STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENDRICK LAMONT MEDLOCK,

Defendant-Appellant.

UNPUBLISHED
December 22, 2020

No. 350633
Oakland Circuit Court
LC No. 2009-227689-FH

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial in 2009, defendant was convicted of three counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (victim between 13 and 16 years of age), and two counts of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(a) (victim between 13 and 16 years of age). Defendant appealed by right, and we affirmed his convictions and sentences.[1] In 2019, defendant sought relief from judgment, and the trial court ordered resentencing on the basis that the presentence investigation report contained certain factual errors. The trial court resentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to the same sentences that were originally imposed: concurrent terms of 18 years and 2½ months' imprisonment to 40 years for the CSC-III convictions, and 5 to 15 years' imprisonment for CSC-IV convictions. Defendant again appeals as of right, and we affirm.

I. SENTENCE ENHANCEMENT

Defendant first argues that he is entitled to resentencing without the fourth-offense habitual-offender enhancement because the prosecution failed to file a proof of service of the

[1] *People v Medlock*, unpublished per curiam opinion of the Court of Appeals, issued December 15, 2011 (Docket No. 298373).

notice of intent to seek an enhanced sentence under MCL 769.13. We conclude that the prosecutor's failure to file a proof of service was harmless.[2]

MCL 769.13 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. [Emphasis added.]

The purpose of MCL 769.13's notice requirement "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." *People v Morales*, 240 Mich App 571, 582; 618 NW2d 10 (2000) (quotation marks and citation omitted). The statute uses the word "shall," so the filing of notice and proof of service is mandatory. See *In re Forfeiture of Bail Bond*, 496 Mich 320, 339-340; 852 NW2d 747 (2014).

However, in *People v Head*, 323 Mich App 526, 542; 917 NW2d 752 (2018), this Court held that although the prosecutor failed to file a proof of service of the notice of intent to seek an enhanced sentence, the error was harmless[3] because the "defendant had actual notice of the prosecutor's intent to seek an enhanced sentence and [the] defendant was not prejudiced in his

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[2] This issue presents a question of law that we review de novo. See *People v Head*, 323 Mich App 526, 542; 917 NW2d 752 (2018). Defendant arguably waived his arguments pertaining to MCL 769.13, along with his claim regarding OV 13, by not raising them in first appeal. See *Vanderwall v Midkiff*, 186 Mich App 191, 201; 463 NW2d 319 (1990) ("[T]he principles of res judicata require that a party bring in the initial appeal all issues which were then present and could have and should have been raised."). Nonetheless, we will address his arguments.

[3] Under MCL 769.26, known as the harmless-error statute, no judgment or verdict shall be set aside "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." See also MCR 2.613(A).

ability to respond to the habitual-offender notification." Notably, "[b]ecause [the] defendant had access to the charging documents, he had notice of the charges against him, including the habitual offender enhancement, and he also was informed of the habitual-offender enhancement at the preliminary examination." *Id*. at 544-545. The defendant waived a formal reading of the information at the arraignment hearing and did not indicate that he had not received a copy of the felony information. *Id*. at 544. Further, at sentencing, neither the defendant nor his counsel were surprised when the defendant was sentenced as a fourth-offense habitual offender. *Id*. at 545. For these reasons, the prosecutor's failure to file the proof of service was deemed a harmless error. *Id*.

In this case, the prosecutor filed the notice of intent on July 23, 2009, and defendant was arraigned four days later. At the arraignment, defense counsel acknowledged receipt of the general information as well as the habitual-offender notice. Accordingly, defendant had actual timely notice of the prosecutor's intent to seek an enhanced sentence, and so per *Head* the prosecutor's failure to file a proof of service of the notice of intent was harmless error.[4]

Defendant nonetheless seeks relief on the ground that the prosecution filed and served the notice of intent "too early." Specifically, he argues that under MCL 769.13(1) the notice must be filed *after* the arraignment or, if arraignment is waived, *after* the filing of the information. We decline to adopt defendant's interpretation of the statute.

A strict and narrow reading of the statutory language supports defendant's interpretation, but we must read statutory language in context, *People v Kowalski*, 489 Mich 488, 497-498; 803 NW2d 200 (2011), and construe it reasonably, "keeping in mind the purpose of the act," *People v Zitka*, 325 Mich App 38, 49; 922 NW2d 696 (2018) (quotation marks and citation omitted). Again, the purpose of MCL 769.13 is to provide notice to the defendant. Therefore, the Legislature likely intended "within 21 days after the defendant's arraignment" and "within 21 days after the filing of the information" to be a *deadline* after which the prosecutor cannot file the notice. Defendant has offered no reason why the Legislature would have intended to preclude filing of notice before the arraignment or information. Further, given *Head*'s holding that the failure to strictly comply with MCL 769.13's proof of service requirement is harmless error when the defendant received timely

[4] We note, however, that the Supreme Court has not adopted this view. In *People v Straughter*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 2017 (Docket No. 328956), pp 9-10, this Court vacated the defendant's sentence and remanded to the trial court for resentencing without the sentence enhancement because although the felony information noted that the prosecution was charging the defendant as a habitual offender, there was "no written proof of service in the circuit court file as is required by MCL 769.13(2)." Our Supreme Court considered the application for leave to appeal, directed the Clerk to schedule oral argument on the application, and ordered that the prosecution file a supplemental brief addressing, in part, whether the harmless-error tests articulated in MCR 2.613 and MCL 769.26 apply to violations of the habitual offender notice requirements set forth in MCL 769.13. *People v Straughter*, 501 Mich 944, 944-945 (2017). The Supreme Court later denied leave because there was "no majority in favor of granting leave to appeal or taking other action." *People v Straughter*, 504 Mich 930 (2019). However, we are bound to follow *Head* because it is a published decision. MCR 7.215(J)(1).

notice of the prosecutor's intent to seek an enhanced sentence, we fail to see how the early filing of notice could warrant reversal when defendant received actual notice at the arraignment.

In sum, under the circumstances of this case the prosecution's failure to file a proof of service of the notice of intent to seek an enhanced sentence was a harmless error. Defendant received timely notice of his fourth-offense habitual offender status, which fulfilled the purpose of the statute. We disagree with defendant that the prosecution violated the statute by filing notice before the arraignment. Alternatively, that error was harmless given that defendant received actual notice of the prosecutor's intent at the arraignment.

For similar reasons, we also reject defendant's claim that his counsel was constitutionally ineffective for failing to object to the prosecutor's failure to file the proof of service required by MCL 769.13. To establish ineffective assistance of counsel, a defendant must demonstrate that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Even assuming that defense counsel's failure to object was professional error, defendant does not demonstrate that he was prejudiced by the prosecutor not filing proof of service when defendant had timely notice of the prosecutor's intent to seek an enhanced sentence and an opportunity to respond.

II. OFFENSE VARIABLES

Next, defendant challenges the trial court's scoring of offense variable (OV) 11 and OV 13. We conclude that the law-of-the-case doctrine bars reconsideration of OV 11 and that the trial court did not err by assessing 25 points for OV 13.

Under the law-of-the-case doctrine, "an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). In defendant's prior appeal, we reviewed the record and affirmed the scoring of OV 11 (criminal sexual penetrations) at 25 points:

> Here, the guidelines were scored for the three CSC 3 convictions, and all of the sexual penetrations upon which defendant was convicted essentially arose out of each other where they occurred in a single, ongoing transaction. [*People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006)] appears to indicate that in such a situation, we could count two if not three sexual penetrations for purposes of OV 11, given that if we focus on one of defendant's three convictions of CSC 3, we could not count that particular offense in the scoring, but we could count the other two because they all arose out of each other. However, we need not determine if such an interpretation of *Johnson* is correct, as there was evidence of a fourth sexual penetration, penis to anus, which also occurred within the same transaction as the other penetrations. Therefore, that fourth sexual penetration arose out of the three CSC 3 sentencing offenses, MCL 777.41(2)(a), yet it did not form the basis of a "third-degree criminal sexual conduct offense," MCL 777.41(2)(c). Accordingly, said sexual penetration justifies a score of 25 points under MCL 777.41(1)(b) ("[o]ne criminal sexual penetration occurred"). [*People v Medlock*, unpublished

per curiam opinion of the Court of Appeals, issued December 15, 2011 (Docket No. 298373), p 6.]

Because we have already decided this issue, and defendant identifies no material change in the facts or intervening change in the law, the law-of-the-case doctrine bars further review. Accordingly, we again affirm the scoring of OV 11 at 25 points.

Defendant also argues that the trial court erred by assessing 25 points for OV 13.[5] OV 13 relates to a "continuing pattern of criminal behavior," and 25 points are properly assessed when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]" MCL 777.43(1)(c). The statute provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

Defendant argues that OV 13 should not have been scored because he was assessed points under OV 11. He relies on MCL 777.43(2)(c), which provides, "Except for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12." However, as noted, we previously affirmed the scoring of OV 11 for one penetration on the basis of evidence that there was a fourth, uncharged penetration. This conduct was not necessary to score OV 13 at 25 points. Rather, in addition to the sentencing offense of CSC-III, which must be counted when scoring OV 13, MCL 777.43(2)(a), the two CSC-IV convictions could be used to find that three crimes against a person occurred. Accordingly, the trial court did not plainly err by assessing 25 points for OV 13. Defendant's claim of ineffective assistance of counsel also fails because he does not establish that an objection to the scoring of OV 13 would have had any merit. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

III. DISPROPORTIONATE SENTENCE

Finally, defendant argues that he is entitled to resentencing because his sentences were unreasonable and disproportionate.[6]

Sentences must adhere to the principle of proportionality, which "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence within the range recommended under the advisory guidelines is presumptively

[5] Because defendant did not raise this issue at sentencing, in a motion for resentencing, or in a motion to remand with this Court, this issue is unpreserved. See MCR 6.429(C). See also *People v McChester*, 310 Mich App 354, 357; 873 NW2d 646 (2015). Therefore, we review defendant's argument for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[6] We review for an abuse of discretion whether a trial court properly imposed a sentence that was proportionate to the offender and offense. See *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017).

proportionate. See *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). See also *People v Steanhouse*, 322 Mich App 233, 257 n 3; 911 NW2d 253 (2017), rev'd in part on other grounds 504 Mich 969 (2019).

Defendant does not present any unusual circumstances that would allow us to conclude that his within-guidelines sentences were disproportionate. Nor does he provide any argument as to why his sentences were not proportionate to the severity of his crime and his background. Accordingly, defendant does not establish that his sentences violated the principle of proportionality, and he is not entitled to resentencing on this basis.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro