STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 8, 2009
v	No. 286573 Cass Circuit Court
AARON HEATH TREADWAY, Defendant-Appellant.	LC No. 07-010232-FH

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of assault with a dangerous weapon (felonious assault), MCL 750.82, and assault and battery, MCL 750.81. Defendant was sentenced as an habitual offender to 2 to 10 years' imprisonment for the felonious assault conviction, and 31 days in jail for the assault and battery conviction. We affirm.

Defendant's convictions arise out of an altercation between him and members of his family and the owner of a bar, Paul Boshoven, and several employees that took place in the parking lot of the bar. Boshoven testified that as he was attempting to end an argument in the parking lot and disperse the participants, defendant hit him in the face and knocked him to the ground. Boshoven explained that once he was on the ground, defendant slammed his head into a car door two times before Boshoven ducked underneath the door and remained on the ground. Defendant was charged with assault with a dangerous weapon and assault and battery.

The original information set forth the felonious assault charge as follows: "[defendant] did make an assault upon Paul Boshoven with a dangerous weapon, to-wit: a car door . . . ." At trial, defendant testified that he did not slam Boshoven's head in the car door; rather, he knocked Boshoven to the ground and kicked him in the head three or four times with hard dress shoes. Defendant claimed he acted in order to get close to a family member who was being physically assaulted by Boshoven's employees. After the close of proofs, and before the case was submitted to the jury, the prosecutor moved to amend the information to add "and/or shoe" as the alleged dangerous weapon with which defendant assaulted Boshoven. The trial court granted the prosecutor's motion over defendant's objection and denied defendant's request for a mistrial. On appeal, defendant argues that the trial court abused its discretion and violated his right to due process by granting the prosecutor's motion to amend the information and by denying his motion for a mistrial. Defendant contends that he did not have adequate notice of the amended charge and not have an adequate opportunity to defend against it.

A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). Similarly, this Court reviews a trial court's decision whether to grant a motion for a mistrial for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). A trial court abuses its discretion when its decision is outside the "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Whether a defendant is denied due process presents a question of law that this Court reviews de novo. *McGee*, *supra* at 699.

A criminal defendant has a constitutional due process right to "reasonable notice of the charge and an opportunity to be heard." *McGee*, *supra* at 699. To establish a due process violation, a defendant must show prejudice resulting from "inadequate notice and opportunity to defend the charges." *Id*. at 702. A trial court's discretion to amend an information is governed both by statute and by court rule. MCL 767.76 provides in relevant part, "[t]he 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." MCR 6.112(H) provides in relevant part, "[t]he 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." In sum, "[a] trial court may amend the information at any time before, during, or after trial in order to cure 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." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987), citing MCL 767.76. An amendment to an information is prejudicial when "defendant does not admit guilt and is not given a chance to defend against the crime." *Id*.

In this case, the amendment did not unfairly surprise defendant. MCR 6.112(H). The original information placed defendant on notice that he would have to defend against a felonious assault charge; he was aware of the nature of the charge against him, and the amendment did not change the substance of that charge. Defendant chose to defend the charge by admitting that he assaulted Boshoven by kicking him in the head with a hard dress shoe and by claiming that he acted in the defense of others. Defendant cannot have been unfairly surprised by the amendment because he introduced the evidence that he assaulted Boshoven with a hard dress shoe, and case law is clear that shoes can be considered dangerous weapons for purposes of felonious assault. See *People v Van Diver*, 80 Mich App 352, 355; 263 NW2d 370 (1977); *People v Buford*, 69 Mich App 27, 31; 244 NW2d 351 (1976) ("a booted foot may be a dangerous weapon").

Additionally, defendant was not prejudiced because he had adequate opportunity to defend against the felonious assault charge. MCR 6.112(H); *Stricklin*, *supra* at 632. Defendant was aware of the nature and substance of the assault charge. His preparation to defend the charge was evident when he advanced the theory that he acted in defense of others. Defendant then testified that he kicked Boshoven in the head three to four times with hard dress shoes. Defendant does not assert that he would have advanced some theory other than defense of others at trial had the original information included reference to a shoe. See *Stricklin*, *supra* at 633-634.

Defendant's arguments on appeal that he was unprepared to defend against the evidence of the hard dress shoes are unpersuasive because defendant chose to introduce that evidence himself. Defendant cannot now claim that he was unfairly surprised by, or unprepared to defend against, evidence he kicked Boshoven because "[a] defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. To do so would allow a

defendant to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684; 580 NW2d 444 (1998) (citation omitted).

Defendant also asserts that the amendment served to deny him the effective assistance of counsel because counsel's trial strategy would have been different had he been aware of the amended information at an earlier time period. However, defendant fails to adequately develop his argument or provide any supporting authority, and he failed to include the issue of effective assistance of counsel in his statement of the questions presented. This argument is not properly presented for review and is abandoned. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008).

Next, defendant argues that the trial court erred in admitting evidence of statements he made during the altercation wherein he asserted that he was not afraid to fight the employees, and that he would "kill all you motherfuckers" because he was just released from prison after 14 years and was not afraid to return there. The trial court admitted evidence of the statements pursuant to MRE 404(b) to show defendant's state of mind or intent. On appeal, defendant contends that the statements were unfairly prejudicial.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

In this case, the trial court properly admitted evidence of defendant's statements because they were relevant and not unfairly prejudicial. While evidence of a defendant's other acts must meet the requirements of MRE 404(b) to be admissible at trial, statements a defendant makes are not governed by the rule. *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). "A prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act." *People v Rushlow*, 179 Mich App 172, 174; 445 NW2d 222 (1989). Instead, a defendant's statements are properly admitted at trial if relevant, MRE 401, and if the probative value of the statements is not substantially outweighed by the danger of unfair prejudice, MRE 403. See *Goddard*, *supra* at 515.

Here, defendant's threatening statements were relevant within the meaning of MRE 401 to show defendant's state of mind because it showed defendant was confrontational, would assault anyone whom he wanted, and wanted those persons to know he was capable of assaulting them and was not afraid to do so. Evidence that defendant intended to commit assault tended to make the determination of whether defendant committed the charged offenses more or less probable than it would be without the evidence. MRE 401.

Additionally, the probative value of the threatening statements was not substantially outweighed by the danger of unfair prejudice within the meaning of MRE 403. Although the evidence was prejudicial to defendant's case, all "[r]elevant evidence is inherently prejudicial." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Evidence is unfairly prejudicial when it is only marginally probative and it is likely a jury would give it more weight then it merits. *Crawford*, *supra* at 398. Here, evidence of defendant's statements was highly probative of defendant's state of mind on the night of the incident, and the danger of unfair prejudice did not "substantially outweigh" this probative value. MRE 403. A significant amount of other

evidence at trial showed defendant committed the charged offenses, including defendant's own testimony. Boshoven testified that defendant slammed his head in a car door two times and his testimony was consistent with what he told a witness immediately following the incident. Additionally, witnesses testified that they observed red marks across the side of Boshoven's face and another witness testified that she observed defendant holding a car door and moving it in a forward motion during the altercation in the parking lot. Furthermore, defendant's cousin acknowledged during his testimony that he and defendant could have left in their vehicle before the altercation but declined to do so, suggesting both men instigated or intended the altercation. In sum, this evidence shows the jury did not give undue weight to evidence of defendant's statements. *Id.*

In sum, the trial court did not abuse its discretion in admitting evidence of the threatening statements. Although the trial court admitted the statements pursuant to the wrong evidentiary rule, we "will not reverse a trial court decision when the lower court reaches the correct result even if for a wrong reason." *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005).

Next, defendant contends that he was denied his constitutional right to a unanimous verdict and properly instructed jury. However, defendant waived review of this issue when his defense counsel twice indicated his approval of the jury instructions on the record. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

We affirm.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray