STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2008
v	No. 274507 Wayne Circuit Court
ISMAEL A. MALIK, Defendant-Appellant.	LC No. 06-003387-01

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of assault with intent to commit murder, MCL 750.83, two counts of resisting and obstructing a police officer causing injury, MCL 750.81d(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to life in prison for one assault conviction, 562 to 900 months in prison for the other assault conviction, one to eight years in prison for each resisting and obstructing a police officer conviction, one to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm defendant's convictions, but remand for a determination regarding the notice of the habitual third offense.

Defendant first argues that the trial court erred when it denied his motion to adjourn for an opportunity to independently analyze a DNA sample.[1] We disagree.

A trial court's ruling on a defendant's request for an adjournment is reviewed for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). A court abuses its discretion when it selects a course outside of the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Further, to merit reversal, the abuse of discretion must have resulted in prejudice. *People v Snider*, 239 Mich App 393, 421; 608 NW2d

[1] Defendant's motion also requested adjournment for time to review a handwriting analysis and procure an unavailable witness. Neither issue was ultimately relevant at trial and defendant does not pursue them on appeal.

503 (2000). A criminal trial should not be adjourned except for reasons of strict necessity or manifest injustice. MCL 768.2.

The DNA analysis was provided to defendant six days before trial was scheduled. The trial court, in denying the motion, noted this fact and expressed that defendant could renew his motion if that period of time proved insufficient. The DNA had already been analyzed; defendant sought time to have an expert interpret the results. Defendant did not present any tangible reason why this was not enough time to interpret the results, nor does he present any on appeal. He did not renew his motion at the time of trial, and there was no indication that he had any difficulty interpreting the analysis. Under the circumstances, the trial court's denial of a request for an adjournment was not an abuse of discretion. *Coy*, *supra*.[2]

Defendant next argues that he did not receive proper notice, pursuant to MCL 769.13, that the prosecutor was seeking to enhance his sentence as a third habitual offender. As an unpreserved issue, we review for plain error affecting substantial rights. *People v Barber,* 255 Mich App 288, 291; 659 NW2d 647 (2003). To affect substantial rights, an error must generally be prejudicial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because this issue was not raised before the trial court and the record is unclear regarding the date of filing of the notice of the habitual third offense, we remand for a determination by the trial court.

MCL 769.13 provides the procedure by which a prosecutor can seek an enhanced sentence against an offender for the offender's prior felony convictions. MCL 769.13(1) requires the prosecutor to file written notice of the enhancement within 21 days after the defendant's arraignment on the information. The statute contains a "bright-line" test for determining promptness, and an amendment to the information filed outside the 21 day period may not seek to include additional prior convictions. *People v Ellis*, 224 Mich App 752, 755-757; 569 NW2d 917 (1997). MCL 769.13(2) provides that the prosecutor shall file a written proof of service of the notice of intent to seek an enhanced sentence. However, the absence of the proof of service from the lower court file is harmless when the defendant had actual notice of the timely filed notice of habitual enhancement. *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999).

At the start of the preliminary examination, the prosecutor notified the district court that he would seek to bind defendant over on charges that were slightly different from those set forth in the information. However, there was no express statement on the record that the habitual offender second notice contained in the original information would be amended to third habitual offender. On March 29, 2006, defendant was arraigned on the information. At that time, counsel for defendant stood "mute to the forthcoming amended information."[3] Once again, there

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[2] In addition to failing to raise the issue of an adjournment at the time of trial, the parties stipulated to the admission of certain DNA evidence at trial. Alternatively, in light of this stipulation, defendant waived review of this issue. *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000). (A party may not express satisfaction with an issue at trial and challenge the issue on appeal.)

[3] In the prosecutor's brief on appeal, it is asserted that the information was orally amended at the preliminary examination. The prosecution also asserts that an amended information was filed at

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was no express statement that the amendment would increase the habitual offense. An amended information notifying defendant of the habitual third offense was filed in the lower court record, but the document is not dated and does not contain a time-stamp date of entry. However, on May 10, 2006, defendant was aware of the amended filing. On that date, defendant, appearing in propria persona, handwrote a motion to the trial court asking it to correct the habitual offender information in the context of MRE 404(b) evidence. The trial court did not resolve the question of the satisfaction of the notice provision of MCL 769.13 because this issue was not raised below. Accordingly, we remand this matter to the trial court for a determination regarding the timeliness of the filing of the amended information containing the habitual third notice in relationship to the date of the arraignment. See *People v Edmond*, 451 Mich 930; 550 NW2d 537 (1996).[4]

We affirm defendant's convictions, but remand for a determination regarding the notice of the habitual third. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

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the arraignment on the information, and defendant did not order a transcript of the arraignment. On the contrary, both the preliminary examination transcript and the arraignment transcript are contained in the lower court record. There was no express mention of the increase in the habitual offense. Consequently, we cannot verify that the amendment was timely filed.

[4] In *Edmond*, *supra*, the Supreme Court remanded to the trial court to address the issue of the compliance with MCL 769.13 where there was record support for the prosecutor's assertion that the notice had been filed. Although this is only a Supreme Court order, not an opinion, an order of the Supreme Court is binding precedent when the rationale can be understood. See *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996).