

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD FRANK RUSH,

Defendant-Appellant.

UNPUBLISHED

April 8, 1997

No. 193155

Kent Circuit Court

LC No. 95-000487-FC

Before: Taylor, P.J., and McDonald and C.J. Sindt,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of pandering. MCL 750.455; MSA 28.710. Defendant was sentenced to four to forty years in prison as a fourth-offense habitual offender. MCL 769.12; MSA 28.1084. Defendant appeals as of right, and we affirm.

Defendant argues that the court abused its discretion in allowing the prosecutor to amend the information several weeks before trial to add the charge of pandering. We review a trial court's decision to allow an amendment to an information for an abuse of discretion. *People v Kurzinski*, 26 Mich App 671, 674; 182 NW2d 779 (1970). After a preliminary examination, a trial court may allow an amendment to the information to add a new charge on which defendant was not bound over where the evidence adduced at the preliminary examination would have supported a bind over on the new charge and where amendment would not cause unacceptable prejudice because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Fortson*, 202 Mich App 13, 15; 507 NW2d 763 (1993). After a review of the record, we find no abuse of discretion. The testimony presented at the preliminary examination would have allowed a bindover for pandering if defendant had been so charged. We find no unfair surprise or unacceptable prejudice to defendant where he had notice at least one month before trial that the prosecutor was seeking permission to amend the information to add a charge of pandering.

Defendant next argues that the prosecutor and the informant witness deliberately misled the judge and jury regarding the bargain given for the witness' testimony. We first note that this issue is

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

unpreserved because it was not raised at trial. Nevertheless, after reviewing the record, we find that the judge and jury were not misled. The witness testified that the police told her that things would go easier for her if she cooperated, but that they did not explain what this meant and that neither the police nor the prosecutor offered her a deal regarding a pending solicitation charge. The record does not support defendant's claim.

Defendant further argues that the court abused its discretion in allowing arresting police officers to testify about statements made to them by two witnesses. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). The trial court allowed the challenged testimony pursuant to MRE 803(3) (declarant's then existing state of mind). We find no abuse of discretion. The witnesses' states of mind were relevant to the charges in the case.

Defendant also claims that the court erred in allowing the prosecutor to cross-examine a witness about a pending charge that resulted in the witness asserting her Fifth Amendment right in front of the jury, in allowing the prosecutor to mention the witness' assertion of this right in closing arguments, and that his counsel's failure to object constituted ineffective assistance of counsel. We agree that error occurred, but find that the error was harmless.

Great care should be exercised by both the trial court and the prosecutor to prevent the invocation of a testimonial privilege in front of the jury. *People v Poma*, 96 Mich App 726, 732; 294 NW2d 221 (1980); *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). The prosecutor and the court erred in allowing the witness to invoke her Fifth Amendment privilege in front of the jury, and the prosecutor also inappropriately mentioned the witness' invocation in closing arguments. Nevertheless, we are satisfied that the error was harmless beyond a reasonable doubt, given the overwhelming evidence presented. We therefore decline to reverse defendant's conviction. *People v Bashans*, 80 Mich App 702, 710-712; 265 NW2d 170 (1978); *People v Solomon*, 220 Mich App 527; ___ NW2d ___ (1996).

We also find that counsel's failure to object did not constitute ineffective assistance of counsel. In order to find trial counsel ineffective, defendant must show that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). After reviewing this record, we are not persuaded that such is the case.

Defendant additionally argues that the court erred in providing the jury with a dictionary during deliberations and that his counsel's concurrence therewith constituted ineffective assistance of counsel. While deliberating, the jury sought additional guidance from the court regarding the meaning of the word "persuade" with reference to the pandering charge. After reinstructing the jury with the elements of the charged offenses, a juror asked if they could have a dictionary. The court asked counsel if they had any problems with supplying the jury with a Webster's Collegiate Dictionary, and both counsel indicated they had no problem. While we do not condone providing the jury with a dictionary, we find that defendant has not established any prejudice from the court's actions. *People v Messenger*, ___ Mich

App __ (Docket No. 178923, issued January 21, 1997). Counsel's failure to object was not ineffective assistance of counsel because he has not established that, but for the provision of the dictionary to the jury, there is a reasonable probability that the result of the proceeding would have been different. *Poole, supra*.

Affirmed.

/s/ Clifford W. Taylor
/s/ Gary R. McDonald
/s/ Conrad J. Sindt