017); *People v Perry*, 317 Mich App 589, 596; 895 NW216 (2016) (quotation marks and citation omitted; alteration in original). A trial court's ultimate determination whether identification evidence is inadmissible for being unduly suggestive is reviewed for clear error. *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). "A photographic identification procedure or lineup violates due process guarantees when it is so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." *Id*. at 357. The lineup must be examined under a "totality of the circumstances" analysis. *Id*. (quotation marks and citation omitted).

III. AMENDED INFORMATION

Defendant first contends that the trial court abused its discretion by granting the prosecutor's motion to amend the information because the new charges were not supported by the preliminary examination. Defendant also argues that the new charges unfairly surprised and prejudiced him. We disagree.

MCL 767.76 provides that "[t]he 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." This statute does not authorize amending an information to include a new offense. See *McGee*, 258 Mich App at 687-688. However, MCR 6.112(H) provides in relevant part that "[t]he court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek enhanced sentence unless the proposed amendment would unfairly surprise or prejudice the defendant." See *McGee*, 258 Mich App at 689. Pursuant to the court rule, a trial court may therefore permit amendment of the complaint to add new charges, so long as doing so will not cause the defendant to suffer "unacceptable prejudice" due to "unfair surprise, inadequate notice, or insufficient opportunity to defend." *Id*. at 689-690 (quotation omitted). A new charge may be supported by evidence provided at the preliminary examination. See *People v Hunt*, 442 Mich 359, 363-365; 501 NW2d 151 (1993). Thus, although new charges may not be added by statute, they may be added under the court rules.

The new charges that the prosecutor sought to add were AWIGBH and felonious assault. The elements of AWIGBH are: "(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 Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014) (quotation marks and citation omitted). "The intent to do great bodily harm less than murder is an intent to do serious injury of an aggravated nature." *Id*. (quotation omitted). "Intent to cause serious harm can be inferred from the defendant's actions, including the use of a dangerous weapon or the making of threats." *Id*. at 629. It is not necessary that the victim sustain any actual injury, although injuries may be indicative of intent. *Id*. The elements of felonious assault are: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013) (quotation marks and citation omitted). An assault occurs when the defendant "takes some unlawful act that places another in reasonable apprehension of receiving an immediate battery." *Id*. (quotation omitted).

AT testified that four victims, including himself, were hit multiple times and that three of the victims were each struck in the head with a pistol. AT described how he was struck multiple times while he was tied up. Additionally, one victim needed stitches in her mouth, another victim received a concussion, and another victim was rendered unconscious. Moreover, AT and another victim went to the hospital for their injuries. Repeatedly striking a bound and defenseless person supports a charge of AWIGBH, and striking someone in the head with a pistol supports a charge of both felonious assault and AWIGBH. See *Nix*, 301 Mich App at 205; *Stevens*, 306 Mich App at 628-269. Although not required as elements, the victims' injuries demonstrate the severity of harm that the assailants inflicted on them. Although defendant did not personally have a weapon, the prosecution proceeded under an aiding and abetting theory. See MCL 767.39. The evidence amply supported the new charges of four counts of AWIGBH or, alternatively, felonious assault, with four corresponding counts of felony-firearm.

Defendant further argues that, because the prosecutor added *new* offenses, defendant was unfairly surprised and prejudiced. However, new offenses may be added if they are supported by the facts. See, e.g., *Perry*, 317 Mich App at 591-592, 594-595 (holding no error in adding a charge of identity theft when the original charges involved counterfeit notes and false pretenses). "[T]he relevant inquiry is whether [a defendant] would have a fair opportunity to meet the charges against him." *People v Carlton*, 313 Mich App 339, 353; 880 NW2d 803 (2015). The prosecution filed its motion to amend more than four months prior to trial. Defendant was also aware of the testimony from the preliminary examination, and he fails to show on appeal how the amendment *unfairly* surprised him or deprived him of the ability to present his defense. Finally, as noted, defendant expressly agreed to forego a second preliminary examination in lieu of taking testimony regarding the addition of charges at an evidentiary hearing.

IV. PHOTOGRAPHIC LINEUP

Next, defendant contends that the photographic lineup was impermissibly suggestive. We disagree.

Defendant does not argue that the photographic lineup was impermissibly suggestive on its face, nor can we find anything seemingly suggestive about the photographic arrays upon our own review of the lineup exhibits. Rather, he argues that it was impermissibly suggestive because AT and MW, another victim, searched Facebook, located defendant, and relayed the information they found to the police before the lineup was created. However, the photographs actually used for the lineup were not the photographs AT and MW found on Facebook. Rather, the lineup photographs were obtained using a computer program called "Snap" that randomly selects images from a central database. Each witness was individually shown the lineup photographs pursuant to lineup procedures established by the Michigan State Police. There is no indication that the witnesses were able to speak to or otherwise signal each other about defendant's photograph.

Defendant takes issue with AT and MW's supposed "involvement" in the lineup process, asserting that it somehow made the lineup impermissibly suggestive. However, as noted, AT and MW were *not* involved in creating the lineup. Defendant cites no authority for the proposition that, in order for a lineup to be valid, a victim or witness may not locate information about a suspect and relay this information to police. This Court will not search for such authority on defendant's behalf, nor will it craft an argument on defendant's behalf. See *People v Payne*, 285 Mich App

181, 195; 774 NW2d 714 (2009). There is no basis for a conclusion that the lineup procedure was impermissibly suggestive.

V. SENTENCE ENHANCEMENT

Finally, defendant argues that the prosecution should not have been permitted to amend its notice to seek an enhanced sentence. We disagree.

The applicable statutory provision is MCL 769.13, which provides in relevant part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1) . . .

Similarly, MCR 6.112(F) provides:

> A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense.

The 21-day notice requirement's purpose "is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense." *People v Head*, 323 Mich App 526, 543; 917 NW2d 752 (2018) (quotation marks and citation omitted). The requirement provides "a bright-line test for determining whether a prosecutor has filed a supplemental information 'promptly.' " *People v Morales*, 240 Mich App 571, 575; 618 NW2d 10 (2000) (quotation marks and citation omitted).

The prosecutor filed an initial notice on the same day as the filing of the information. The first notice provided the prosecutor's intent to seek an enhanced sentence under MCL 769.13. The prosecutor listed four prior felony convictions and informed defendant that he would be treated as a fourth-habitual offender, which carried a maximum sentence of life in prison. Defendant does not appear to contest that the initial notice was timely. The second notice was filed on January 10, 2019, which is well beyond the 21-day timeframe espoused in MCL 769.13. However, as we will discuss, this second notice was not required to be within the 21-day timeframe.

In *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997), this Court explained that under MCL 769.13, the 21-day requirement did not apply "to the extent that the proposed amendment does not relate to the specific requirements of MCL 769.13, i.e., the amendment may not relate to additional prior convictions not included in the timely filed supplemental information." In *Ellis*, the amendment was held untimely because the prosecutor had included two *new* prior convictions and subjected him to a drastically longer sentence. *Id*. at 757. Here, in contrast to *Ellis*, the *same* four convictions were listed for the second notice as were listed for the first notice. Because the amendment in this case did not add any new prior convictions, MCL 769.13 was not implicated. See *Ellis*, 224 Mich App at 756-757. Furthermore, as we will discuss, the amendment did not increase the "potential consequences" that defendant faced. See *id*.

In the first notice, defendant was informed that he faced a fourth-offense habitual sentence enhancement. A fourth-offense habitual offender sentence enhancement is set forth in MCL 769.12, which provides: "[i]f the subsequent felony is a *serious crime* or a conspiracy to commit a serious crime, and 1 or more of the prior felony convictions are listed prior felonies, the court shall sentence the person to imprisonment *for not less than 25 years*." MCL 769.12(1)(a) (emphasis added). A "serious crime" is defined to include AWIGBH and armed robbery, MCL 769.12(6)(c), both of which were charges against the defendant. Thus, defendant was on notice from the outset that he faced a sentence enhancement with a mandatory minimum sentence of 25 years. See *Head*, 323 Mich App at 546-547 (inclusion of the 25-year mandatory minimum status in the amended notice was not improper because defendant was already informed in the original notice that he faced a potential life sentence as a fourth-offense habitual offender). Defendant was notified both in the original notice and the amended notice of his status as a fourth-offense habitual offender. Cf. *Morales*, 240 Mich App at 573-574 (amendment changed the notice from a third-offense habitual status to fourth-offense habitual status).

Finally, we note that MCL 769.13(2) requires the notice to "list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement." However,

nowhere in the statute is it required that the prosecutor specify the number of years of which the enhancement will consist.[2]

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Amy Ronayne Krause

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[2] Although not raised by the parties, we do have a concern in this matter. As discussed, MCL 769.12, MCL 769.13, or MCR 6.112(F) do not require disclosure of any applicable minimum sentence. Likewise, MCR 6.112(D) requires disclosure of the "penalty of the offense allegedly committed," but not necessarily any mandatory minimum sentence. Rather, defendants are apparently only entitled to be told about a mandatory minimum sentence at their arraignments, pursuant to MCR 6.104(E)(1). According to defendant, Genesee County dispenses with arraignments, presumably pursuant to MCR 6.113(E), which requires defendants to be provided with "a copy of the information and any notice of intent to seek an enhanced sentence." Arraignments are, of course, waivable, and doing so would necessarily waive the judicial responsibility of informing the defendant of any mandatory minimum sentence. Troublingly, however, this appears to mean that the court has chosen to waive defendants' rights for them, leaving them with no guaranteed opportunity to learn what minimum sentence they might face. Although this appears to be permissible, we are concerned that this constitutes an unfair "loophole" in the law, and we respectfully urge our Supreme Court to consider revising the court rules to ensure that defendants will be informed of any minimum sentences in the event an arraignment is not held for any reason other than the defendant's waiver thereof.