STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY MORGAN,

Defendant-Appellant.

UNPUBLISHED
June 7, 1996

No. 177248
LC No. 92 008262

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo,* JJ.

PER CURIAM.

Defendant Jeffery Morgan appeals of right from his convictions by jury of first-degree felony murder, MCL 750.316; MSA 28.548, two counts of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

On June 24, 1992, Kurt Benton and his friend, Jason Carrington, were riding in Benton's Mustang when they stopped at a telephone booth to make a call. Benton left the car to use the telephone. Defendant and another man approached the car; defendant held a gun. Carrington exited the car as defendant instructed, while defendant's companion got into the driver's seat. Benton returned to the car, and reached inside to remove the keys. Defendant fired one shot at Benton, striking and wounding him. Benton ran, and Carrington followed to help him. Defendant and his companion exited the car and walked away. Carrington later explained that Benton's car would not operate unless the clutch was used in a particular manner. Benton later died from the gunshot wound.

Defendant first argues that his conviction of the second count of assault with intent to rob while armed was improper because the information contained only one count alleging assault on both victims. Defendant was originally charged with three counts: (1) Count I, felony murder; (2) Count II, assault with intent to rob while armed upon Benton and Carrington; and (3) Count III, felony firearm. The prosecution contends that the original three-count information was amended into a four-count

* Circuit judge, sitting on the Court of Appeals by assignment.

information; the court file does not contain a copy of the amended information. Nonetheless, the jury verdict form contained four counts. Defendant did not object to the jury verdict form. Moreover, the judgment of sentence reflects convictions on four counts.

The trial court arguably amended the information by using a four-count jury form. See *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). A trial court may amend the information before, during, or after trial, provided that the amendment does not unfairly surprise or prejudice the defendant. MCL 767.76; MSA 28.1016, MCR 6.112(G). A defendant will not be prejudiced by an amendment to the information when the original information was sufficient to inform him of the nature of the new or amended charge. MCL 767.76; MSA 28.1016, *People v Covington*, 132 Mich App 79, 86; 346 NW2d 903 (1984). Because defendant threatened both Benton and Carrington with his gun, the facts of this case sufficiently informed defendant and the court about the nature of the additional count of assault with intent to rob while armed. The original information also referenced the two victims, thereby putting defendant on notice. Additionally, defendant had the opportunity to defend against the second count. See *Stricklin, supra*, at 633. The amended information did not add a new offense; rather, it separated into two counts defendant's assault with intent to rob while armed offenses against each victim. See *People v Weathersby*, 204 Mich App 98, 104; 514 NW2d 493 (1994).

Defendant next contends that he could not have been convicted of felony murder because assault with intent to rob while armed is not an enumerated felony under the statute.[1] Although assault with intent to rob while armed is not an enumerated felony, robbery and attempted robbery are enumerated. Assault with intent to rob while armed is a necessarily included offense of armed robbery. *People v Robert Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979). Evidence that will support a finding of a greater offense will always support a finding of a necessarily included lesser offense. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993). Additionally, this Court has previously affirmed felony murder convictions where the underlying felony was assault with intent to rob while armed. See *People v Hicks*, 185 Mich App 107; 460 NW2d 569 (1991), *People v Anderson*, 147 Mich App 789; 383 NW2d 186 (1985), and *People v Gibson*, 115 Mich App 622; 321 NW2d 749 (1982). Therefore, although assault with intent to rob while armed is not a specifically enumerated felony, we conclude that defendant's conviction of felony murder may stand.

Defendant next argues that the court committed an error requiring reversal by omitting the specific intent requirement in its response to a jury inquiry. The court, however, instructed the jury that assault with intent to rob while armed is a specific intent crime. Defendant also asserts that the court erred by describing *robbery* as the underlying offense rather than *assault with intent to rob while armed*. Defendant has not shown how this error prejudiced him. Accordingly, we determine that no manifest injustice would result from our declining to review this issue. See *People v Weatherford*, 193 Mich App 115, 121; 483 NW2d 924 (1992).

Defendant also contends that he was denied a fair trial by the prosecutor's statement of personal belief. Defendant did not object to the alleged misconduct; thus, this issue has not been preserved for our review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Nonetheless, defendant was not denied a fair and impartial trial by the prosecutor's comment that the evidence was clear that defendant was guilty of first-degree murder. That comment did not rise to the level of a personal belief, and no error requiring reversal resulted. See *People v Bahoda*, 448 Mich 261, 285-287; 531 NW2d 659 (1995).

Finally, defendant asserts that the circuit court improperly permitted the prosecution to divide the evidence between the case in chief and the rebuttal. The prosecution may not separate the evidence upon which it proposes to rest its case and save some for rebuttal. *People v Losey*, 413 Mich 346, 351; 320 NW2d 49 (1982). The trial court may, however, in its discretion, reopen the proofs. *People v Keeth*, 193 Mich App 555, 560; 484 NW2d 761 (1992). The court should consider if an undue advantage would be taken by the moving party, and if the nonmoving party would be surprised or prejudiced by the reopening. *Id.*

In this case, the prosecutor in defendant's second trial put defendant on notice that she might call certain witnesses who were called in the first trial, which had resulted in a mistrial. Because he was on notice, defendant cannot claim surprise. At the first trial, defendant testified and asserted an alibi defense. Therefore, the prosecutor could have reasonably anticipated that defendant would again assert an alibi at the second trial, even though defendant ultimately did not do so. At the second trial, however, defense counsel asserted in his opening statement that defendant was not present at the crime scene, thus suggesting that defendant would assert an alibi defense. For those reasons, the prosecutor was justified in saving the evidence for rebuttal, and the court did not abuse its discretion by reopening the proofs.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Paul J. Clulo

[1] The pertinent statute defines felony murder as: "Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping." MCL 750.316(1)(b); MSA 28.548(1)(b).