

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-913-2013  
 :  
 BRYAN YAGGIE, :  
 Defendant :  
 OPINION AND ORDER

This matter came before the court on September 4, 2013 for a hearing and argument on Commonwealth’s motion to amend the information.

By way of background, Defendant was charged with one count of attempted robbery graded as a felony of the second degree; five counts of attempted robbery graded as a felony of the third degree; one count of theft by unlawful taking; five counts of terroristic threats, two counts of simple assault, five counts of harassment, one count of disorderly conduct; two counts of criminal mischief; and one count of public drunkenness. These charges arise from allegations by five juveniles that at approximately 6:00 p.m. on May 21, 2013 as they were passing through a wooded area after swimming in the river near Sylvan Dell Road in South Williamsport, an intoxicated, six foot tall, brown haired, husky built white male, who identified himself as “Yogi” and was wearing a gray Mansfield shirt, black shorts with red stripes, and leather boots, demanded money from them. They offered him \$12 but that was not enough, so “Yogi” grabbed one of the juveniles by the arm and pulled him into some brush, causing abrasions on his head, face and back. “Yogi” then threatened to kill the juveniles. He also threatened to rape them or force them to engage in oral sex with him. When he began to pull at his pants as if he was going to remove them, one of the juveniles pulled out his smartphone to call 911. “Yogi” tackled the juvenile, pried the phone

away from him, and smashed it. The juvenile struck “Yogi” in the face, and all of them ran for help.

About 90 minutes later, the police located an individual who matched the description provided by the juveniles. The individual was taken into custody and identified as Defendant Brian Yaggie.

At the time scheduled for the preliminary hearing, the Commonwealth amended the grading of the five attempted robbery counts graded as felonies of the third degree to felonies of the second degree. The parties then signed a guilty plea recommendation form, which indicated that Defendant would enter a guilty plea to a consolidated count of robbery graded as a felony of the second degree for a minimum sentence of 24 months of incarceration in a state correctional institution consecutive to any other case, and Defendant waived his preliminary hearing. The form also indicated that the guilty plea recommendation was subject to final approval of the District Attorney and could be withdrawn by the Commonwealth at any time prior to the entry of the guilty plea, as well it contained a provision stating that Defendant understood and agreed he may not remand the matter for a preliminary hearing in the event that the guilty plea recommendation was withdrawn by the Commonwealth.

The District Attorney withdrew the guilty plea recommendation at arraignment before Defendant had the opportunity to enter the contemplated guilty plea. A few days later, the Commonwealth filed its motion to amend the information, which contained three components: (1) a request to amend counts 1 through 6 to robbery graded as

a felony of the second degree instead of attempted robbery; (2) a request to add five counts of robbery graded as a felony of the first degree under 18 Pa.C.S. §3701(a)(1)(ii) related to threatening or putting the victims in fear of serious bodily injury; and (3) a request to add five counts of robbery graded as a felony of the first degree under 18 Pa.C.S. §3701(a)(1)(iii) related to threatening to commit any felony of the first or second degree.

Defendant had no objection to increasing the grading of counts 2 through 6 because the Commonwealth had amended the grading at the preliminary hearing and those offenses were merely improperly transcribed on the information. Defendant, however, objected to changing counts 1 through 6 from attempted robbery to robbery. He also objected to the request to add ten counts of robbery graded as felonies of the first degree, because such would add new offenses and greatly increase Defendant's potential punishment without providing him with the opportunity to have a preliminary hearing on these charges.

The Commonwealth argued that because the phrase "in the course of committing a theft" includes an act that occurs in an attempt to commit theft, the requested amendment really did not change those charges; it only removed the unnecessary attempt language which was already subsumed in the definition of the phrase "in the course of committing a theft." The Commonwealth also asserted that the request to amend the information to include ten counts of robbery graded as felonies of the first degree was proper because those charges were based on Defendant's threats to commit murder, aggravated assault, rape, statutory sexual assault, involuntary deviate sexual intercourse and aggravated indecent assault against the victims, of which Defendant was already placed on notice by the

allegations contained in count 2 of the criminal complaint.

### **DISCUSSION**

Rule 564 of the Pennsylvania Rules of Criminal Procedure governs amendment of the information. Rule 546 provides that a court may allow the amendment of the information where, among other things, there is a defect in the description of the offense, provided the amendment does not charge an additional or different offense.

The purpose of Rule 564 is to “ensure that a defendant is fully apprised of the charges and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed.” Commonwealth v. Duda, 831 A.2d 728, 732 (Pa. Super. 2003), quoting Commonwealth v. J.F., 800 A.2d 942, 945 (Pa. Super. 2002).

In determining prejudice, the lower courts are directed to consider several factors including the following:

- (1) whether the amendment changes the factual scenario supporting the charges;
- (2) whether the amendment adds new facts previously unknown to the defendant;
- (3) whether the entire factual scenario was developed during the preliminary hearing;
- (4) whether the description of the charges changed with the amendment;
- (5) whether a change in defense strategy was necessitated by the amendment; and
- (6) whether the timing of the Commonwealth’s request for amendment allowed for ample notice and preparation.

Commonwealth v. Sinclair, 897 A.2d 1218, 1223 (Pa. Super. 2006), citing Commonwealth v. Grekis, 601 A.2d 1284, 1292 (Pa. Super. 1992).

Furthermore, since the purpose of an information is to apprise a defendant of the charges against him so that he may have a fair opportunity to prepare a defense, relief is awarded only when the variance between the original and the new charges prejudices the

defendant by, for example, rendering defenses which might have been raised against the original charges ineffective with respect to the substituted charges. Commonwealth v. Brown, 556 Pa. 131, 727 A.2d 541, 543 (1999); Sinclair, supra. As well, “the mere possibility that the amendment of an information may result in a more severe penalty due to the additional charges is not, of itself, prejudice.” Sinclair, 897 A.2d at 1224, citing Commonwealth v. Picchianti, 600 A.2d 597, 599 (Pa. Super. 1991), appeal denied, 530 Pa. 660, 609 A.2d 168 (1992).

The request to amend counts 1 through 6 from attempted robbery to robbery is supported by the Sinclair factors. There is no change of the factual scenario or the addition of facts previously unknown to Defendant. Although the statutory provision Defendant allegedly violated changes from 18 Pa.C.S. §901 to 18 Pa.C.S. §3701, the description of the charges does not materially change, because the “in the course of committing a theft” element of the robbery statute includes actions and threats that occur in an attempt to commit a theft. Thus, under the facts and circumstances of this case, whether the charge is attempted robbery or robbery, the description of the charge is that Defendant attempted to take property from the juveniles by inflicting bodily injury or threatening or intentionally putting them in fear of immediate bodily injury. The entire factual scenario was not developed at the preliminary hearing, but only because the preliminary hearing was waived. Defense counsel did not indicate any way in which the proposed amendment would change the defense strategy, and the Commonwealth filed its motion to amend shortly after arraignment, giving Defendant ample notice and opportunity to prepare for trial. Therefore, the court finds this

amendment is permissible under the case law.

The court also finds that the proposed amendment to add five counts of robbery graded as felonies of the first degree based on threatening to commit serious bodily injury is permissible. There is no change of the factual scenario or the addition of facts previously unknown to Defendant. Although the amendment will change the description of the charges in that there will be five charges based on threatening to cause serious bodily injury in addition to five charges based on threatening to cause bodily injury, the same alleged threats that provide the basis for counts 2 through 6 also support these charges. Under the facts and circumstances of this case, similar defenses would apply to both sets of charges, and there is ample notice and opportunity to prepare for trial. While Defendant did not have an opportunity to have a preliminary hearing on these charges and he might not have waived his right to a preliminary hearing if he originally been charged with felonies of the first degree or if he had known that the District Attorney was not going to approve the guilty plea recommendation, there are other ways that Defendant's interests can be protected, such as permitting him to challenge the Commonwealth's prima facie case through the filing of a petition for writ of habeas corpus, without impinging on the public interest that would be furthered by permitting the amendment. Therefore, the court will permit the Commonwealth to add as counts 25 through 29 five counts of robbery graded as felonies of the first degree under 18 Pa.C.S. §3701(a)(1)(ii).

The request to amend to add five counts of robbery graded as felonies of the first degree based on a threat to commit any felony of the first or second degree is somewhat

more problematic. The Commonwealth asserted that there was no change in the factual scenario and no addition of new facts because these charges were based on Defendant's threats to commit murder, aggravated assault, rape, statutory sexual assault, involuntary deviate sexual intercourse and aggravated indecent assault against the victims, of which Defendant was already placed on notice by the allegations contained in count 2 of the criminal complaint. The court can only agree with the Commonwealth in part. Certainly, the alleged threats to kill the juveniles, to rape them or to force them to perform oral sex also would constitute threats to commit murder, rape and involuntary deviate sexual intercourse. Furthermore, since the definition of serious bodily injury includes bodily injury which creates a substantial risk of death, 18 Pa.C.S. §2301, the alleged threat to kill the juveniles would also implicitly include a threat to commit aggravated assault. Neither the description in Count 2 nor the affidavit of probable cause, however, include the factual allegations necessary to support statutory sexual assault or aggravated indecent assault.

For statutory sexual assault to occur, the complainant must be under 16 years of age. 18 Pa.C.S. §3122.1. While the complaint alleges that Defendant threatened to rape five juveniles or to force them to perform oral sex, the ages of the juveniles are not stated anywhere in the complaint or the affidavit of probable cause. Similarly, there is no mention of any acts that would constitute threats to commit aggravated indecent assault, a crime which excepts conduct that would satisfy the statutory sections related to rape, statutory sexual assault, involuntary deviated sexual intercourse, and sexual assault and requires the penetration of the genitals or anus of a complainant with a part of the perpetrator's body for

any purpose other than good faith medical, hygienic or law enforcement procedures. See 18 Pa.C.S. §3125(a). There are no allegations in the criminal complaint or the affidavit of probable cause that Defendant threatened to penetrate any of the juvenile's genitals or anus with a part of his body. Therefore, to the extent the proposed amendment seeks to encompass threats to commit statutory sexual assault or aggravated indecent assault, it would impermissibly add new facts, change the description of the charges and change the defenses available in a situation where Defendant never had the opportunity to explore or develop the entire factual scenario at a preliminary hearing. Accordingly, the court will permit the Commonwealth to add, as counts 30 through 34, five counts of robbery graded as a felony of the first degree under 18 Pa.C.S. §3701(a)(1)(iii), but it will limit the felonies of the first or second degree that Defendant allegedly threatened to commit to the crimes of murder, aggravated assault, rape and involuntary deviate sexual intercourse.

In the alternative, Defendant contends that he is entitled to challenge the sufficiency of the Commonwealth's prima facie case. The court agrees.

Rule 541 of the Pennsylvania Rules of Criminal Procedure states, in relevant part: "If the defendant waives the preliminary hearing by way of an agreement, made in writing or on the record, and the agreement is not accomplished, the defendant may challenge the sufficiency of the Commonwealth's prima facie case." Pa.R.Cr.P. 541(A)(2). Here, not only was the agreement that provided for a recommendation of a guilty plea to one consolidated count of robbery graded as a felony of the second degree in exchange for 24 months of incarceration at a state correctional institution not accomplished, but the



Commonwealth is adding ten charges of robbery graded as felonies of the first degree. Fundamental fairness requires that Defendant be given the opportunity to challenge the sufficiency of the Commonwealth's prima facie case. Such a result also is required to prevent the potential for the Commonwealth to abuse the guilty plea recommendation forms and the case law permitting amendment to initially charge only lesser offenses and offer a favorable plea recommendation in order to induce a defendant to waive his preliminary hearing when he otherwise would not. The court does not in any way believe that was the intent of the assistant district attorney who handled the preliminary hearing in this case. From Defendant's perspective, however, the end result was the same. Therefore, the court will give Defendant thirty (30) days within which to file a petition for writ of habeas corpus, if he so chooses.

Accordingly, the following order is entered:

cc: Nicole Ippolito, Esquire (ADA)  
Robert Cronin, Esquire (APD)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)

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**ORDER**

AND NOW, this \_\_\_ day of November 2013, the court GRANTS the Commonwealth's motion to amend the information. The information is amended to add Counts 25 through 29, Robbery, a felony of the first degree under 18 Pa.C.S. §3701(a)(1)(ii), and Counts 30 through 34, Robbery, a felony of the first degree under 18 Pa.C.S. §3701(a)(1)(iii), but the felonies that Defendant allegedly threatened to commit for Counts 30 through 34 will be limited to threatening to commit murder, aggravated assault, rape and involuntary deviate sexual intercourse. The Prothonotary is directed to add these counts in CPCMS. Defendant is given thirty (30) days within which to file a petition for writ of habeas corpus to challenge the sufficiency of the Commonwealth's prima facie case.

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)  
Robert Cronin, Esquire (APD)  
Gary Weber, Esquire (Lycoming Reporter)  
Prothonotary  
Work file