

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
July 29, 2014

v

FATEEN ROHN MUHAMMAD,

Defendant-Appellee.

No. 317054
Ingham Circuit Court
LC No. 13-000161-FH

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

In this interlocutory appeal, the prosecution appeals by leave granted the trial court's order dismissing a habitual offender notice for failure to timely serve the notice on defendant. Because we hold that the harmless error rule applies to errors in the application of MCL 769.13(2), we reverse.

Defendant was charged with first-degree home invasion, MCL 750.110a(2), and assault with intent to do great bodily harm less than murder, MCL 750.84. The felony warrant and felony complaint, both dated February 6, 2013, included a fourth habitual offender notice. At arraignment, the district court noted for the record that each of the charges carried a habitual notice and that the "penalties could be made greater than 20 years and 10 years respectively." Subsequently, defendant and his attorney signed a written waiver of circuit court arraignment which acknowledged that they had received a copy of the "Felony complaint." At the preliminary examination, the court noted that defendant was a "fourth habitual offender." On February 27, 2013, the felony information, which included a fourth habitual offender notice, was filed. On March 27, 2013, a pretrial conference was conducted in the circuit court, and defendant's attorney signed the pretrial conference order, which included an indication that if defendant pleaded to count one of the complaint, the prosecution would dismiss the habitual offender notice and the second count of the complaint.

Defendant asserted that neither he nor his attorney received a copy of the felony information when it was filed on February 27. There is no proof of service of notice of fourth habitual offender in the lower court file. Instead, on April 24, 2013, the prosecutor forwarded a copy of the felony information to defendant. Thereafter, on May 22, 2013, defendant filed a motion to dismiss the habitual offender count because the information was "not timely filed or

served” pursuant to MCL 769.13. Relying on *People v Cobby*, 463 Mich 893; 618 NW2d 768 (2000), the trial court agreed with defendant and dismissed the habitual offender count.

On appeal, the prosecutor argues that the failure to serve notice within the time limit was harmless error because defendant had actual notice that the prosecutor intended to seek an enhanced sentence. The prosecutor’s argument raises an issue of statutory interpretation, which this Court reviews de novo. *People v Hornsby*, 251 Mich App 462, 469; 650 NW2d 700 (2002).

Pursuant to MCL 769.13(1), “the prosecuting attorney may seek to enhance the sentence of the defendant . . . by filing a written notice of his or her intent to do so within 21 days after the defendant’s arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.” Further, MCL 769.13(2) states that “[t]he notice *shall* be filed with the court and served upon the defendant or his or her attorney within” the 21-day time limit. (Emphasis added.) It is not disputed that the prosecution failed to serve notice of intent to enhance sentence on defendant or his attorney within the statutory time limit.

Clear and unambiguous language in a statute must be enforced as written. *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). “[S]tatutory language should be construed reasonably, keeping in mind the purpose of the statute.” *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009). This Court has held that the purpose of MCL 769.13 is to ensure that a defendant receives notice at an early stage in the proceedings that he could be sentenced as a habitual offender. *People v Morales*, 240 Mich App 571, 582; 618 NW2d 10 (2000).

Here, the statutory language states unambiguously that the prosecutor “shall” file notice of intent to enhance a defendant’s sentence within 21 days after the information charging the underlying offense is filed. MCL 769.13. The word “shall” is used to designate a mandatory provision. *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006). Accordingly, pursuant to the plain language of the statute, the prosecution is required to serve notice of intent to enhance sentence on the defendant or the defendant’s attorney. The statute does not state what the penalty is for failure to comply with its mandates.

Defendant relies on, and the trial court was persuaded by, our Supreme Court’s order in *Cobby*. The order states:

In lieu of granting leave to appeal, the case is remanded to the trial court. MCR 7.302(F)(1). On remand, the defendant’s sentence, as a fourth habitual offender, is to be vacated and the defendant resentenced because the prosecutor has not proven that the notice of sentence enhancement was served on defendant within twenty-one days after the defendant was arraigned. In all other respects the application for leave to appeal is denied. [*Cobby*, 463 Mich at 893.]

An order of the Supreme Court is binding precedent when the rationale can be understood. *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996). In this case, the Supreme Court’s order clearly applies the harmless error provisions in MCL 769.26 and MCR 2.613(A) to reach its result.

In *Cobley*, the Supreme Court clearly stated that the defendant needed to be resentenced “because the prosecutor has not proven that the notice of sentence enhancement was *served* on defendant within twenty-one days after the defendant was arraigned.” *Cobley*, 463 Mich at 893 (emphasis added). Accordingly, at least part of the rationale of the Court can easily be understood, i.e., because the prosecution could not prove that notice of intent to seek sentence enhancement was served within the time limit, the defendant’s sentence could not be enhanced. However, nothing in the Supreme Court’s order indicates whether a harmless error analysis can be applied to violations of MCL 769.13.

The harmless error rule is codified both in statute and court rule. MCR 2.613(A) provides:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Similarly, MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for *error as to any matter of pleading or procedure*, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [Emphasis added.]

The statute and the court rule are different articulations of the same idea. *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009). An “error is not grounds for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative.” *Id.* at 243. It is axiomatic that the filing and serving of a criminal information is a matter of criminal procedure. Accordingly, unless “it shall affirmatively appear” that an error in the filing and serving of a criminal information “has resulted in a miscarriage of justice,” or “unless refusal to take this action appears to the court inconsistent with substantial justice,” an accompanying judgment or verdict should not be set aside or reversed. Here, because the lower court record clearly shows that defendant had actual notice that the prosecution intended to seek an enhanced sentence, the prosecution’s error in not serving the habitual offender notice cannot fairly be considered outcome determinative.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Peter D. O’Connell