STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE ARTHUR HAUSER, II,

Defendant-Appellant.

UNPUBLISHED
June 18, 1996

No. 180204
LC No. 93-709-FH

Before: O'Connell, P.J., and Sawyer and G.R. Corsiglia,* JJ.

PER CURIAM.

Defendant was convicted by a jury of larceny in a building, MCL 750.360; MSA 28.592, and subsequently pleaded guilty to the charge of being an habitual offender (third), MCL 769.11; MSA 28.1083. The trial court sentenced defendant to 3-1/2 to 8 years of imprisonment. Defendant appeals his conviction and sentence as of right. We affirm.

I

Defendant was originally charged with and bound over on the charges of larceny in a building and with being an habitual offender (third). After defendant waived his right to an arraignment on these charges, the prosecutor filed an information which added an alternative count of receiving stolen property in excess of $100, MCL 750.535; MSA 28.803. This amendment appears to have been made without leave of the trial court. Defendant insists that it was improper for the prosecutor to add a count for which he was not arraigned, and argues that the trial court erred in granting his motion to dismiss this alternative charge. We agree.

As a general rule, a prosecutor may amend the information at any time unless the proposed amendment would result in unfair surprise or prejudice to the defendant. However, the prosecutor may not amend the information on his own, but must first request the trial court's permission to do so. MCR 2.116(G). Moreover, although an information may be amended to add a new charge on which the

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

defendant was never bound over where the evidence at the preliminary examination would have supported a bindover on the charge sought to be added, *People v Hunt*, 442 Mich 359, 363-364; 501 NW2d 151 (1993), defendant in the present case waived his right to a preliminary examination. We thus conclude that the trial court erred in failing to dismiss the alternative charge of receiving stolen property.

This does not end the inquiry, however. Defendant has failed to demonstrate that the trial court's error resulted in a miscarriage of justice which necessitates a reversal of his conviction. See *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). Defendant was not convicted of the erroneously added charge, and he has failed to suggest how his defense would have been different had he faced only the charge of larceny in a building. In addition, we have carefully reviewed the record and find that the evidence supporting defendant's guilt of the larceny charge is overwhelming. We are unpersuaded that the fact that the jury had two charges to consider necessarily enhanced defendant's chance of conviction.

It was error for the prosecutor to amend the information without leave of the trial court and for the trial court to permit defendant to stand trial for the additional charge of receiving stolen property. However, under the facts of this case, this error does not require a reversal of defendant's conviction for larceny in a building.

II

Defendant also challenges several remarks by the prosecutor during rebuttal argument which, defendant insists, improperly denigrated defense counsel, vouched for a prosecution witness' credibility, and asserted the prestige of the prosecutor's office. Because defendant did not object to these remarks at trial, appellate review is foreclosed except where a curative instruction could not have eliminated the prejudicial effect of the misconduct or where failure to review the issue would result in manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 527 (1994).

As defendant correctly notes, a prosecutor may not vouch for the credibility of witnesses to the effect that he has some special knowledge regarding a witness' truthfulness. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Our review of the challenged remarks reveals that the prosecutor merely responded to the suggestions by defense counsel that defendant's girlfriend was the true thief, and that defendant had been "set up." When viewed within the context of closing arguments as a whole, the remarks at issue did not deny defendant his right to a fair trial. See *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

Notwithstanding the propriety of the prosecutor's remarks, we note that a prompt admonishment to the jury regarding its role as fact-finder would have cured any resultant prejudice, and that the jury was properly instructed that the comments of counsel were not evidence, that it was its duty to determine the credibility of witnesses, and that plaintiff bore the burden of proving the elements of each offense beyond a reasonable doubt. See *Stanaway*, *supra*.

Because defendant has not demonstrated that he was subjected to manifest injustice, he has waived any challenge to the prosecutor's remarks during rebuttal argument.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ George R. Corsiglia