

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 21, 2011

v

ANTHONY LEE STOUTEMIRE,  
  
Defendant-Appellant.

No. 296029  
Kent Circuit Court  
LC No. 2009-000162-FH

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Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of one count of carrying a concealed weapon (CCW), MCL 750.227, and one count of felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 1 to 7-1/2 years for each conviction, to be served consecutively to a parole term for a prior conviction. Defendant appeals as of right. We affirm.

Defendant's previous trial in August 2009 on a single charge of CCW resulted in a hung jury. On September 29, 2009, the prosecutor filed a motion to amend the information to add charges of felon in possession of a firearm and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.<sup>1</sup> After jury selection, the trial court allowed the prosecutor to add a charge of felon in possession of a firearm.

Testimony at trial indicated that on December 26, 2008, police responded to reports of gunshots on the southwest side of Grand Rapids. In the course of investigating the reported gunshots, police stopped a vehicle in which defendant was a passenger. A gun, a box of bullets, and several loose bullets were found in the passenger glove compartment. Defendant was searched at the scene and again at the jail, where an officer discovered a bullet in defendant's pocket. Police identified a fingerprint belonging to defendant on a box of ammunition taken

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<sup>1</sup> The prosecutor indicated that these charges were not initially pursued because it was anticipated that defendant would be prosecuted under federal law. The prosecutor did not know until eight days before the first trial that federal charges would not be pursued.

from the glove box. Police also discovered shell casings nearby. Because Jennifer Parker, the driver of the vehicle, could not be located, her testimony from defendant's earlier trial was read into evidence. She testified that she saw defendant put the gun in the glove box.

Defendant first argues that the trial court improperly allowed the prosecutor to add the felon in possession of a firearm charge on the day of trial without prior notice to defendant. Interpretation of a statute or court rule is subject to de novo review. *People v Chavis*, 468 Mich 84, 91; 658 NW2d 469 (2003). A decision of the trial court on a motion to amend the information is reviewed for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-87; 672 NW2d 191 (2003).

The constitutional right to due process requires that an accused be sufficiently apprised of the charges against him. *People v Higuera*, 244 Mich App 429, 442; 625 NW2d 444 (2001). Under MCL 767.76,

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 . . . 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 . . . . [Emphasis added.]

MCL 767.76 does not permit an amendment that adds a new offense. That statute only permits amendments that cure defects in the statement of an offense that is already sufficiently charged to fairly apprise the accused of its nature. *McGee*, 258 Mich App at 688. "An information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *Higuera*, 244 Mich App at 446, citing MCL 767.76.

However, under MCR 6.112(H):

The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information.

In *McGee*, this Court, citing *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998), noted that, while the *Goecke* Court "found it unnecessary to find the court rule inconsistent with the statute, the Court noted that as a rule of procedure, the court rule superseded the statute." *McGee*, 258 Mich App at 689. The *McGee* Court then reviewed *Goecke*, as well as *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993), and *People v Adams*, 202 Mich App 385; 509 NW2d 530 (1993), to essentially find that the court rule controlled, that a prosecutor may add a

charge to a complaint so long as the prosecutor shows probable cause at the preliminary exam that the defendant committed the charged crime, and that this Court should look at whether unfair prejudice resulted from the addition of the charge. *McGee*, 258 Mich App at 690-693.<sup>2</sup>

Thus, we must decide whether there was sufficient evidence at the time of defendant's preliminary exam to show probable cause for the amended charge of felon in possession and whether the addition of this charge would cause unacceptable prejudice to defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *McGee*, 258 Mich App at 690-693. See also *Hunt*, 442 Mich at 362-364.

As to whether there was probable cause to show that defendant committed the crime charged, the elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant had been convicted of a prior felony, and (3) less than five years had lapsed since defendant had been discharged from parole or probation. *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004).<sup>3</sup> In the instant case, defendant cannot seriously contend that the prosecution did not present sufficient evidence to the trial to support the charging of this offense. Here, the initial information in this case charged defendant with CCW, but also indicated that the prosecution planned to seek habitual offender status because plaintiff had been convicted of unarmed robbery in August of 1997. Moreover, defendant's pre-bond report, signed by defendant, lists his status as still on parole from the unarmed robbery. Defendant does not dispute his criminal history, and stipulated to the prior felony conviction at trial. In addition, evidence of possession sufficient to support a bindover on CCW would satisfy possession under MCL 750.224f. MCL 750.227(2) states, in pertinent part, "A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person . . . without a license to carry the pistol as provided by law." Also, as in *McGee*, defendant cannot seriously contend the prosecutor would have been unable to establish probable cause for the additional charge at a preliminary exam because defendant was, in fact, convicted. See *McGee*, 258 Mich App at 696-697.

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<sup>2</sup> *McGee* itself involved a defendant who had waived her preliminary examination; and the Court noted that defendant could have been surprised by the addition of charges the first day of trial. *McGee*, 258 Mich App at 691-692. However, the Court found that defendant could not show prejudice under MCR 6.112(H), and also found that "a logical extension of [*Goecke*, *Hunt* and *People v Fortson*, 202 Mich App 13; 507 NW2d 763 (1993)] permits the amendment at issue in this case despite the lack of a preliminary examination." *McGee*, 258 Mich App at 693-695.

<sup>3</sup> Moreover, after the five-year period has passed, the convicted felon is prohibited from possessing a firearm until his right to do so has been formally restored under MCL 28.424, with the prosecution only being required to prove that the defendant's right to possess a firearm had not been restored if the defendant produces evidence to the contrary. *Perkins*, 262 Mich App at 270-271, citing MCL 750.224f(2)(b).

We also find that defendant has not shown that he suffered prejudice. Under *McGee*, “an amendment must not cause unacceptable prejudice to the defendant through ‘unfair surprise, inadequate notice, or insufficient opportunity to defend.’” *Id.* at 688, quoting *Hunt*, 442 Mich at 364. As noted above, at the time of his arrest, defendant was on parole for another felony. Therefore, there can be no legitimate claim of surprise at the addition of the charge of felon in possession of a firearm. Further, the motion was filed more than two weeks before the beginning of trial. Defendant was therefore well notified of the potential addition of this charge, and afforded ample opportunity to defend against the charge. Finally, the prosecution is correct that addition of the felon in possession of a firearm charge did nothing to change defendant’s strategy. The only additional element the felon in possession of a firearm charge added to that of CCW was a requirement that the prosecution prove defendant’s status as a felon, something that was hardly in dispute here where defendant stipulated to the prior felony conviction. The key element the prosecution needed to prove for both crimes was that the defendant possessed the gun found in the glove box. Thus, the defendant’s theory as to this additional charge was the same as to the charge of carrying a concealed weapon; that is, that the gun was not his and he did not possess it. There is no suggestion of what defense counsel would have done differently if given more time to prepare, *see McGee*, 258 Mich App at 696-697. The trial court did not abuse its discretion when it decided to allow the prosecution to add the charge of felon in possession of a firearm.

Defendant next argues that the trial court erred when it ruled that his prior conviction could be admitted for impeachment purposes if he testified. The record reveals that defendant did not testify. In *People v Finley*, 431 Mich 506; 431 NW2d 19 (1988), our Supreme Court adopted the rule of *Luce v United States*, 496 US 38, 105; 105 S Ct 460; 83 L Ed 2d 443 (1984), requiring that defendants testify in order to preserve issues of improper impeachment. *Finley*, 431 Mich at 521 (Riley, C.J.), 531 (Brickley, J). The rule was adopted to provide for meaningful appellate review; the error does not occur until the evidence is actually admitted. *Id.* at 512. Unless the defendant testifies, the harm to defendant is speculative: the reviewing court cannot assume fear of impeachment caused the defendant to refrain from testifying, the prosecutor ultimately may have chosen not to impeach with the prior conviction, or the court may have changed its prior in limine ruling. *Id.* at 512-513.

Here, because defendant essentially waived this issue by intentionally relinquishing his known right to testify, any alleged error in the court’s ruling has been extinguished for purposes of appellate review. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Gaines*, 198 Mich App 130, 131; 497 NW2d 210 (1993).

Defendant next argues that trial counsel provided ineffective assistance. This issue was not included in the statement of questions presented section of defendant’s brief; therefore, pursuant to court rule and case law, this issue is not properly before this Court and we need not address it. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Douglas B. Shapiro  
/s/ Stephen L. Borrello