FILED
MAR 31 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 31, 1980

vs.)

JOSEPH GRANT,) 0-37
62812

Defendant-Appellant.)

Appeal from Johnson District Court - Harold J. Swailes, Judge.

Defendant appeals conviction for second degree criminal mischief in violation of section 716.4, supplement to the Code 1977. - Reversed in part and remanded for resentencing.

Duane L. Rohovit, of Freed, Reisetter, Megan & Rohovit, Iowa City, for defendant-appellant.

Thomas Miller, Attorney General of Iowa, Julie F. Pottorff, Assistant Attorney General, and Paul C. Peglow, Assistant Johnson County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

OXBERGER, C.J.

Defendant, Joseph Grant, appeals conviction for second degree criminal mischief in violation of section 716.4, supplement to the Code 1977. We reverse in part and remand for resentencing.

Grant was charged by information on May 19, 1978, with criminal mischief in the third degree for painting the words "Peace on Earth" and "End War" on a memorial war plane at the Iowa City airport. Trial was set for Monday, August 28, 1978. On Wednesday, August 23, 1978, the State filed a motion to amend the charge to second degree criminal mischief stating evidence showed damage to the plane was more than the $100 to $500 amount originally charged. Grant filed a resistance to that motion on Friday, August 25, 1978. That afternoon the trial court held an informal hearing on the amendment and indicated it would allow it. On Monday, August 28, 1978, the motion was granted and trial commenced on the substituted charge. Grant was convicted by the jury of second degree criminal mischief. On appeal, Grant asserts the trial court erred by granting the motion to amend on the eve of trial, by denying his requested continuance, and by overruling, without hearing, his motion for new trial. Our review of these contentions is on errors assigned. Iowa R. App. P. 4.

I. Amendment of the charge.

Iowa R. Crim. P. 4(8) governs amendments of indictments or informations and states the trial court may grant amendments before or during trial "when no substantial rights of the defendant are prejudiced by the amendment, and if a wholly new and different offense is not charged." Iowa R. Crim. P. 4(8)(a). An amendment may correct errors or omissions in the original information so long as it does not change the original charge. Id. Here, the State sought to amend the information to raise the offense to criminal mischief in the second degree, raising it from an aggravated misdemeanor to a class D felony.

Initially, we find the amendment did not change the crime charged; criminal mischief was the basis for each. However, even if the amendment could be deemed a correction of an error or omission, we find substantial rights of the defendant were prejudiced by granting the amendment. By its delay, the State caused unfair surprise. Even though the State did or could have obtained the estimate of damages on which the amendment was based prior to the filing of the information, it waited until five calendar days before trial to come forward with the information. Grant was given

informal notice his resistance to the amendment would be overruled on the Friday preceding the Monday trial date. Assuming the State obtained a Cedar Rapids expert to estimate damages because no reliable expert was available in Iowa City, it is unreasonable to expect Grant to have located an out-of-town expert over a weekend. Yet, Grant's counsel was given only a weekend to prepare a defense to the newly instituted felony charge, which included the seldom encountered issue of the amount of aircraft restoration that was necessary. Grant's assertion he was not going to contest that issue on the lessor charge, but wished to rebut the amount of damages on the greater charge by expert testimony is reasonable. The timing of the amendment and trial prevented that. Granting of a continuance after the State rested would not aid defense counsel in his preparation of cross examination of the State's expert witness. Although the trial court has considerable discretion in ruling on amendments to an information, that discretion was abused here. See State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978). Accordingly, we reverse the trial court's amendment of the information.

II. Motion for new trial.

Grant based his motion for new trial on alleged errors of the trial court and newly discovered evidence but the trial court, without hearing, denied his request. On appeal, Grant alleges he was entitled to a hearing on his Iowa R. Crim. P. 23(b)(8) new trial motion. We do not reach this issue, however, because Grant failed to preserve error on it. No objection was made to the trial court; Grant did not alert the trial court to the alleged error and thereby denied it the opportunity to correct any error. Accordingly, such alleged error was waived. See State v. Holbrook, 261 N.W.2d 480, 482 (Iowa 1978).

Based on our holding in Division I, we reverse the trial court's amendment of the information. However, we need not order a new trial because of the error. A finding of criminal mischief in the third degree inhered in the jury's conviction for second degree criminal mischief. The prejudice Grant suffered related only to his ability to defend on the issue of increased damages and he was fully prepared to defend the charge in the third degree. Therefore, by remanding for resentencing on the finding of criminal mischief in the third degree, an aggravated misdemeanor, the prejudice below is remedied. Accordingly, this matter is reversed in part, and remanded for sentencing on the lesser charge.

Reversed in part and remanded for resentencing.

Donielson, J., dissents.

DONIELSON, J. (dissenting)

I dissent from Division I of the majority opinion. The determining issue is whether the trial court erred in granting State's amendment to the information. Under these facts, I can find no error.

Iowa R. Crim. P. 4(8) permits the trial court to order the amendment of an information to correct errors or admissions in matters of form or substance. Only if defendant's substantial rights are prejudiced or a wholly new and different offense is charged, should amendment not be allowed. Id; see State v. Sheffey, 234 N.W.2d 92, 95 (Iowa 1975). The majority finds the amendment to the information prejudiced defendant because of unfair surprise and his resulting inability to prepare for trial. A close reading of this record fails to support such a finding.

State filed its amendment on Wednesday, August 23, 1978, and the trial began Monday, August 28, 1978. Defendant thus had at least four days to prepare to defend against the amended information. In a hearing on defendant's resistance to State's motion to amend, the trial court expressed its concern defendant have sufficient time to prepare to meet the amended information. In an informal discussion on Friday, August 25, 1978, defense counsel informed the trial judge he had employed an expert who was to look at the damage and would be prepared to testify at trial on Monday, August 28. Noting this, the trial court found on Monday defendant had an adequate opportunity to prepare for whatever new circumstances might have arisen from the amendment. Defendant thus was not unfairly surprised by the amendment. See State v. Fuhrmann, 252 N.W.2d 619, 624 (Iowa 1977).

Later, defense counsel during the course of the trial claimed he was unprepared to meet the testimony of State's expert witness. The trial court offered defense counsel the opportunity to move for a continuance, which he declined. The alleged denial of defense preparation time could be considered waived by such an act. See State v. Rush, 242 N.W.2d 313, 316 (Iowa 1976). Yet, the majority accepts defendant's claim he lacked the opportunity to rebut State's witness regarding the issue of damages.

Defendant also knew the cost of repair was substantial. The minutes of testimony stated State's expert witness on cost of repair "would testify that the repairs to 'Old Jet' will cost approximately $500." Although this figure is the threshold figure for

second degree criminal mischief, defendant failed to depose State's witness or move for a bill of particulars.

Neither the timing nor the substance of the amendment prejudiced defendant sufficiently to justify finding an abuse of discretion by the trial court in granting the amendment. See Rush, 242 N.W.2d at 316; State v. Crutcher, 174 N.W.2d 449, 452 (Iowa 1970); State v. Houston, 261 Iowa 1369, 1375-76, 158 N.W.2d 158, 162 (Iowa 1968); Nelson v. Bennett, 255 Iowa 773, 778-79, 123 N.W.2d 864, 867 (Iowa 1963); State v. Kulow, 255 Iowa 789, 792-93, 123 N.W.2d 872, 874 (Iowa 1963). The test for prejudice is whether the complaining party's rights were injuriously affected or the party suffered a miscarriage of justice. See State v. Massey, 275 N.W.2d 436, 439 (Iowa 1979). The record here does not support the majority's finding of prejudice or abuse of discretion. I would affirm in whole the trial court's decision.

Further, I do not agree with the novel and unprecedented action of setting aside the felony conviction and an appellate determination finding the defendant guilty of criminal mischief in the third degree. The amended information was not challenged as to its legal correctness or timeliness, but only to the abuse of discretion in not granting a continuance. The substitution of this court's verdict for that of the jury's is unwarranted. At the very least, the majority should remand for a new trial, which will allow defendant the adequate preparation time he claims he was denied. However, since I find no abuse of discretion, I would affirm the trial court judgment.