

**STATE OF MICHIGAN
MICHIGAN SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FATEEN MUHAMMAD,

Defendant-Appellant.

Supreme Court No.
Court of Appeals File No. 317054
Circuit Court File No. 13-161-FH

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APPLICATION FOR LEAVE TO APPEAL

NOTICE FOR HEARING

NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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I. **THE TRIAL COURT DID NOT ERROR WHEN IT DISMISSED THE
HABITUAL OFFENDER FOURTH OFFENSE NOTICE.....2**

STANDARD OF REVIEW: The interpretation and application of statutes is a legal question reviewed de novo. Estes v Titus, 481 Mich 573, 578-79; 751 NW2d 493 (2008); Pellegrino v AMPCO Sys Parking, 486 Mich 330, 338; 785 NW2d 45 (2010).

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STATEMENT OF APPELLATE JURISDICTION

On June 13, 2013, the trial court dismissed Defendant-Appellant's Habitual Offender Fourth Offense Notice (See Order attached as **Exhibit A**). On July 29, 2014, the Michigan Court of Appeals reversed the trial court's ruling and remanded the case for further proceedings (See Michigan Court of Appeals July 29, 2014, Unpublished Opinion attached as **Exhibit B**). The Court has jurisdiction to consider the Defendant-Appellant's application for leave to appeal as it is being filed within 56 days of the July 29, 2014 Michigan Court of Appeals unpublished opinion. See MCR 7.203(C) (2) and (4).

STANDARD OF REVIEW

The interpretation and application of statutes is a legal question reviewed de novo. Estes v Titus, 481 Mich 573, 578-79; 751 NW2d 493 (2008); Pellegrino v AMPCO Sys Parking, 486 Mich 330, 338; 785 NW2d 45 (2010).

DATE AND NATURE OF JUDGMENT APPEALED FROM

Since the prosecuting attorney failed to serve defense counsel with a copy of the Felony Information within 21 days of the arraignment that stated the Habitual Fourth Offense Notice, Defense counsel filed a motion to dismiss the Habitual Notice. On June 13, 2014, the trial court granted the motion (See Order Granting Defendant's Motion to Dismiss Habitual Offender Count attached as **Exhibit A**).

Plaintiff-Appellee appealed the trial court order to the Michigan Court of Appeal. In an opinion dated July 29, 2014, the Michigan Court of Appeals reversed the trial court's

ruling and remanded for further proceedings (See Court of Appeals Unpublished Opinion and dissent attached as **Exhibit B**).

Defendant brings this Application for Leave to the Supreme Court seeking a reversal of the Michigan Court of Appeals July 29, 2014 decision.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED WHEN IT DISMISSED THE HABITUAL OFFENDER – FOURTH OFFENSE NOTICE?

Plaintiff-Appellee says, "Yes."

Defendant-Appellant says, "No."

Trial Court answers, "No,"

STATEMENT OF FACTS

On February 6, 2013, Defendant-Appellant Fateen Muhammad was arraigned before 54-A District Court Judge Frank J. Deluca. Judge Deluca informed Defendant-Appellee that he faced a maximum of more than 20 years and 10 years respectively for the two felony charges that were filed against Appellee, but Judge Deluca never informed Appellee that he faced a maximum of life in prison as a result of the habitual notice for the two felony charges that he faced (See transcript from arraignment, pages 3-4, attached as **Exhibit C**). In addition, Judge Deluca never asked Defendant-Appellee if Appellee understood the charges and maximum penalties that Appellee was facing (See pages 3-4 of **Exhibit C**).

Defense counsel received a copy of the Felony Complaint on February 11, 2013 (See Felony Complaint attached as **Exhibit D**). The Felony Complaint contained the Habitual Offender Fourth Offense Notice (See **Exhibit D**).

Following a February 15, 2013 Preliminary Examination, the above-referenced case was bound over to 30th Judicial Circuit Court (See Adult Bind Over Form attached as **Exhibit E**). Following the Preliminary Examination, Defendant-Appellant signed a form that waived his Circuit Court Arraignment (See Waiver of Arraignment and Election to Stand Mute or Enter a Guilty Plea attached as **Exhibit F**). Thereafter, on March 27, 2013 a Circuit Court Pre-Trial was held (See Criminal Pre-Trial Conference Order attached as **Exhibit G**). Neither Defendant nor Defendant's counsel was provided with a copy of the Felony Information at the Pre-Trial.

In this Application for Leave to Appeal, Defendant-Appellant's attorney does not dispute that he and his client received a copy of the Felony Complaint prior to the February 15, 2013 preliminary examination.

There is no dispute that that the Felony Complaint contained an Habitual Offender Fourth Offense Notice. However, there is absolutely no factual dispute, between Plaintiff-Appellee and Defendant-Appellant that the Plaintiff-Appellee Prosecutor failed to serve Defendant-Appellant's trial attorney with a copy of the Felony Information that contained an Habitual Offender Fourth Offense Notice within 21 days after the Information was filed. The trial court agreed with Defendant-Appellant and following a May 29, 2014 hearing on Defendant-Appellant's Motion to Dismiss Habitual Count, the trial court dismissed the Habitual Count (See May 29, 2014 transcript of hearing on Defendant-Appellant's Motion to Dismiss attached as **Exhibit H**).

Plaintiff-Appellee appealed the trial court's ruling to the Michigan Court of Appeals who reversed the trial court in a July 29, 2014 Unpublished Opinion (See **Exhibit B**).

Plaintiff-Appellant now seeks a reversal of the Michigan Court of Appeals ruling.

LEGAL ARGUMENT

I. THE TRIAL COURT DID NOT ERROR WHEN IT DISMISSED THE HABITUAL OFFENDER FOURTH OFFENSE NOTICE.

This case involves the interpretation of a statute that is not ambiguous. As it relates to interpreting a statute the Court in Sun Valley Foods Co. v Ward, 460 Mich 230, 596 NW2d 119 (1999) stated as follows:

"The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. Murphy v Michigan Bell Telephone Co, 447 Mich. 93, 98; 523 N.W.2d 310 (1994). See also Nation v W D E Electric Co, 454 Mich.

489, 494; 563 N.W.2d 233 (1997). This task begins by examining the language of the statute itself. The words of a statute provide "the most reliable evidence of its intent" United States v Turkette, 452 U.S. 576, 593; 101 S. Ct. 2524; 69 L. Ed. 2d 246 (1981). If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. Tryc v Michigan Veterans' Facility, 451 Mich. 129, 135; 545 N.W.2d 642 (1996). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. Luttrell v Dep't of Corrections, 421 Mich. 93; 365 N.W.2d 74 (1984).

In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as "its placement and purpose in the statutory scheme." Bailey v United States, 516 U.S. 137, 145; 116 S. Ct. 501; 133 L. Ed. 2d 472 (1995). See also Holloway v United States, 526 U.S. 1; 119 S. Ct. 966; 143 L. Ed. 2d 1 (1999). As far as possible, effect should be given to every phrase, clause, and word in the statute. Gebhardt v O'Rourke, 444 Mich. 535, 542; 510 N.W.2d 900 (1994). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. Aetna Finance Co v Gutierrez, 96 N.M. 538; 632 P.2d 1176 (1981)."

It is a general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears. Dale v Beta-C, Inc, 227 Mich. App. 57, 68; 574 N.W.2d 697 (1997); Weems v Chrysler Corp, 448 Mich. 679, 699; 533 N.W.2d 287 (1995). See also 2A Singer, Sutherland Statutory Construction (5th ed), § 47.33, p 270."

Sun Valley at 236-237.

The controlling statute regarding the filing and serving of Habitual Offender Notices is MCL 769.13. MCL 769.13(1) and (2) state as follows:

"§ 769.13. Notice of intent to seek enhanced sentence; filing by prosecuting attorney; challenge to accuracy or constitutional validity; evidence of existence of prior conviction; determination by court; burden of proof.

Sec. 13. (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, 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.***

(2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court **and served upon the defendant or his or her attorney within the time provided in subsection (1)**. The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court."

(Emphasis added).

* * *

The Court in People v Ellis, 224 Mich App 752; 569 NW2d 917 (1997) addressed the issue of timely filing and serving an Habitual Offender Notice:

"If a prosecutor wishes to file a supplemental information alleging that a defendant is an habitual offender, he must do so "promptly." People v Fountain, 407 Mich. 96, 98; 282 N.W.2d 168 (1979). In defining "promptly," our Supreme Court has stated: The purpose of requiring a prosecutor to proceed "promptly" to file the supplemental information is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense. We conclude that a standard which would find a filing on the day of trial to suffice is an inadequate one. **We recognize that any "rule" which we might establish is subject to the criticism that it is arbitrary. However, we believe that the imposition of a "rule" is preferable to the ad hoc decision-making which has been the practice heretofore.**

Accordingly, we hold that a supplemental information is filed "promptly" if it is filed not more than 14 days after the defendant is arraigned in circuit court (or has waived arraignment) on the information charging the underlying felony, or before trial if the defendant is tried within that 14-day period. We believe that such a rule allows the prosecutor sufficient time to make a decision concerning supplementation while at the same time providing notice at an early stage of the proceedings to the defendant of the potential consequences of conviction of the underlying felony. [People v Shelton, 412 Mich. 565, 569; 315 N.W.2d 537 (1982).]

The Legislature has seen fit to enlarge the time within which a prosecutor may file an habitual offender information to twenty-one days:

(1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's 21 days after the filing of the information charging the underlying offense.

(2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). [MCL 769.13; MSA 28.1085, as amended by 1994 Pa. 110.]

As this Court has recently held, this statute reflects a bright-line test for determining whether a prosecutor has filed a supplemental information "promptly." People Bollinger, 224 Mich. App. 491, 492; 569 N.W.2d 646 (1997)."

Ellis at 754-755. (Emphasis added).

* * *

Given the time line in this case, it is clear that Appellee failed to comply with the service requirements of MCL 769.13 when Appellee failed to serve the defense with a copy of the sentence enhancement request within 21 days of filing the same in circuit court. Given this violation of MCL 769.13, the proper remedy is to strike the sentence enhancement. This is true whether or not the untimely service prejudiced Defendant. See People v Cobby, 463 Mich 893; 618 NW2d 768 (2000).

The Michigan Supreme Court in Cobby, in rejecting the appellate court's ruling in People v Cobby, Unpublished, Michigan Court of Appeals, (Docket No. 204155, April 19, 1999 at page 2-3 attached as **Exhibit H**) "that although the prosecution's failure to serve notice upon defendant was technically a violation of the statute, such error was harmless because defendant had actual notice of this filing. . . ." stated as follows:

"On order of the Court, the application for leave to appeal from the April 20, 1999 decision of the Court of Appeals is considered, and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this case to the trial court. On remand, the defendant's sentence, as a fourth habitual offender, shall be VACATED and the defendant resentenced **because the prosecutor has not proven that the notice of sentence enhancement was served on defendant within 21 days after the defendant was arraigned**. In all other respects, the application for leave to appeal is DENIED.

We do not retain jurisdiction."

Cobley , 463 Mich at 893 (Emphasis added) (See opinion also attached as **Exhibit I**).

* * *

During the Michigan Court of Appeals proceedings in this case, Plaintiff-Appellee relied primarily on three unpublished rulings in its attempt to overturn current Michigan Supreme Court precedent. Those cases include the following: in People v Cobley, Unpublished, Michigan Court of Appeals, (Docket No. 204155, April 19, 1999) (See **Exhibit J**), People v Hardwick, Unpublished Memorandum, Michigan Court of Appeals, (Docket No. 231393, August 9, 2002) (See **Exhibit J**), People v Bouie, Unpublished Memorandum, Michigan Court of Appeals, (Docket No. 232963, October 11, 2002) (See **Exhibit J**) and People v Johnson, Unpublished Memorandum, Michigan Court of Appeals, (Docket No. 304273, June 21, 2012) (See **Exhibit J**).

People v Cobley, Unpublished Opinion Michigan Court of Appeals Decided April 20, 1999 (Docket No. 204155)

In People v Cobley, Unpublished Opinion Michigan Court of Appeals Decided April 20, 1999 (Docket No. 204155) defendant was **convicted** of two counts of felonious assault, malicious destruction of property over \$100.00 and escape from lawful custody. Defendant was sentenced as a fourth habitual offender. Defendant's appeal included an assertion that the prosecuting attorney failed to serve notice of the prosecutors intent to seek an enhanced sentence. As to the above assertion, the Cobley Court concluded as follows:

"We conclude that although the prosecutor's failure to serve notice upon defendant was technically a violation of the statute, such error was harmless because defendant had actual notice of this filing well before trial, and he did not suffer any prejudice by the lack of service."

Cobley at page 2 (See People v Cobely attached as **Exhibit H**).

As noted above, the Michigan Supreme Court in Cobley rejected the above-noted reasoning. The service requirements of MCL 769.13 are quite clear. The absolute best way to provide a defendant with actual notice of any sentence enhancement is to serve a copy of the Information (or notice enhancement) on defendant or defendant's attorney. It is not the job of a defense attorney to guess whether a prosecuting attorney intends to seek an habitual fourth offense notice, simply because the prosecuting attorney sought such a request in the district court. Certainly, a defense attorney may assume that a prosecutor may seek a similar habitual offender notice in the circuit court. The great thing that MCL 769.13 does is remove all assumptions and provides the defense with documentation of the prosecuting attorneys intentions regarding whether or not to seek an Habitual Offender – Fourth Offense Notice.

People v Hardwick, Unpublished Memorandum Opinion Michigan Court of Appeals Decided August 9, 2012 (Docket No. 231393)

In People v Hardwick, Unpublished Opinion Michigan Court of Appeals, Decided August 9, 2012 (Docket No. 231393) defendant was **convicted** of larceny from a person and was sentenced to five to ten years in prison. In the Felony Complaint, the prosecutor included an Habitual Offender – Fourth Offense Notice. The district court register showed that the defendant was arraigned on “all counts” and the return to circuit court includes defendant’s preliminary examination with the following statement:

“I understand that I will be bound over to the Circuit Court on the charges in the complaint and warrant.” Hardwick at 2 (See **Exhibit I**).

* * *

Interestingly, a review of the Adult Bind Over form (attached as **Exhibit E**) does not

indicate that Appellant was bound over to the circuit court on the charges in the complaint. Further, Appellant was not provided with a copy of the Felony Information at the close of the preliminary examination.

The Hardwick court refused to set aside defendant's habitual offender's sentence stating that:

"Because the notice of intent was filed as part of the information, it was timely filed under MCL 769.13. Although defendant claims that he was never served with a copy of the information and notice, the lower court file establishes that defendant and his attorney had **actual notice of the intent to seek enhancement as a fourth felony offender from the day the complaint and warrant were issued**. Under these circumstances, we decline to vacate defendant's habitual offender sentence."

People v Hardwick at 2 (Emphasis added).

Notwithstanding the above holding in Hardwick, the only way to prove actual notice pursuant to MCL 769.13(2) is to serve defendant with a copy of the intent to seek an enhancement of sentence within 21 days after such a request is filed.

People v Bouie, Unpublished Memorandum Opinion Michigan Court of Appeals Decided October 11, 2002 (Docket No. 232963)

In People v Bouie, Unpublished Memorandum Opinion Michigan Court of Appeals Decided October 11, 2002 (Docket No. 232963) the defendant was **convicted** of assault with intent to do great bodily harm less than murder, MCL 750.84 and appealed thereafter. Defendant's appeal included an assertion that the prosecutor failed to timely file a notice of intent to seek sentence enhancement. Defendant waived circuit court arraignment and acknowledged by his signature that he received and read the information and understood the substance of the charges. The information filed in the circuit court contained the same notice of intent to seek enhancement that was contained in the complaint and warrant.

The Bouie case does not apply to this case because here Defendant-Appellee did not receive a copy of the Information by the deadline outlined in MCL 769.13.

People v Johnson, Unpublished Opinion, Michigan Court of Appeals, (Docket No. 304273, June 21, 2012)

The Johnson case involves another conviction and appeal of right. The prosecution timely filed an Felony Information on September 28, 2006 and a supplemental Information the same day that sought a sentence enhancement as a fourth habitual offender. The defendant was arraigned on October 13, 2006 and on February 23, 2007 the prosecution filed a motion to amend the supplemental Information to correct the dates of the convictions.

This case is distinguishable because in Johnson, there is no argument that the prosecution served the Information in an untimely manner. The argument is that the Information was timely served but the dates of convictions were incorrect. In short, the argument in Johnson is simply an objection to allowing dates to be corrected.

As is quite clear, the facts and holding in Johnson are completely distinguishable from this case and should be discarded in any analysis.

DISCUSSION

Plaintiff-Appellant Ingham County Prosecuting Attorney's office failed to comply with the service requirement outlined in MCL 769.13. This fact is not in dispute. Based on the records, the prosecutor filed the Felony Information on February 27, 2013. All the prosecuting attorney needed to do is place a copy of this Information in an envelope and mail the same to defense counsel (or send the document via e-mail to defense counsel) within 21 days of filing the same. Not only did this not happen, but the prosecuting

attorney failed to hand defense counsel a copy of the Information when they met face to face at a Pre-Trial on March 27, 2013. There is simply no excuse for this failure.

The bottom line is that MCL 769.13 is clear and it works to the benefit of both the defense and prosecution bars because it removes all speculation, assumptions and arbitrariness as to what a defendant or defense attorney may have known. It removes appellate courts from relying on what may or may not have occurred in district courts.

Here, the prosecuting attorney did not serve the defense with a copy of the Felony Information (with the requested sentence enhancement) as required by MCL 769.13(2). The statute does not provide for an exception for late service or for harmless error. The Legislature gave prosecuting attorney's a clear and unambiguous deadline of when to file and serve a sentence enhancement. Failing to comply with this deadline is a clear violation of the statute, which requires dismissal of the habitual offender fourth offense notice.

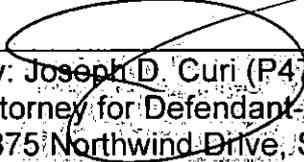
JUDGMENT APPEALED AND RELIEF SOUGHT

Defendant-Appellant appeals from the July 29, 2014, Michigan Court of Appeals Unpublished Opinion that reversed the trial court's ruling dismissing Defendant-Appellant's Habitual Offender Fourth Offense Notice and Defendant-Appellant moves this Honorable Court to either grant this application for leave to appeal, or reverse the orders and judgments of the Court of Appeals, and remand this case to the Ingham County Circuit Court for further proceedings.

Date: September 22, 2014

Respectfully submitted,

The Curi Law Office, P.L.L.C.


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STATE OF MICHIGAN
IN THE 30th JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 13-161-FH

v

Hon. Rosemarie E. Aquilina

FATEEN MUHAMMAD,
Defendant.

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JUN 18 2013

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ORDER
GRANTING DEFENDANT'S MOTION TO DISMISS
HABITUAL OFFENDER COUNT

At a session of said Court, held in the Courthouse
in the City of Lansing, County of Ingham
on the 13th day of June, 2013

PRESENT: THE HONORABLE ROSEMARIE E. AQUILINA,
CIRCUIT COURT JUDGE

This Court having reviewed Defendant's Motion to Dismiss Habitual Offender Count and the People's Response in opposition to the motion, and oral argument from defense counsel and the People, and after considering the above and the Court being otherwise fully advised in the premises;

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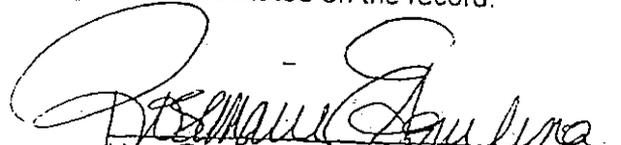
ATTACHMENT 10

IT IS HEREBY ORDERED:

Defendant's Motion to Dismiss Habitual Offender Count is GRANTED and the Habitual Offender Count is hereby dismissed for the reasons stated on the record.

Dated:

13 June 13


Hon. Rosemarie E. Aquilina: P37670
Circuit Court Judge,
Ingham County

WILLIAM B. MURPHY
CHIEF JUDGE
DAVID H. SAWYER
CHIEF JUDGE PRO TEM
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TO ATTORNEYS OF RECORD:

Enclosed with this letter is the decision and opinion in the entitled matter. Under MCR 7.215(E), this opinion is the judgment of the Court of Appeals. The official date of the filing of this opinion is the date that is printed on it, and all time periods for further action under the rules will run from that date. See MCR 7.215(F) and (I), and MCR 7.302(C)(2)(b).

If the words *For Publication* appear on the face of this opinion, it will be published in the Michigan Appeals Reports. If the word *Unpublished* appears on the face of this opinion, it was not slated for publication at the time it was released. See MCR 7.215(A).

Although an opinion that is to be published is official as of the date that is printed on it, actual publication will be delayed until editorial work is completed in the Reporter's Office. This editorial work may result in slight changes in style or in citations when the opinion is published in the Michigan Appeals Reports.

I hereby certify that the annexed is a true and correct copy of the opinion filed in the record of the Court of Appeals in the entitled matter and that the date printed thereon is the actual date of filing.

Very truly yours,

Jerome W. Zimmer Jr.
Chief Clerk

JWZ/las
Encl.
cc: Trial Judge or Agency

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STATE OF MICHIGAN
COURT OF APPEALS

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JUL 30 2014

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant.

v

FATEEN ROHN MUHAMMAD,

Defendant-Appellee.

UNPUBLISHED

July 29, 2014

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

the habitual offender charge was a factor that was used in ongoing plea negotiations. The proof of service requirement in MCL 769.13(2) . . . is designed to ensure that a defendant promptly receives notice of the potential consequences of an habitual offender charge should he be convicted of the underlying offense. . . . Thus, where there is no dispute that defendant was actually aware of the prosecutor's intent to file the habitual information, we conclude that defendant was not prejudiced by the prosecutor's noncompliance with the statute. [*Cobley*, unpub. op at 1-2 (citations and footnote omitted).]

In lieu of granting leave to appeal, our Supreme Court remanded the matter to the trial court instructing the trial court that the defendant's fourth habitual offender status was vacated "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. As stated by the majority, an order of our Supreme Court is binding precedent when the rationale can be understood. *People v Edgett*, 220 Mich App 686, n 6; 560 NW2d 360 (1996). Clearly, this Court in *Cobley* based its affirmance of the defendant's fourth habitual status on the harmless error rule, MCL 769.26. Our Supreme Court rejected application of the harmless error rule to violations of MCL 769.13(2) when the prosecutor cannot prove that the notice of sentence enhancement was served on the defendant within the statutory timeframe. Most assuredly in *Cobley*, had our Supreme Court been of the opinion that a violation of MCL 769.13(2) was subject to the harmless error rule, it would have so stated. Instead, the Court reversed this Court's decision, which was based on the very same rationale the majority relies on in this case.

This issue arose again in the case of *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2012 (Docket No. 304273). In *Johnson*, this Court found that the prosecution timely filed the original information on September 28, 2006. The trial court arraigned the defendant on October 13, 2006 and on February 23, 2007, the prosecutor filed a motion seeking to amend the supplemental information based on a realization that the dates and convictions listed pertaining to sentencing enhancement were incorrect. This Court, citing its prior decision in *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999), held as follows:

Similar to the factual circumstances of *Walker*, [the defendant] makes no claim that he did not receive the notice of intent to enhance but simply contends that the [order permitting amendment of the supplemental information] was not filed with the lower court. If true, this in no way prejudiced defendant's ability to respond to the habitual offender charge. Specifically, a prosecutor's failure to strictly follow the statute does not necessarily offend due process, if in fact a defendant has received actual notice. [*Johnson*, unpub op at 8 (quotation marks and citations omitted).]

The defendant in *Johnson* applied for leave to appeal in our Supreme Court, which held:

On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we AFFIRM the result reached in the June 21, 2012 judgment of the Court of Appeals. Defendant was given timely notice of his enhancement level and had sufficient prior convictions to support a fourth habitual enhancement. Relief is

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.

Justice Christopher M. Murray
Justice Peter D. O'Connell

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FATEEN ROHN MUHAMMAD,

Defendant-Appellee.

UNPUBLISHED

July 29, 2014

No. 317054

Ingham Circuit Court

LC No. 13-000161-FH

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

BORRELLO, J., (*dissenting*).

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. My colleagues in the majority would hold that the harmless error rule, codified in statute, MCL 769.26 and court rule, MCR 2.613(A) applies to errors in the application of MCL 769.13(2). Accordingly, they would we reverse. While I find no fault in the reasoning behind their application of the afore-cited harmless error rule to MCL 769.13(2), I respectfully dissent because I believe we, like the trial court, are bound by our Supreme Court's order in *People v Cobley*, 463 Mich 893; 618 NW2d 768 (2000).

This Court, in *People v Cobley*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 1999 (Docket No. 204155) had a virtually identical factual scenario as is presented in this case. In *Cobley*, this Court made the following specific findings and conclusions of law relevant to this issue:

We conclude that although the prosecutor's failure to serve notice upon defendant was technically a violation of the statute, such error was harmless because defendant had actual notice of this filing well before trial, and he did not suffer any prejudice by the lack of service.

It is undisputed that the prosecutor filed timely notice of his intent to seek an enhanced sentence based upon defendant's habitual offender status. In addition, the record indicates that the prosecutor informed the court, defendant and defense counsel at the arraignment that he "will be filing a supplemental information alleging him as a fourth time habitual offender." In fact, defense counsel did not contest that he received actual notice of the prosecutor's intent to file the supplemental information well in advance of trial, nor did he contest that

served" pursuant to MCL 769.13. Relying on *People v Cobley*, 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 *Cobley*. 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. [*Cobley*, 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.

barred by MCL 769.26 because there was no miscarriage of justice when the trial court allowed the prosecution to amend the notice to correct the convictions or when it sentenced defendant as a fourth habitual offender. In addition, affirming defendant's sentence as a fourth habitual offender is not inconsistent with substantial justice. MCR 2.613(A). [*People v Johnson*, 495 Mich 919; 840 NW2d 373 (2013).]

While our Supreme Court affirmed this Court's result in *Johnson*, it specifically stated as one of its reasons for so finding was that "[d]efendant was given timely notice of his enhancement level" Such was not the case here. The prosecution admits, and the majority concedes, that defendant was not given timely notice pursuant to MCL 769.13(2). Therefore, while I have no quarrel with the majority's application of the harmless error rule to situations such as this where defendant had notice of the prosecutor's intent to file the enhancement, and where it appears the district court informed defendant that he would be facing enhanced charges, because there was no timely notice in this case, it is analogous to *Cobley* and not *Johnson*, and I believe we are bound by our Supreme Court to affirm the trial court's ruling.

/s/ Stephen L. Borrello

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STATE OF MICHIGAN

IN THE 54-A JUDICIAL DISTRICT COURT FOR THE CITY OF LANSING

THE PEOPLE OF THE STATE OF MICHIGAN,

v

File No. 13-00576-FY

FATEEN R. MUHAMMAD,

Defendant.

ARRAIGNMENT

BEFORE THE HONORABLE FRANK J. DELUCA, DISTRICT JUDGE

Lansing, Michigan - Wednesday, February 6, 2013

Courroom No. 4

RECORDED BY:

Julia M. Cherry, CER-5287
Certified Electronic Recorder
(517) 483-4412

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1	
2	WITNESSES
3	None
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9	EXHIBITS:
10	None
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1 Lansing, Michigan

2 Wednesday, February 6, 2013 - at 3:24 p.m.

3 THE COURT: Fateen Muhammad.

4 THE DEFENDANT: Good morning, sir.

5 THE COURT: Hi, Mr. Muhammad. How are you?

6 THE DEFENDANT: I was peaceful until I got
7 arrested yesterday.

8 THE COURT: I--I didn't expect to see you 'cause
9 I thought you were in Fort Gratiot, and you were coming
10 back.

11 THE DEFENDANT: I did go to Fort Gratiot, and I
12 came back here to do some work. And my wife asked for
13 some help, and I went to help her and--

14 THE COURT: 13-00576, and this is a charge, sir,
15 that says that on or about the 5th day of February, of
16 2013, at or near Edgewood, 3300 block, that you committed
17 the offense of home invasion. That's a 20 year felony.
18 And in count two--that's home invasion first degree--
19 count two is assault with intent to do great bodily harm.
20 Each of those has a habitual notice. The penalties could
21 be made greater than 20 years and 10 years respectively.

22 And, sir, in regard to these charges, you're
23 entitled to have a preliminary examination now scheduled
24 before Judge Alderson on the 15th day of February with a
25 pre-exam conference on the 12th day of February. And

1 those are times when you must be present. You're
2 entitled to be represented by a lawyer. And if you
3 couldn't afford one, the Court would consider appointing
4 one for you at public expense. Are you asking for a
5 lawyer at public expense?

6 THE DEFENDANT: Yes, sir. Do I get to choose
7 one?

8 THE COURT: No, you don't get to choose. You--
9 yes, you do. You can choose whatever lawyer you want if
10 you hire your own; if you hire your own.

11 THE DEFENDANT: Okay.

12 THE COURT: If not, then you get the one that we
13 appoint to you.

14 THE DEFENDANT: Then I'll take a court appointed
15 one today.

16 THE COURT: All right. 4-3-0-4 Guilford, Fort
17 Gratiot, Michigan 48059?

18 THE DEFENDANT: Yes, sir. And I came down here
19 to court report when I got a bond. I came down here and
20 made the report in front of you. So I'm not goin'
21 anywhere. I--and I can be on the train this evening
22 'cause I have a dog and a cat I have to feed. And I have
23 to exchange my bond money for work.

24 THE COURT: You're bond is \$25,000.00 cash or
25 surety. No out of state travel, no weapons, no alcohol

1 of drugs and no contact whatsoever with the victim.
2 There's a PPO in existence, sir. Now there's two court
3 orders. No contact. Any contact of any kind will cause
4 your bond to be revoked. Do you understand that?

5 THE DEFENDANT: Yes, sir. There will be no
6 contact.

7 THE COURT: All right, thank you, Mr. Muhammed.
8 That's all on the record.

9 THE DEFENDANT: Thank you.

10 THE COURT: Uh-hum.

11 THE DEFENDANT: Thank you, sir.

12 THE COURT: Uh-hum.

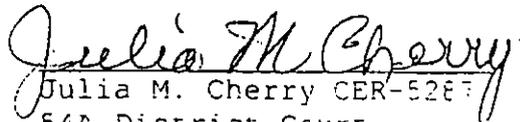
13 (At 3:28 p.m., proceedings concluded)

14
15 STATE OF MICHIGAN)

16 COUNTY OF INGHAM)
17

18 I certify that this transcript, consisting of five pages,
19 is a complete, true, and correct transcript of the proceedings
20 taken in this case on Wednesday, February 6, 2013.

21 Dated: June 10, 2013

22 
23 Julia M. Cherry CER-5287
24 54A District Court
25 124 West Michigan Avenue
Lansing, MI 48933
(517)483-4412

STATE OF MICHIGAN 54A JUDICIAL DISTRICT 30L JUDICIAL CIRCUIT	COMPLAINT FELONY	CASE NO.: DISTRICT: CIRCUIT:
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District Court ORI: MI330075J Circuit Court ORI: MI330055J
 124 W. MICHIGAN AVE. LANSING, MI 48933 517-483-4433 313 W. Kalamazoo Lansing, MI 48901 517-483-6500

THE PEOPLE OF THE STATE OF MICHIGAN	Defendant's name and address V FATEEN ROHN MUHAMMAD 4304 GUILFORD GRATIOT, MI 48059 Sex: M Race: Black	Victim or complainant KRYSTAL MUHAMMED Complaining Witness OFC WENDY PRINCE
--	--	--

Co-defendant(s)	Date: On or about 02/05/2013
-----------------	---------------------------------

City/Twp./Village CITY OF LANSING	County in Michigan INGHAM	Defendant TCN K813070193W	Defendant CTN 33-13000949-01	Defendant SID 1372717A	Defendant DOB 01/19/1967
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Police agency report no. 33LLA 130205001211	Charge SEE BELOW	DLN Type:	Vehicle Type	Defendant DLN M530244744052
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Witnesses
 KRYSTAL MUHAMMED OFC WENDY PRINCE OFC RACHEL BAHL
 OFC PENNI ELTON MAIL CARRIER

STATE OF MICHIGAN, COUNTY OF INGHAM

The complaining witness says that on or about 02/05/2013 at 337 E Edgewood #5. City of Lansing, Ingham County, Michigan the defendant contrary to law:

COUNT 1: HOME INVASION - 1ST DEGREE

did enter without permission a dwelling located at 337 East Edgewood, #5, and, while entering, present in, or exiting did commit an assault, and while entering, present in, or exiting the dwelling Krystal Muhammed, was lawfully present therein; contrary to MCL 750.110a(2). [750.110A2]
 FELONY: 20 Years and/or \$5,000.00

COUNT 2: ASSAULT WITH INTENT TO DO GREAT BODILY HARM LESS THAN MURDER

did make an assault upon Krystal Muhammed with intent to do great bodily harm less than the crime of murder; contrary to MCL 750.84. [750.84].
 FELONY: 10 Years or \$5,000.00; DNA to be taken upon arrest.

HABITUAL OFFENDER - FOURTH OFFENSE NOTICE

Take notice that the defendant was previously convicted of three or more felonies or attempts to commit felonies in that on or about 2/25/2009, he or she was convicted of the offense of Deliver/Manufacture Narcotics Less Than 50 Grams in violation of MCL 333.74012A4; in the 30th Circuit Court for Lansing, State of Michigan;
 And on or about 12/05/2007, he or she was convicted of the offense of Breaking and Entering a Building with Intent in violation of MCL 750.110; in the 30th Circuit Court for Lansing, State of Michigan;
 And on or about 08/04/1994, he or she was convicted of the offense of Assault with a Dangerous Weapon in violation of MCL 750.82; in the Detroit Records Court for Detroit, State of Michigan;

Therefore, defendant is subject to the penalties provided by MCL 769.12. [769.12]
PENALTY: Life if primary offense has penalty of 5 Years or more; 15 Years or less if primary offense has penalty under 5 Years. The maximum penalty cannot be less than the maximum term for a first conviction.

Upon conviction of a felony or an attempted felony court shall order law enforcement to collect DNA identification profiling samples.

The complaining witness asks that the defendant be apprehended and dealt with according to law.

(Peace Officers Only) I declare that the statements above are true to the best of my information, knowledge and belief.

Warrant authorized on

by:

Molly H. Greenwalt 2/16/2013 11:32:35 AM

MOLLY H. GREENWALT (P73583)
ASSISTANT PROSECUTING ATTORNEY

Complaining Witness Signature

Subscribed and sworn to before me on _____
Date

Judge/Magistrate/Clerk Bar no.

STATE OF MICHIGAN JUDICIAL DISTRICT JUL JUDICIAL CIRCUIT	ADULT BIND OVER	CASE NO.: DISTRICT: CIRCUIT: <u>13-00570</u>
District Court ORI: MI330075J 124 W. MICHIGAN AVE. LANSING, MI 48933 517-483-4433		Circuit Court ORI: MI330055J 313 W. Kalamazoo, Lansing, MI 48901 517-483-6500

THE PEOPLE OF THE STATE OF MICHIGAN	Defendant's name and address V FATEEN ROHN MUHAMMAD <i>Aquiline</i> 4304 GUILFORD GRATIOT, MI 48059 Sex: M Race: Black <u>13-161-FH</u>	Victim or complainant KRYSTAL MUHAMMED Complaining Witness OFC WENDY PRINCE
--	---	--

Co-defendant(s)		Date: On or about 02/05/2013			
City/Twp./Village CITY OF LANSING	County in Michigan Ingham	Defendant TCN K813070193W	Defendant CTN 33-13000949-01	Defendant SID 1372717A	Defendant DOB 01/19/1967
Police agency report no. 33LLA 130205001211	Charge SEE BELOW	DLN Type:	Vehicle Type	Defendant DLN M530244744052	

Date: 2/15/13 District Judge: Louis Aderson Bar no 40151

Reporter/Recorder <u>Tami Bennett</u>	Cert. no. <u>5221</u>	Represented by counsel no. <u>Joseph Cusi</u>	Bar <u>47811</u>
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EXAMINATION WAIVER

1. I, the defendant, understand:
 - a. I have a right to employ an attorney.
 - b. I may request a court appointed attorney if I am financially unable to employ one.
 - c. I have a right to a preliminary examination where it must be shown that a crime was committed and probable cause exists to charge me with the crime.
2. I voluntarily waive my right to a preliminary examination and understand that I will be bound over to circuit court on the charges in the complaint and warrant (or as amended).

Defendant attorney _____ Bar no. _____
Defendant

ADULT BIND OVER

3. Examination has been waived.
4. Examination was held and it was found that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed the offense.
5. The defendant is bound over to circuit court to appear on 2/27/13 at 1:30 m.
Date Time
- on the charge(s) in the complaint.
- on the amended charge(s) of _____
MCL/PACC Code _____
6. Bond is set in the amount of \$ 500 Type of bond: C5 Posted
FEB 15 2013 Aderson Post
- Date 2013 **30TH CIRCUIT COURT** Bar no _____

MAY 10 2013

I hereby certify that the attachment is a true and correct copy of the original on file with this court.

Elizabeth A. Roberts
Deputy Clerk

C.R. BOND 2-5-14

ATTACHMENT 4

STATE OF ARIZONA
ELECTION TO STAND NEXT OF
ENTER NOT BUILT UP

13-576-FY

The defendant's name, address, and telephone number

Fateen Muhammad

The defendant is charged with the following offense(s):

Felony Complaint

1. The defendant is charged with the following offense(s):

2. The defendant has read the information and understands the nature of the charge(s)

3. The defendant understands the nature of the charge(s)

4. The defendant waives arraignment in open court

5. The defendant pleads not guilty to the charge(s) stands mute to the charge(s) and requests the court to enter a plea of not guilty.

stands mute to the charge(s) and requests the court to enter a plea of not guilty.

Defendant's name and signature: [Signature]
Address: 2975 Northwind Dr., Ste 137
East Lansing, MI 48823
Telephone: 333-9905

Defendant's name and signature: [Signature]
Address: _____
Telephone: _____

ENTRY OF PLEA

A plea of not guilty is entered on behalf of the defendant. Bond/Bail is continued.

CERTIFIED COPY
30TH CIRCUIT COURT

[Signature]
Clerk of Court

CRIMINAL PRE-TRIAL CONFERENCE ORDER

PEOPLE OF THE STATE OF MICHIGAN,

Docket No: 13-161-fl

Honorable Rosemarie E. Aquilina

Charges: h: 1, g6h, hab4

fateen muhammad

Prosecution Checklist:

- YES NO Additions/deletions to the witness list on the Information who will be called at trial?
If yes, explain: all mentioned in police report, mailman #62
- YES NO Discovery pursuant to MCR 6.201 and/or Brady complete? If no, explain: _____
- YES NO Intent to use MRE 609 convictions? If yes, specify: _____
- YES NO Intent to use MRE 404(b) evidence? If yes, specify: _____
- YES NO Physical exhibits, if any, are they available for inspection upon request?
If no, specify: _____

Plea offer by People: rt 1, dismiss habs: g6h

Defense Checklist:

- YES NO Are Competency and/or Criminal Responsibility at issue in this case?
If yes, specify: _____
- YES NO Have notices of defenses been served?
If yes, specify: _____

SCHEDULING INFORMATION/CUT-OFF DATES:

YES NO Special accommodations are needed.
If yes, specify: _____

Trial Type: Jury or Bench Anticipated length of trial (days) 1 wk

Special Jury Instructions prepared and agreed to by: _____

Defendant is in custody: YES NO Unusual legal issues: _____

Cut-off date for Motions: 2 wks before trial date Cut-off date for plea: 2 wks before trial date

ACCEPTANCE BY THE PARTIES: A Pre-Trial Conference having been held, the parties accept and agree to the information and cut-off dates listed above.

Assistant Prosecutor

P42811
Defendant/Attorney for Defendant

ORDER

The Court takes notice of the Pre-Trial Conference information above and Orders that the information and dates listed under Scheduling Information/Cut-Off Dates shall be amended only by Order of the Court for good cause shown.

NO PLEAS TO REDUCED CHARGES WILL BE ACCEPTED AFTER THE PLEA CUT-OFF DATE.

IT IS SO ORDERED.

Dated: 27 March 13

Rosemarie E. Aquilina
Honorable Rosemarie E. Aquilina, Circuit Court Judge

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,	:	
	:	
Plaintiff,	:	
	:	
-vs-	:	File No.
	:	13-161-FH
FATEEN ROHN MUHAMMAD,	:	
	:	
Defendant.	:	
	:	

MOTION TO DISMISS HABITUAL

BEFORE THE HONORABLE ROSEMARIE E. AQUILINA

Lansing, Michigan - May 29, 2013

APPEARANCES:

For the People: Ingham County Prosecutor
 ANDREW M. STEVENS (P73680)
 303 West Kalamazoo
 Lansing, MI 48933

For the Defendant:

 JOSEPH D. CURI (P47811)
 2875 Northwind Drive
 Suite 137
 East Lansing, MI 48823

Reported by: Genevieve A. Hamlin, CSR-3218

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN, :
Plaintiff, :
-vs- : File No. :
FATEEN ROHN MUHAMMAD, : 13-161-FH
Defendant. :

MOTION TO DISMISS HABITUAL
BEFORE THE HONORABLE ROSEMARIE L. AQUILINA
Lansing, Michigan - May 29, 2013

APPEARANCES:
For the People: Ingham County Prosecuted
ANDREW M. STEVENS (P73680)
303 West Kalamazoo
Lansing, MI 48933
For the Defendant: JOSEPH D. CURI (P24711)
2875 Northwind Drive
Suite 137
East Lansing, MI 48823
Reported by: Genevieve A. Hamlin, CSR-3218

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Lansing, Michigan
May 29, 2013
12:33 p.m.
RECORD

THE COURT: This is docket 13-161-FH,
People of the State of Michigan versus Fateen
Muhammad. Counsel.

MR. CURI: Your Honor, Joseph Curi here on
behalf of Fateen Muhammad. This is the time and
place set for defendant's motion to dismiss the
habitual count.

THE COURT: All right. And the record
should reflect that your client is seated at counsel
table.

MR. CURI: Correct.

THE COURT: Sir, you look like you're
having trouble seeing me. Are you okay?

THE DEFENDANT: Yes, ma'am. I wear
glasses, too. I just can't see. It's a little
bright in here compared to the county jail.

THE COURT: You, what?

THE WITNESS: It's a little bright in here
compared to where I usually be.

THE COURT: Okay. And, sir, could you
raise your right hand?

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WITNESS: PAGE
None

EXHIBITS:
None

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Do you swear or affirm the testimony you
are about to give will be the truth, the whole truth,
and nothing but the truth under penalty of perjury?

THE DEFENDANT: Yes, ma'am.

THE COURT: Thank you. You may put your
hand down. I don't anticipate you're going to say a
whole lot, but just in case, since we are talking, I
always swear everybody. This is a motion that your
attorney is bringing, but just in case I have to ask
you a couple questions, you've been sworn now, okay?

THE DEFENDANT: Thank you.

THE COURT: Have a seat, sir. Okay.
Counsel, you may proceed.

MR. CURI: Thank you, Your Honor. Your
Honor, this motion is brought under Michigan case law
MCL 769.13. I don't think any of the facts are in
dispute on this motion.

Essentially, as stated in the attached
Supreme Court order -- I should say, opinion dated
October 24, 2000, the Court is pretty clear that the
prosecutor cannot show that they not only filed but
served the defendant with the habitual notice. It's
clear.

The unpublished opinions that were attached
by the prosecutor only deal with filing. They don't

1 deal with serving. This opinion from the Supreme
2 Court deals with serving, which was not done.
3 There's no requirement that prejudices be had by
4 defendant. And the case that I cited indicates that
5 it's a bright line rule, which means it's
6 unambiguous. They have to do it. They didn't do it,
7 and there's no argument, so I think based on the law
8 as it stands today, since they didn't -- there's no
9 proof that they served because they didn't timely,
10 that that needs to be dismissed under the case law
11 and the statute. Thank you.

12 MR. STEVENS: Facts aren't in dispute.
13 However, Mr. Curi fails to recognize that this case
14 law is incomplete. As I indicated in my response,
15 since the Cobley case, which is the only case he
16 attached, which is a 2000 case, there have been --
17 and I cited at least two instances where a habitual
18 offender notice was not filed or served within 21
19 days except that it was attached either on the felony
20 complaint, the warrant, and information that was
21 started in district court, and because they were
22 present in district court, he was provided his
23 notice.

24 That's the exact same situation we have
25 here. When he was arraigned on the complaint in

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1 district court Judge DeLuca, knowing Judge DeLuca to
2 be the chief judge and having watched him do felony
3 arraignments, read that habitual offender notice. He
4 was arraigned on that felony complaint. No changes
5 were made to the felony complaint in district court
6 after the preliminary exam. That was then filed --
7 the information was then filed in circuit court.
8 Even on the pretrial statement he was provided notice
9 that he was a habitual offender, and Mr. Curi signed
10 it.

11 Additionally, I would note that he attached
12 an exhibit that shows he waived arraignment but he
13 modified what is otherwise acceptable as a SCAO
14 recognized document, so if he's modifying his waiver,
15 then I'm not sure this is an actual waiver of
16 arraignment, so this is an absolutely absurd result,
17 absurd motion to bring, knowing that his habitual
18 offender notice was attached to every piece of paper
19 from the beginning inception of this case. He was
20 well aware of it. The case law says knowing he was
21 aware of it from district court through circuit
22 court, there is no violation. If any violation, it's
23 harmless error. And, as I indicated, the waiver of
24 arraignment shows not only that he received the
25 felony complaint, but I question whether this is a

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1 valid waiver if he's going to modify the waiver, the
2 SCAO recognized document for his own liking. I
3 certainly don't know the answer to that question, but
4 this is merely an attempt to manipulate the
5 paperwork, the document to serve his own purpose, and
6 there's no way the People would even know that he's
7 modified the SCAO -- we don't receive a copy of this,
8 so I would ask that you deny this motion. Again,
9 this is based on case law but Mr. Curi's case law is
10 incomplete, and I have provided the court with at
11 least two examples where the Court of Appeals has
12 said that the argument that he's making is meritless,
13 so for that reason I'd ask that you deny the motion.

14 THE COURT: Well, I have a question for you
15 in that regard, and the question really revolves
16 around notice versus actual service, because I think
17 the Supreme Court talks about having that actual
18 notice of sentence enhancement being actually served,
19 and there's a big difference between having it read
20 and actual service, and the defendant has to be
21 served on it, I think, in accordance with the Cobley
22 case, and there's a difference there, and I'm looking
23 to that distinction. Can you address that or --

24 MR. STEVENS: Certainly.

25 THE COURT: Okay.

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1 MR. STEVENS: In the cases I cited,
2 specifically the Cowans case, in that case the
3 prosecutor did not file an information within 21
4 days. The Court of Appeals said because the habitual
5 notice was included and the defendant was advised of
6 the habitual notice in the warrant, the complaint,
7 and ultimately in the felony information, that was
8 the notice that he needed, and that's why the Court
9 of Appeals said in the Cowans case the argument that
10 that defendant was making, the same one that Mr. Curi
11 is making on behalf of Mr. Muhammad, is warrantless.
12 He was advised of it and knew of it at the beginning
13 of the case, just like Mr. Muhammad was. He was
14 served with all that paperwork. He acknowledges
15 receipt of that paperwork in his modified waiver of
16 arraignment, in his pretrial statement, during his
17 district court arraignment, so he received all of
18 that.

19 The fact that, again, the actual
20 information was not provided within 21 days is, if
21 anything, a harmless error. I hope that that
22 addressed Your Honor's question.

23 THE COURT: Let me hear the answer.

24 MR. CURI: Your Honor, I think in the
25 Cowans case that the prosecutor is relying on, not

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... of course, now I am, of course. I don't think
I need it for purpose of my motion -- the Cowans
says, the court indicated in part that the -- the
court concluded a lack of proof of service in the
file was harmless error because the defendant did not
argue that he had not received notice of intent to
seek enhancement but simply argued that the proof of
service was not in the file in the lower court. I'm
arguing -- and there's no factual dispute, we did not
receive notice within 21 days. That corresponds with
the Supreme Court rule.

And, Your Honor, in addressing the SCAO
forms, the well recognized SCAO forms, if Your Honor
will look at those, those indicate that we have
received a copy of the felony information at that
time. I have never received a copy of the felony
information after preliminary examination. If I
signed that, I think that would be perjury or it
would certainly be misrepresentation of what I
received. At that time I received a complaint.
Thank you.

MR. STEVENS: Then Mr. Curi is free not to
waive arraignment if he hasn't received it.

THE COURT: Mr. Curi, you are saying that
your client did not have actual and timely notice of

the enhancement?
MR. CURRI: There's no factual dispute.
Under case law they define that as 21 days from the
arraignment, that's how it's defined. If Mr.
Steven's argument is accurate, then there's no need
for having 21 in the statute whatsoever. It would be
harmless, Your Honor. It would absolutely be
harmless in every case they bring up and I think
that's why the Supreme Court says we're not going to
address this case except for this one issue, we're
going to remand it down to this one issue, and I
think they've spoken.

MR. STEVENS: That's not what the 21 days
is for. In fact, the Cobley case and the cases that
deal specifically with this issue address more
specifically supplemental informations. When there
are changes to the document or, for example, out of
state convictions are located, there needs to be a
cut off, and as the case law said, the reason for the
cut off is to provide the defendant prompt notice of
his consequences. He knew his consequences from the
inception of this case, so this idea that he had no
notice is just absolutely absurd on behalf of Mr.
Curi and his client. They knew from the beginning.

MR. CURRI: Your Honor, we're not arguing we

didn't receive service. That's not what I'm arguing.
I'm arguing that it was not within the statute, so --
I didn't make the rule.

THE COURT: I get it. You didn't make the
rule. I don't like the rule. And I have to say that
I'm with the People on this, but I can't rule in
favor of the People on this because of the case law.
I have to say that defendant clearly knows he has a
hab four. On the other hand, the rules are the
rules, and we have a constitution for a reason, and
we are America, and we're going to follow the rules,
and I don't like what I'm about to rule, but the
Supreme Court has spoken, and it is very clear, and,
Mr. Curi, what you say makes sense, and I'm not happy
about it, but it is what it is.

MR. CURRI: Sure.

THE COURT: Okay? I have to say, not
happy, but I'm ruling in your favor, and here's why,
so the record is clear so that I can be appealed, we
have, as the People have stated -- although
unpublished, we do have People versus Cowans,
C-o-w-a-n-s, and that's a 2008 case, and it clearly
states that MCL 769.13 provides the procedure for a
prosecutor to follow in order to seek an enhanced
sentence against a defendant based on prior felony

convictions. MCL 769.13(1) states that the
prosecutor must file written notice of the
enhancement within 21 days after defendant is
arraigned on the information. This statute creates a
bright line test to determine whether notice is
provided within the proper time limit; People versus
Ellis, 224 Mich App 752.

MCL 769.13(2) states that the prosecutor
must also file written proof of service of this
notice to seek enhancement. However, this court has
held that the lack of proof of service in the lower
court file is harmless if the defendant had actual
and timely notice of the enhancement, and they quote
People versus Walker, 234 Mich App 299, 1999.

When we get to People versus Cobley,
C-o-b-l-e-y, which is a Supreme Court case, 463
Michigan 893, October 24, 2000, case, that case talks
about a defendant being resentenced because the
prosecutor has not proven that the notice of sentence
enhancement was served on defendant within 21 days
after defendant was arraigned, and this case is
completely on point with what happened here. The
prosecutor essentially has 21 days to file written
notice of the enhancement. So, Mr. Curi, despite me
being troubled by this --

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MR. CURI: Sure.

THE COURT: -- it is a technicality, and you win your motion.

MR. CURI: Thank you. I'll file the order under the seven day rule.

THE COURT: So the habitual is dismissed. (Whereupon hearing concluded at 12:50 p.m.)

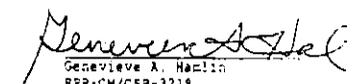
* * *

1 STATE OF MICHIGAN)
 2 COUNTY OF EATON) SS

3 I, GENEVIEVE A. HAMLIN, Certified Shorthand
 4 Reporter and Notary Public in and for the County of
 5 Eaton, (Acting in Ingham County) State of Michigan,
 6 do hereby certify that the foregoing was taken before
 7 me at the time and place hereinbefore set forth.

8 I FURTHER CERTIFY THAT said witness was
 9 duly sworn in said cause; that the testimony then
 10 given was reported by me stenographically;
 11 subsequently with computer-aided transcription,
 12 produced under my direction and supervision, and that
 13 the foregoing is a true and correct transcript of my
 14 original shorthand notes.

15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand and seal this 30th day of May, 2013.

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 21 Genevieve A. Hamlin
 22 RPP-CH/CSR-3218
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463 Mich. 893; 618 N.W.2d 768;
 2000 Mich. LEXIS 2075, *

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v RYAN PATRICK COBLEY, Defendant-Appellant.

SC: 114665

SUPREME COURT OF MICHIGAN

463 Mich. 893; 618 N.W.2d 768; 2000 Mich. LEXIS 2075

October 24, 2000, Decided

PRIOR HISTORY: [*1] COA: 204155. Shiawassee CC: 96-007655-FH.

OPINION

On order of the Court, the application for leave to appeal from the April 20, 1999 decision of the Court of Appeals is considered, and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this case to the trial court. On remand, the defendant's sentence, as a fourth habitual offender, shall be VACATED and the defendant resentenced because the prosecutor has not proven that the notice of sentence enhancement was served on defendant within 21 days after the defendant was arraigned. In all other respects, the application for leave to appeal is DENIED.

We do not retain jurisdiction.

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1999 Mich. App. LEXIS 1666, *

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v RYAN PATRICK COBLEY, Defendant-Appellant.

No. 204155

COURT OF APPEALS OF MICHIGAN

1999 Mich. App. LEXIS 1666

April 20, 1999, Decided

NOTICE: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Shiawassee Circuit Court. LC No. 96-007655 FH.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed the judgment of the Shiawassee Circuit Court (Michigan), which was entered on a jury's verdict that convicted defendant of two counts of felonious assault, malicious destruction of property over \$ 100, and escape from lawful custody in violation of Mich. Comp. Laws §§ 750.82, 750.377a, 750.197a. Defendant was sentenced as a fourth habitual offender, pursuant to Mich. Comp. Laws § 769.12, to concurrent prison terms.

OVERVIEW: Defendant essentially committed acts of terrorism against his victims. The trial court's judgment, which the court affirmed, convicted defendant of felonious assault, malicious destruction of property, and escape from lawful custody. The court held that, although the prosecutor failed to serve notice of his intent to seek an enhanced sentence against defendant as an habitual offender, such error was harmless because defendant had actual notice of the filing of the habitual information well before trial. Further, he did not suffer prejudice by the lack of service. The court determined that the trial court correctly permitted the prosecutor to amend the supplemental information, to reflect the correct prior conviction of attempted breaking and entering from breaking and entering, because the amendment did not increase the severity of the habitual information charge. The court concluded that the trial court imposed a sentence that was proportionate to the offense and the offender given defendant's criminal history and the intolerable nature of his conduct toward his victims.

OUTCOME: The court affirmed the trial court's judgment that convicted defendant of felonious assault, malicious destruction of property, and escape from lawful custody.

CORE TERMS: habitual offender, supplemental, prosecutor, sentence, notice, sentencing, sentencing guidelines, prosecutor's failure, serve notice, prior convictions, imprisonment, habitual, amend, destruction of property, enhanced sentence, actual notice, defense counsel, breaking and entering, disproportionate, prejudiced, convicted, malicious, sentenced, correctly, offender, assault, contest

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Criminal Law & Procedure > Sentencing > Guidelines > Adjustments & Enhancements > Criminal History > Prior Felonies 

Criminal Law & Procedure > Sentencing > Guidelines > Adjustments & Enhancements > Criminal History > Prior Misdemeanors 

HN1  The proof of service requirement in Mich. Comp. Laws § 769.13(2) is designed to ensure that a defendant promptly receives notice of the potential consequences of an habitual offender charge should he be convicted of the underlying offense. Thus, where there is no dispute that a defendant is actually aware of the prosecutor's intent to file the habitual information, that defendant is not prejudiced by the prosecutor's noncompliance with § 769.13(2). More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection 

HN2  A defendant's right to adequate notice of the charges against him upon which he is to defend is guaranteed by the Due Process Clause of U.S. Const. amend. XIV. However, prejudice is essentially a prerequisite to any claim of inadequate notice. More Like This Headnote

Criminal Law & Procedure > Accusatory Instruments > Informations > General Overview 

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Time Limitations 

Criminal Law & Procedure > Sentencing > Guidelines > Adjustments & Enhancements > Criminal History > General Overview 

HN3  The prosecution may not amend an otherwise timely supplemental information outside the 21 day period that is set forth in Mich. Comp. Laws § 769.13(1) to allege additional prior convictions that will, in effect, increase the level of the supplemental charge. However, this rationale is inapplicable to a situation where the prosecutor merely seeks to correct an error, and the correction does not elevate the level of the supplemental charge. More Like This Headnote

Criminal Law & Procedure > Sentencing > Appeals > Standards of Review > Abuse of Discretion 

Criminal Law & Procedure > Sentencing > Proportionality 

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview 

HN4 When a defendant is sentenced as an habitual offender, the sentencing guidelines do not apply and may not be considered on appeal in determining the appropriate sentence. Instead, an appellate court's review is limited to whether the trial court has abused its discretion in imposing defendant's sentence. A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. Thus, an habitual offender's sentence must comply with the principle of proportionality. More Like This Headnote

JUDGES: Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

OPINION

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, malicious destruction of property over \$ 100, MCL 750.377a; MSA 28.609(1), and escape from lawful custody, MCL 750.197a; MSA 28.394(1). As a fourth habitual offender, defendant was subject to an enhanced penalty pursuant to MCL 769.12; MSA 28.1084. The trial court sentenced defendant to concurrent terms of ten to fifteen years' imprisonment for the assault convictions, ten to fifteen years' imprisonment for the malicious destruction of property conviction, and 260 days' imprisonment for the escape conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in sentencing him as an habitual offender because the prosecutor failed to serve notice of his [*2] intent to seek an enhanced sentence on defendant, as required by MCL 769.13; MSA 28.1085. We conclude that although the prosecutor's failure to serve notice upon defendant was technically a violation of the statute, such error was harmless because defendant had actual notice of this filing well before trial, and he did not suffer any prejudice by the lack of service.

It is undisputed that the prosecutor filed timely notice of his intent to seek an enhanced sentence based upon defendant's habitual offender status. In addition, the record indicates that the prosecutor informed the court, defendant and defense counsel at the arraignment that he "will be filing a supplemental information alleging him as a fourth time habitual offender." In fact, defense counsel did not contest that he received actual notice of the prosecutor's intent to file the supplemental information well in advance of trial, nor did he contest that the habitual offender charge was a factor that was used in ongoing plea negotiations. **HN1** The proof of service requirement in MCL 769.13(2); MSA 28.1085(2) is designed to ensure that a defendant promptly receives notice of the [*3] potential consequences of an habitual offender charge should he be convicted of the underlying offense. *People v Ellis*, 224 Mich App 752, 754; 569 NW2d 917 (1997). Thus, where there is no dispute that defendant was actually aware of the prosecutor's intent to file the habitual information, we conclude that defendant was not prejudiced by the prosecutor's noncompliance with the statute. ¹

FOOTNOTES

¹ Defendant cites *People v Bollinger*, 224 Mich App 491; 569 NW2d 646 (1997), to support his claim that the trial court erred in sentencing him as an habitual offender. We find that *Bollinger* is inapposite, however, because that case dealt with a prosecutor's failure to file the supplemental charge within the statutory period, and did not address the consequences where the prosecutor fails to serve notice of the supplemental charge on the defendant, which is the situation presented here.

In a related argument, defendant contends that the prosecutor's failure [*4] to serve him with notice of the charge violated his due process right to be informed of the charges against him. We disagree. ^{HN2} A defendant's right to adequate notice of the charges against him upon which he is to defend is guaranteed by the Due Process Clause of the Fourteenth Amendment. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). However, "prejudice is essentially a prerequisite to any claim of inadequate notice." *Id.* at 602, n 6, citing *People v Traugber*, 432 Mich 208, 215; 439 NW2d 231 (1989) ("The dispositive question is whether the defendant knew what acts he was being tried for so he could adequately put forth a defense. Put another way, was the defendant prejudiced by the information[?]"). Here, defendant was aware of the charges against him, and had sufficient time and ability to fully defend against the supplemental information. *People v Walker*, Mich App ; NW2d (1999). Therefore, defendant's due process argument lacks merit.

Next, defendant contends that the trial court erred in allowing the prosecutor to amend the supplemental habitual information [*5] at sentencing to correct one of defendant's prior convictions from breaking and entering to attempted breaking and entering. We find no error. In *Ellis, supra* at 755-757, this Court held that ^{HN3} the prosecution may not amend an otherwise timely supplemental information outside the twenty-one day period set forth in MCL 769.13(1); MSA 28.1085(1) to allege additional prior convictions that would, in effect, increase the level of the supplemental charge. However, the rationale employed in *Ellis* is inapplicable to a situation where the prosecutor merely seeks to correct an error, and the correction does not elevate the level of the supplemental charge. *Id.* at 757, n 2, citing *People v Manning*, 163 Mich App 641; 415 NW2d 1 (1987). We find *Ellis* to be correctly decided and decline defendant's invitation to reconsider that holding. Accordingly, because the amendment, albeit untimely, did not increase the severity of the habitual information charge, we conclude that the trial court correctly permitted the prosecutor to amend the supplemental information to reflect the correct prior conviction.

Finally, [*6] defendant contends that the trial court incorrectly calculated his sentencing guidelines' range and imposed a disproportionate sentence. We disagree. ^{HN4} Defendant was sentenced as an habitual offender; hence, the sentencing guidelines do not apply, *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996), and may not be considered on appeal in determining the appropriate sentence, *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996). Instead, this Court's review is limited to whether the trial court abused its discretion in imposing defendant's sentence. *Cervantes, supra* at 627; *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). Thus, an habitual offender's sentence must comply with the principle of proportionality. [*7] *Id.* at 650.

Initially, we note that because the sentencing guidelines do not apply to habitual offenders, *Cervantes, supra* at 630, any error in calculating defendant's sentencing score is inconsequential. Moreover, after a thorough review of the record, we conclude that, contrary to defendant's contention, the trial court sufficiently articulated the reasons for defendant's sentence, focusing particularly on defendant's criminal history and the intolerable nature of defendant's conduct which amounted to an act of terrorism against the victims, *People v Poole*, 186 Mich App 213, 214-215; 463 NW2d 478 (1990), and imposed a sentence that was proportionate to the offense and the offender, *Milbourn, supra* at 634-635.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra

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EXHIBIT J

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONY D. HARDWICK,

Defendant-Appellant.

UNPUBLISHED
August 9, 2002

No. 231393
Wayne Circuit Court
LC No. 99-012454

Before: Hood, P.J., and Sawyer and Zahra, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of larceny from a person, MCL 750.357. The trial court sentenced him to three to ten years' imprisonment and then vacated that sentence and sentenced defendant as a fourth felony offender, MCL 769.12, to five to ten years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that his habitual offender sentence must be set aside for lack of appropriate notice. Whether the prosecutor satisfied the statutory requirements regarding enhanced sentencing for habitual offenders is a question of law that this Court reviews de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

MCL 769.13(1) provides that a prosecutor may seek enhancement of a defendant's sentence as an habitual offender by filing a written notice of intent to do so within twenty-one days after the defendant's arraignment on the information or the filing of the information. Subsection (2) provides that the notice of intent to seek an enhanced sentence "shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1)," and requires the prosecutor to file a written proof of service.

In this case, the prosecutor first indicated his intent to seek an enhanced sentence within the initial complaint and warrant by including an "Habitual Offender - Fourth Offense Notice" enumerating three of defendant's seven prior felony convictions beneath the original armed robbery charge. The district court register of actions shows that he was arraigned on "all counts" and the return to circuit court includes defendant's waiver of preliminary examination with a statement that "I understand that I will be bound over to Circuit Court on the charges in the complaint and warrant," followed by his signature and that of his attorney. The bind over, part of the same document, similarly shows that he was bound over on both charges. The information

filed in the circuit court also included a notice of intent to seek enhancement of defendant's sentence as a fourth felony offender.

Because the notice of intent was filed as part of the information, it was timely filed under MCL 769.13. Although defendant claims that he was never served with a copy of the information and notice, the lower court file establishes that defendant and his attorney had actual notice of the intent to seek enhancement as a fourth felony offender from the day the complaint and warrant were issued. Under these circumstances, we decline to vacate defendant's habitual offender sentence.

Defendant also suggests that his habitual offender sentence must be set aside because the prosecutor never filed a proof of service as required by MCL 769.13(2). Again, however, the record makes it apparent that defendant had actual notice that the prosecutor intended to seek sentence enhancement. The failure to file a proof of service was therefore harmless. *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999).

Affirmed.

/s/ Harold Hood
/s/ David H. Sawyer
/s/ Brian K. Zahra

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE CANTRAL BOUIE, a/k/a
JERMAINE CANTRELL BLACK,

Defendant-Appellant.

UNPUBLISHED
October 11, 2002

No. 232963
Kent Circuit Court
LC No. 00-003904-FC

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

MEMORANDUM.

Defendant appeals as of right his enhanced sentence as a second-offense habitual offender, MCL 769.10, following his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

Defendant argues that the trial court erred in sentencing him as a second-offense habitual offender because the prosecutor failed to timely file a notice of intent to seek sentence enhancement. We disagree. This Court reviews de novo as a question of law the issue whether the prosecutor satisfied the statutory requirements regarding enhanced sentencing for habitual offenders. See *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

MCL 769.13(1) provides that a prosecutor may seek an enhanced sentence by filing a written notice of intent to do so within twenty-one days after arraignment or, if arraignment is waived, within twenty-one days after filing the information charging the underlying offense. Defendant claims that such notice was not filed. However, the prosecutor's habitual notice was included in the felony complaint and the felony warrant, both of which stated:

Take notice that the defendant, JERMAINE CANTRAL BOUIE, was previously convicted of a felony or an attempt to commit a felony in that on or about 10/29/97, he or she was convicted in the CIRCUIT Court for the COUNTY OF KENT, State of MICHIGAN, for the offense of R & C O/100, File No. 97-09396-FH. Therefore, defendant is subject to the penalties provided by MCL 769.10; MSA 28.1082. [769.10] PENALTY: LIFE

Thereafter, defendant waived circuit court arraignment and acknowledged by his signature that he received and read the information and understood the substance of the charges. The

information filed in the circuit court included the same notice of intent to seek enhancement that was contained in the complaint and warrant. See *People v Morales*, 240 Mich App 571, 583; 618 NW2d 10 (2000) ("the prosecutor is no longer required to file a supplemental information"). Consequently, the prosecutor complied with the notice requirements of MCL 769.13(1) and defendant's claim is without merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFONZO ANTWON JOHNSON,

Defendant-Appellant.

UNPUBLISHED

June 21, 2012

No. 304273

Monroe Circuit Court

LC No. 06-035599-FH

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant Alfonzo Antwon Johnson appeals as of right his jury trial conviction for delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv).¹ The trial court sentenced Johnson as a fourth habitual offender, MCL 769.12, to three to 30 years' imprisonment for this conviction. We affirm.

Johnson first challenges his conviction based on insufficiency of the evidence. In particular, Johnson takes issue with the prosecution's failure to submit any concrete or objective forensic evidence at trial demonstrating his guilt. We review de novo questions pertaining to the sufficiency of the evidence. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "This Court will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). In addition, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The elements comprising the delivery of less than 50 grams of a controlled substance include: (a) delivery of a controlled substance and (b) that the controlled substance was of an

¹ The trial court also convicted Johnson of criminal contempt of court at his sentencing hearing but he does not challenge this conviction on appeal.

amount constituting less than 50 grams. *People v Schultz*, 246 Mich App 695, 703-704; 635 NW2d 491 (2001). In turn, the term "deliver" or "delivery" has been defined as constituting "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there was an agency relationship." *Id.*, quoting MCL 333.7105(1). "[T]ransfer is the element which distinguishes delivery from possession." *Schultz*, 246 Mich App at 703 (citation, internal quotations, and emphasis omitted). It is "well settled that the act of transferring a controlled substance is sufficient to sustain a finding of an actual delivery." *Id.* at 704 (citations and internal quotations omitted). In challenging the sufficiency of the evidence to sustain his conviction, Johnson does not contest that the controlled substance was cocaine or the amount of the substance involved.

The individual involved in the purchase of the cocaine from Johnson was his neighbor, Ronald Salkey. Allegedly, Salkey suspected Johnson of having stolen a stereo from Salkey's apartment and was aware that drugs were being sold from Johnson's apartment. Salkey informed police that he had arranged to purchase cocaine from Johnson. Officer Jason Flora searched Salkey to ensure that he did not have any monies or drugs on his person immediately before the purchase. Officer Flora also provided Salkey with specially designated funds to effectuate the purchase. Officer Flora and other officers observed Salkey enter into the apartment building and one of the officers watched Salkey enter one of the apartments. Shortly thereafter, the officers observed Salkey exit the apartment building and proceed directly to Officer Flora's vehicle. Salkey reported that he exchanged the provided funds for a bag of cocaine, which Salkey gave to Officer Flora, who immediately sealed it into an evidence bag. Officer Flora also searched Salkey twice after he exited the apartment building to ensure that he had no other funds or drugs on his person.

Johnson's challenge to the sufficiency of the evidence is two-fold. Johnson suggests that the evidence is insufficient because it is circumstantial since none of the police officers actually observed Salkey directly engage in the drug transaction with Johnson or had sight of Salkey from the time he left the apartment until he exited the building. Contrary to Johnson's assertion, the evidence more than sufficiently links him to the cocaine that Salkey gave to Officer Flora. Officers ensured that Salkey had no controlled substances on his person or any funds other than those that the police specifically provided to him to effectuate the purchase of the controlled substance. An officer observed Salkey enter into the apartment. While officers may not have directly observed Salkey from the moment he exited the apartment until he left the building, they did observe him return directly to Officer Flora and was subject to an additional search of his person. All of this transpired within a relatively short time frame. This Court has previously "unhesitatingly reject[ed a] defendant's suggestion that a prosecutor may only establish delivery of a controlled substance if a police officer directly views an illegal narcotics exchange" *People v Williams*, 294 Mich App 461, 472; 811 NW2d 88 (2011). In the circumstances of this case, sufficient circumstantial evidence existed to sustain Johnson's conviction.

In challenging the sufficiency of the evidence, Johnson also takes issue with Salkey's credibility and the testimony he provided at trial, asserting that Salkey had an ulterior motive for contacting police and participating in this transaction. "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Specifically, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the

evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Consequently, the evidence submitted in conjunction with the reasonable inferences drawn therefrom, viewed in the light most favorable to the prosecution, is sufficient to sustain Johnson's conviction.

Johnson next contests the trial court's use of the standard jury instruction pertaining to reasonable doubt rather than the proffered versions he submitted, which he asserts were more specific and informative. This Court reviews de novo issues of law arising from jury instructions, but this Court reviews for an abuse of discretion a trial court's decision whether to provide an instruction. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

The trial court's use of CJ12d 3.2, the standard jury instruction on reasonable doubt, did not comprise error. The trial court provided the standard instruction verbatim. "This standard jury instruction has repeatedly been held to adequately convey the concepts of reasonable doubt, the presumption of innocence, and the burden of proof." *People v Hill*, 257 Mich App 126, 151; 667 NW2d 78 (2003). As such, reversal is not warranted.

Johnson also contends several instances of prosecutorial misconduct involving (a) improper voir dire, (b) elicitation of hearsay evidence, (c) engaging in an improper "civic duty" argument, and (d) arguing facts not in evidence during closing. We review Johnson's allegations of prosecutorial misconduct for plain error affecting substantial rights because Johnson failed to properly preserve these claims by objecting to the statements in the trial court. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is warranted "only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *Id.* at 454 (citation omitted). "[W]e consider issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *Id.*

Johnson first asserts that the prosecutor engaged in misconduct when, during voir dire, he questioned the prospective jurors whether they could consider a police officer's training and background as a component of the officer's credibility. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). "[T]here is no right to any specific procedure for engaging in voir dire. There is simply a right to a jury whose fairness and impartiality are assured by procedures generally within the discretion of the trial court." *People v Sawyer*, 215 Mich App 183, 191; 545 NW2d 6 (1996).

Because three of the prosecution's primary witnesses at trial were police officers, the prosecutor sought during voir dire to ascertain whether any of the possible jury members held any bias against police officers. Such an inquiry does not exceed the permissible scope of voir dire and was not improper because it did not imply or suggest how potential jurors should gauge the credibility of such witnesses.

Johnson also asserts that the prosecutor engaged in misconduct by eliciting improper hearsay testimony from Salkey regarding comments by other residents of the apartment complex and his conversations with police. Although Johnson asserts this issue solely in the context of

prosecutorial misconduct, we initially analyze whether the trial court abused its discretion by permitting the prosecutor to present allegedly impermissible hearsay. Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is deemed to be inadmissible at trial unless there is a specific exception permitting its introduction. MRE 801; MRE 802. In this instance, the elicited testimony was not proffered to prove the truth of the matter asserted, i.e., that Johnson was a drug dealer. Rather, the testimony served as background information to provide the jury with a context for the events that occurred and to explain how police were made aware of Johnson's activities and Salkey's involvement. Further, it has been consistently recognized that, "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A "prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *Id.* at 660-661. Johnson has failed to establish either bad-faith by the prosecutor in the elicitation of this testimony or that he was prejudiced by its admission. Consequently, Johnson's assertion of error cannot be sustained.

We similarly reject Johnson's contention of error regarding the elicitation and admission of this testimony based on undue prejudice in violation of MRE 403 and MRE 404b. MRE 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This rule only excludes evidence that is deemed unfairly prejudicial. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Unfair prejudice is found to exist when there is a tendency for a jury to give the evidence undue or preemptive weight, or when it would be inequitable to permit the evidence to be used. *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Johnson suggests that permitting Salkey to testify regarding statements by other individuals not called as witnesses served to improperly bolster Salkey's credibility to the jury. Again, the contested testimony did not comprise hearsay because it was not proffered to demonstrate the truth of the matter asserted but merely served to place in context events and explain to the jury how Johnson came to the attention of police. Johnson provides no evidence to support his contention that the jury gave these statements undue or preemptive weight.

Johnson further asserts that admission of this testimony violated MRE 404(b) because it comprised evidence of "other bad acts" and led the jury to infer that he was a "bad person." Contrary to Johnson's contention, this evidence was admissible as part of the *res gestae* of the offense and was independent of MRE 404(b). *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). "Evidence of other criminal acts is admissible when so blended or connected with the crime of which [the] defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Sholl*, 453 Mich at 742 (citation and internal quotations omitted). In the circumstances of this case, the testimony was relevant to the reasons for Salkey's involvement and the actions of police in the delivery of the cocaine and, therefore, admissible pursuant to MRE 401 and MRE 402, independent of MRE 404(b).

Challenging the admission of this testimony, Johnson argues that allowing Salkey to repeat statements or information he obtained from unidentified individuals who were not

produced as witnesses at trial violated his constitutional right to confrontation. Again, as the contested testimony was admitted for a non-hearsay purpose, no violation of Johnson's right to confrontation occurred. "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 10-11; see also *Crawford*, 541 US at 59. "[A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Chambers*, 277 Mich App at 11. Salkey's testimony was not offered to establish the truth of the statements, i.e., to prove that Johnson was involved in the sale and delivery of illegal substances. Rather, the statements merely provided a context to understand the course of action that led to the police arresting Johnson. See *id.* We further note that Johnson fails, in his appellate brief, to fully explicate his reasoning on this issue. A defendant may not simply claim error or announce a position and then leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (citation omitted).

Johnson additionally contends that the prosecutor engaged in an improper "civic duty" argument seeking to evoke jury sympathy. In general,

prosecutors are accorded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case. Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinion of a defendant's guilt and must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal. [*People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995) (internal citations and quotation marks omitted).]

Johnson, however, misconstrues what constitutes an improper "civic duty" argument. An improper civic duty argument typically occurs when a prosecutor urges jurors to convict a defendant as part of the "civic duty" of the members of the jury. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). In this instance, during closing argument, the prosecutor referenced civic duty in the context of discussing testimony elicited from Salkey pertaining to his motivation for becoming involved in this matter and reporting Johnson's conduct to police. As such, the statements did not serve to "unfairly encourage[] jurors not to make reasoned judgments." *Id.* at 273. In addition, because prosecutors are permitted to "free[ly] argue the evidence and any reasonable inferences that may arise from the evidence[.]" *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003), it did not constitute misconduct for the prosecutor to engage in the challenged statement as it conformed to testimony elicited at trial.

In conjunction with his allegations of prosecutorial misconduct, Johnson finally asserts that the prosecutor improperly indicated to the jury that Salkey had not received anything in exchange for his trial testimony. Specifically, Johnson contends that this statement constituted an impermissible inference from Salkey's testimony that he received "nothing of value" for testifying at trial. As noted previously, "[a] prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman*, 257 Mich App at 450. "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Salkey indicated at trial that he had not received anything "of value" in exchange for his testimony. It was a reasonable inference, on behalf of the prosecutor, to indicate that Salkey had not received *anything* for testifying. This comment could also be construed as a permissible emphasis by the prosecutor on the credibility of his own witness. *Thomas*, 260 Mich App at 455. Regardless, even if we were to deem the prosecutor's comment to be improper, Johnson would not be entitled to relief because a timely curative instruction could have served to dispel any potential prejudice caused by the statement. *People v Unger (On Remand)*, 278 Mich App 210, 238; 749 NW2d 272 (2008).

Johnson contends that the cumulative effect of the errors he alleged pertaining to prosecutorial misconduct resulted in a denial of his right to a fair trial and precludes application of a "harmless error" standard. While "[i]t is true that the cumulative effect of several minor errors may warrant reversal where the individual errors would not[.]" *id.* at 258 (citation and internal quotations omitted), because we find no errors to aggregate Johnson's claim cannot be sustained.

Johnson's next claim of error involves the filing of an amended supplemental information and whether the trial court entered an order permitting such amendment. "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). "The 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." MCR 6.112(H).

The prosecution timely filed the original information on September 28, 2006. The same day, the prosecution filed a supplemental information, which provided notice of the prosecutor's intent to seek a sentencing enhancement premised on Johnson's status as a fourth habitual offender. The trial court arraigned Johnson on October 13, 2006. On February 23, 2007, the prosecutor filed a motion seeking to amend the supplemental information based on a realization that the dates and convictions listed pertaining to sentencing enhancement were incorrect. Counsel for Johnson objected. While the lower court record fails to include an order permitting the filing of the amended supplemental information, the document was filed with the lower court on March 1, 2007. It is relevant to note that the criminal charge for the instant offense remained consistent on all three versions of the information. In addition, both the supplemental information and the amended supplemental information indicated that the prosecutor was seeking sentencing enhancement premised on Johnson's status as a fourth habitual offender. The only difference in these two documents was the correction of Johnson's prior arrest dates and offenses.

Johnson contends that he should not have been sentenced as a fourth habitual offender because the prosecutor's notice in terms of the amended supplemental information was untimely and not in compliance with MCL 769.13, which provides in relevant part:

(1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, 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.

(2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

Notably, MCL 769.13(2) provides: "A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement." Because the prosecutor need only list convictions that "may be" relied upon, our Legislature has provided the prosecutor a certain amount of leeway in the accuracy of the notice. This Court has previously indicated that the purpose of the notice is merely to inform a defendant that the prosecutor intends to seek sentencing enhancement. See *People v Manning*, 163 Mich App 641, 644; 415 NW2d 1 (1987), overruled in part on other grounds *People v Bailey*, 483 Mich 905 (2009). The prosecutor's notice is not deemed to be "evidence" of a defendant's status, as MCL 769.13(5) provides:

The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

- (a) A copy of a judgment of conviction.
- (b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
- (c) A copy of a court register of actions.
- (d) Information contained in a presentence report.
- (e) A statement of the defendant.

Case law precludes the prosecutor from filing an initial notice and then seeking to amend the notice to increase the level of sentencing enhancement. *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997); see *People v Hornsby*, 251 Mich App 462, 469-473; 650 NW2d 700 (2002). We find the instant case to be analogous to *Manning*, where this Court determined that the trial court did not err in allowing the prosecutor to file an amended information that corrected the convictions underlying the defendant's status as a fourth habitual offender. *Manning*, 163 Mich App at 644-645. Similar to the *Manning* defendant, Johnson was given sufficient notice of the prosecutor's intent to seek sentencing enhancement, satisfying the primary purpose of MCL 769.13(2). Consequently, we find no error.

Johnson's assertion of error on this issue is also premised on the absence of an order from the trial court permitting the amended supplemental information. Johnson does not dispute that the supplemental information provided notice that the prosecutor was seeking sentencing enhancement based on his status as a fourth habitual offender. He acknowledges that the prosecutor brought a motion before the trial court, to which Johnson objected, indicating the necessity of correcting inaccurate prior convictions that were listed in the supplemental information. Johnson does not contend that the amended supplemental information served to, in any manner, increase his potential sentencing consequences. In effect, Johnson is placing form over substance as correct procedures were followed, notice was received, and the statutory requirements were not violated. This Court has previously rejected a similar argument pertaining to a prosecutor's failure to file a proof of service in conjunction with a notice of intent to seeking sentencing enhancement. See *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999). The *Walker* Court determined "reversal [was] not warranted on a basis of this issue because any error was harmless beyond a reasonable doubt." *Id.* Similar to the factual circumstances of *Walker*, Johnson "makes no claim that he did not receive the notice of intent to enhance" but "simply contends that the [order permitting amendment of the supplemental information] was not filed with the lower court. If true, this in no way prejudiced defendant's ability to respond to the habitual offender charge." *Id.* at 314-315. Specifically, a prosecutor's failure to strictly follow the statute does not necessarily offend due process, if in fact a defendant has received actual notice. *Id.* at 315.

We further note that, for purposes of sentencing enhancement, the court had to determine the existence of Johnson's prior convictions at the sentencing hearing. MCL 769.13(5); *People v Green*, 228 Mich App 684, 698-699; 580 NW2d 444 (1998). At the sentencing in this matter, Johnson's attorney and the trial court referenced his status as a fourth habitual offender on the basis of offenses enumerated in the presentence investigation report (PSIR). Johnson did not object to the underlying offenses as contained in the PSIR. Because the trial court had sufficient evidence to sentence Johnson as a fourth habitual offender, there was no error in sentencing or prejudice to Johnson. Because Johnson has failed to demonstrate lack of notice, surprise, or prejudice, his contention that resentencing with removal of his fourth habitual offender status is required is unavailing. Similarly, his contentions pertaining to the proportionality of his sentence are rendered moot. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

As his final issue on appeal, Johnson asserts ineffective assistance of counsel. A claim of ineffective assistance of counsel must be raised by a motion for new trial or an evidentiary hearing in accordance with *People v Gimher*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Because Johnson failed to seek a new trial or evidentiary hearing, our review of this claim is based on the existing record. *Rodriguez*, 251 Mich App at 38.

First and foremost, Johnson fails to specify what actions or omissions by his defense counsel at trial constituted deficient performance. As discussed in conjunction with Johnson's assertion of error regarding violation of his right to confrontation, we note that a defendant may not simply claim error or announce a position and then leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Kevorkian*, 248 Mich App at 389 (citation omitted). We further observe that "trial counsel is not ineffective when failing to make objections that are lacking in merit." *People v Mauszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Based on our conclusion that the prosecutor did not engage in misconduct, the permissibility of enhancement of Johnson's sentence, and our affirmation of the trial court's rulings, Johnson's claim of ineffective assistance must fail.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan

CTN: 33-13000949-01 TM C11

STATE OF MICHIGAN 54A JUDICIAL DISTRICT 30L JUDICIAL CIRCUIT	INFORMATION FELONY	CASE NO.: DISTRICT: CIRCUIT: 13-000161-FA
District Court ORI MI330075J 124 W. MICHIGAN AVE. LANSING, MI 48933 517-483-4433	Circuit Court ORI MI330055J 313 W. Kalamazoo, Lansing, MI 48901 517-483-6500	

THE PEOPLE OF THE STATE OF MICHIGAN	Defendant's name and address V FATEEN ROHN MUHAMMAD 4304 GUILFORD GRATIOT, MI 48059 Sex: M Race: Black	Victim or complainant: KRYSTAL MUHAMMED Complaining Witness OFC WENDY PRINCE
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Co-defendant(s)	Date: On or about 02/05/2013
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City/Twp./Village CITY OF LANSING	County in Michigan Ingham	Defendant TCN K813070193W	Defendant CTN 33-13000949-01	Defendant SID 1372717A	Defendant DOB 01/19/1967
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Police agency report no. 33LLA 130205001211	Charge SEE BELOW	DLN Type	Vehicle Type	Defendant DLN M530244744052
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Witnesses
 KRYSTAL MUHAMMED OFC WENDY PRINCE OFC RACHEL BAHL
 OFC PENNI ELTON MAIL CARRIER

STATE OF MICHIGAN, COUNTY OF INGHAM
 IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on or about 02/05/2013 at 337 E Edgewood #5, the defendant:

COUNT 1: HOME INVASION - 1ST DEGREE
 did enter without permission a dwelling located at 337 East Edgewood, #5, and, while entering, present in, or exiting did commit an assault, and while entering, present in, or exiting the dwelling Krystal Muhammed, was lawfully present therein; contrary to MCL 750.110a(2). [750.110A2]
 FELONY: 20 Years and/or \$5,000.00

COUNT 2: ASSAULT WITH INTENT TO DO GREAT BODILY HARM LESS THAN MURDER
 did make an assault upon Krystal Muhammed with intent to do great bodily harm less than the crime of murder, contrary to MCL 750.84. [750.84].
 FELONY: 10 Years or \$5,000.00; DNA to be taken upon arrest.

HABITUAL OFFENDER - FOURTH OFFENSE NOTICE
 Take notice that the defendant was previously convicted of three or more felonies or attempts to commit felonies in that on or about 2/25/2009, he or she was convicted of the offense of Deliver/Manufacture Narcotics Less Than 50 Grams in violation of MCL 333.74012A4; in the 30th Circuit Court for Lansing, State of Michigan,
 And on or about 12/05/2007, he or she was convicted of the offense of Breaking and Entering a Building with Intent in violation of MCL 750.110; in the 30th Circuit Court for Lansing, State of Michigan;
 And on or about 08/04/1994, he or she was convicted of the offense of Assault with a Dangerous Weapon in violation of MCL 750.82; in the Detroit Records Court Court for Detroit, State of Michigan;

33-13000949-01
 02/05/2013
 13-000161-FA

Therefore, defendant is subject to the penalties provided by MCL 769.12. [769.12]
PENALTY: Life if primary offense has penalty of 5 Years or more; 15 Years or less if primary offense has penalty under 5 Years. The maximum penalty cannot be less than the maximum term for a first conviction.

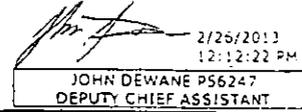
Upon conviction of a felony or an attempted felony court shall order law enforcement to collect DNA identification profiling samples.

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

By: _____

Stuart Dunnings, III P31089



CERTIFIED COPY
30TH CIRCUIT COURT

MAY 30 2013

I hereby certify that this document is a true and correct copy of the original on file with this court.

Elizabeth Roberts Deputy Clerk

STATE OF MICHIGAN
MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FATEEN MUHAMMAD,

Defendant-Appellee.

Supreme Court No.
Court of Appeals File No. 317054
Circuit Court File No. 13-161-FH

ATTORNEY FOR APPELLEE

Ingham County Prosecuting Attorney
Stuart Dunnings, III (P31089)
303 W Kalamazoo Street
Lansing, Michigan 48933
(517) 483-6108

ATTORNEY FOR APPELLANT

The Curi Law Office, P.L.L.C.
Joseph D. Curi (P47811)
2875 Northwind Drive, Suite 137
East Lansing, Michigan 48823
(517) 333-9905



**Notice of Filing of Defendant-Appellant's Application for
Leave to Appeal**

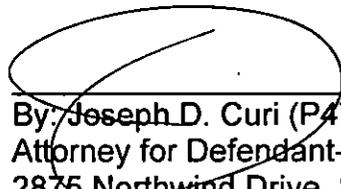
Please take notice that Defendant-Appellant's Application for leave to Appeal in the
above-named case has been filed with the Michigan Supreme Court.

The Curi Law Office, PLLC
2875 Northwind Drive
Suite 137
East Lansing, MI 48823
(517) 333-9905

Date: September 22, 2014

Respectfully submitted,

The Curi Law Office, P.L.L.C.



By: Joseph D. Curi (P47811)
Attorney for Defendant-Appellant
2875 Northwind Drive, Suite 137
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(517) 333-9905

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STATE OF MICHIGAN
MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FATEEN MUHAMMAD,

Defendant-Appellee.

Supreme Court No.
Court of Appeals File No. 317054
Circuit Court File No. 13-161-FH

ATTORNEY FOR APPELLEE

Ingham County Prosecuting Attorney

Stuart Dunnings, III (P31089)

303 W Kalamazoo Street

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(517) 483-6108

ATTORNEY FOR APPELLANT

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Notice for Hearing

Please take notice Defendant-Appellant's Application for Leave to Appeal will be submitted to the Court on a date which is on a Tuesday at least 21 days after the filing of this application.

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Date: September 22, 2014

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Proof of Service

The undersigned hereby certifies that on September 22, 2014, he personally served a copy of the following: Appellee Fateen Muhammad's Application For Leave to Appeal to the Michigan Supreme Court, Notice of Hearing and Notice of Filing Application for Leave to Appeal to the Michigan Supreme Court, on the following office:

Lawyer for Appellee

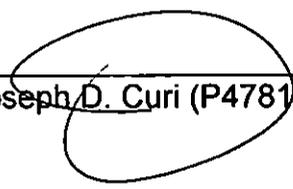
Ingham County Prosecuting Attorney
Stuart Dunnings, III (P31089)
303 W Kalamazoo Street
Lansing, Michigan 48933

The Curi Law Office, PLLC
2875 Northwind Drive
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East Lansing, MI 48823
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The undersigned further hereby certifies that on September 22, 2014, he personally served a copy of the following: Notice of Filing of the Application for Leave to Appeal to the Michigan Supreme Court on the following:

**Ingham County Circuit Court Clerk
313 W Kalamazoo St
Lansing Charter Township, MI 48933**

**Michigan Court of Appeals Court Clerk
925 W Ottawa St
Lansing Charter Township, MI 48915**



Joseph D. Curi (P47811)

The Curi Law Office, PLLC
2875 Northwind Drive
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(517) 333-9905



THE CURI LAW OFFICE, P.L.L.C.

2875 Northwind Drive, Suite 137
East Lansing, Michigan 48823
TELE: (517) 333-9905 ♦ FAX: (517) 333-9907
e-mail: curilawoffice@tds.net

September 22, 2014

Michigan Supreme Court
C/o Court Clerk
925 Ottawa Street
Lansing, Michigan 48909-7522

Re: People v Fateen Muhammad
Court of Appeals File No. 317054
Circuit Court File No. 13-161-FH

Dear Clerk of Court:

The following are enclosed:

- Original and seven copies of Appellant Fateen Muhammad's Application for Leave;
- Notice for Hearing and
- Proof of Service.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

The Curi Law Office, P.L.L.C.

Joseph D. Curi

Enclosures

cc: Mr. Fateen Muhammad
Ingham County Prosecuting Attorney
Michigan Court of Appeals Clerk
30th Judicial Circuit Clerk

