

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 15, 2015

v

PATRICK ERNEST RUSSELL,
Defendant-Appellant.

No. 323158
Macomb Circuit Court
LC No. 2012-000319-FC

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his convictions of second-degree murder, MCL 750.317, and operating a vehicle while intoxicated causing death, MCL 257.625(4)(a), following his *nolo contendere* plea to both charges. We affirm.

Defendant was driving his vehicle while under the influence of narcotics when he struck a vehicle stopped at a red light and killed a passenger in that vehicle. Defendant was initially charged with reckless driving causing death, MCL 257.626(4), and operating a vehicle while intoxicated causing death, MCL 257.625(4)(a). He pleaded *nolo contendere* to these charges and, over the prosecutor's objection, the court agreed it would not exceed 87 months at sentencing. However, on the date scheduled for sentencing, the court changed the *Cobbs* evaluation¹ to reflect a new minimum of 14 years. In response, defendant withdrew his *nolo contendere* plea. The prosecution then moved to amend Count 1 of the information from reckless driving causing death to second-degree murder. Over defense counsel's objection, the court permitted the amendment and, following defense counsel's request, remanded the case to the district court for a preliminary examination. After the preliminary examination, defendant was bound over as charged. He eventually pleaded *nolo contendere* to both charges and was sentenced, as a fourth habitual offender, to 20 to 40 years' imprisonment.

On appeal, defendant argues that the trial court erred when it permitted the prosecution to amend the information from reckless driving causing death to second-degree murder, which substantially increased his sentencing exposure. We disagree.

¹ See *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

A trial court's decision to grant a motion to amend the information is reviewed for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

It is well-established that both MCL 767.76 and MCR 6.112(H) permit the amendment of an information and that MCR 6.112(H) specifically permits amendment before, during, or after trial unless to do so "would unfairly surprise or prejudice the defendant." See also *McGee*, 258 Mich App at 689. As a rule of procedure, MCR 6.112(H) supersedes MCL 767.76. *Id.*, citing *People v Goecke*, 457 Mich 442, 460; 579 NW2d 868 (1998). Consequently, the only issue on appeal is whether permitting the amendment in this case unfairly surprised or prejudiced defendant. See *id.*; *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant argues that "[s]urprise and/or prejudice regarding the amendment are apparent" because the added second-degree murder charge "involves the element of 'malice,' which is certainly a stretch considering Defendant did not know the victim." We disagree.

The elements of reckless driving causing death, the original charge, are: (1) the operation of a vehicle, (2) in willful or wanton disregard for the safety of persons or property, and (3) by the operation of that vehicle, caused the death of another person. MCL 257.626(4); *People v Jones*, 497 Mich 155, 167; 860 NW2d 112 (2014). The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Reese*, 491 Mich 127, 143; 815 NW2d 85 (2012), quoting *Goecke*, 457 Mich at 464. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* Thus, "malice may be established even absent an actual intent to cause a particular result if there is wanton and wilful disregard of the likelihood that the natural tendency of a defendant's behavior is to cause death or great bodily harm." *Id.* at 466.

In this case, defendant has not established that the addition of the second-degree murder charge unfairly surprised or prejudiced him. The malice element of second-degree murder can be proven in the same manner as the "willfull and wanton disregard for safety" element of reckless driving causing death. Thus, the amendment did not add any substantially different elements that defendant needed to defend. And the second-degree murder charge did not involve any new or different acts or evidence.

The amendment also did not deprive defendant of an adequate opportunity to prepare a defense. When defendant was originally charged with reckless driving causing death, he was put on notice that the charges against him were predicated on his (1) operation of a vehicle, (2) in willful or wanton disregard for the safety of persons, and (3) by the operation of that vehicle, caused the death of a passenger in the car he struck. During the year between those charges and the amended information, defendant attempted to plead *nolo contendere* to that conduct before eventually withdrawing the plea over dissatisfaction with the *Cobbs* evaluation minimum. Additionally, there was almost four months between the amendment and the second-degree murder preliminary examination. During that time defendant had adequate opportunity to

consider his defense and prepare his case. See, e.g., *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). And, between the preliminary examination and the plea hearing, there was almost two additional months in which defendant could prepare a defense to the new charge. Because defendant had approximately six months between the amended information and the plea hearing, the amendment did not deprive defendant of a sufficient opportunity to defend.

In summary, defendant did not establish that the trial court abused its discretion by granting the prosecutor's motion to amend the information from reckless driving causing death to second-degree murder.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher