

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DELANO VANOMMEREN,

Defendant-Appellant.

UNPUBLISHED

March 17, 2000

No. 207858

Recorder's Court

LC No. 95-002062

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), armed robbery, MCL 750.529; MSA 28.797, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to thirty to sixty years' imprisonment for each criminal sexual conduct conviction and the armed robbery conviction, five to fifteen years' imprisonment for the home invasion conviction, and two years' imprisonment for the felony-firearm conviction.¹ Defendant appeals as of right, and we affirm.

On January 24, 1995, the victim was asleep in her home when she awoke to find a gun pushed to her temple. Defendant threatened to kill the victim and demanded money and jewelry. The victim complied with defendant's request. Defendant sexually assaulted the victim then fled the premises. The victim's son was in a nearby room and heard his mother crying as well as a male voice. This caused him to telephone police. When police arrived on the scene, they observed that defendant had gained entry into the home by kicking in a door. Police were able to locate defendant by following his footprints in the snow to his residence, approximately ten to twelve blocks from the scene of the crimes.

Defendant first argues that the trial court did not have jurisdiction once the prosecutor dismissed the charges due to unavailability of a witness. We disagree. Whether a court has jurisdiction presents a question of law which we consider de novo. *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997). Jurisdiction involves two different inquiries, subject-matter jurisdiction and personal jurisdiction. *People v Eaton*, 184 Mich App 649, 652; 459 NW2d 86 (1990). There is a presumption that subject-matter jurisdiction is present unless expressly denied by constitution or statute.

People v Goecke, 457 Mich 442, 458; 579 NW2d 868 (1998). It addresses the right of the court to exercise jurisdiction over a class of cases, for example, criminal cases. *Id.* Subject matter jurisdiction is never waivable and may not be stipulated to by the parties. *Eaton, supra.* Personal jurisdiction addresses the authority of the court to bind the parties to the action. *Id.* Personal jurisdiction is vested in the circuit court upon the filing of a return of the magistrate after the preliminary examination has occurred or been waived. *Goecke, supra.* Personal jurisdiction is always waivable, and defects may be corrected by stipulation of the parties. *Eaton, supra.* The rationale being that if the defendant elects not to avail himself an established procedural right, he may not later be heard to complain. *Id.*

In the present case, defendant has not identified the type of jurisdiction which was lacking at the time of trial. However, defendant's brief on appeal alleges that the trial court did not have jurisdiction to "proceed against the appellant [defendant]." Accordingly, defendant's challenge is to the trial court's acquisition of personal jurisdiction. Review of the lower court record reveals that personal jurisdiction vested in the circuit court after the filing of the return following the preliminary examination. Defendant's trial for these offenses was originally scheduled for November 7, 1995, but was adjourned on at least six occasions. On June 23, 1997, the trial court's notes, contained within the lower court file, indicate that a request by the prosecution for an adjournment was denied. Unable to obtain an adjournment, the prosecutor requested that the trial court dismiss the action without prejudice due to the unavailability of an out-of-state witness. Defense counsel did not object to the dismissal. The trial court granted the motion to dismiss without prejudice because "the case is very old," but acknowledged that it would consider granting a motion to reinstate the case if the witness was located. The trial court did, in fact, reinstate the case, and there is no indication in the lower court record that defendant objected to the trial court's jurisdiction over his person upon reinstatement. Accordingly, the issue of personal jurisdiction was waived. *Eaton, supra.*

Defendant next argues that the trial court erred in admitting evidence of weapons and ammunition which were unrelated to the commission of the convicted offenses. To preserve an evidentiary issue for appellate review, the defendant must oppose the admission of evidence by objection, and the objection raised at trial must be the same basis for objection on appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Defendant did not object to the admission of weapons unrelated to the charged offenses, but did object to the admission of the ammunition based on irrelevance. Accordingly, only the issue of the admission of the ammunition has been preserved for appellate review. *Id.* MRE 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence which is not relevant is not admissible. MRE 402. Furthermore, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

In the present case, the evidence of other weapons and ammunition did not relate to a fact of consequence at trial, and therefore, was not relevant. MRE 401. However, the erroneous admission of the evidence was harmless when overwhelming evidence of defendant's guilt was presented. *People v Mateo*, 453 Mich 203, 207; 551 NW2d 891 (1996). Furthermore, we will not reverse where an

error, nonconstitutional in nature, was not outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant next argues that the trial court erred when instructing the jury regarding the specific intent requirement for first-degree home invasion and the instruction regarding DNA evidence. We disagree. In order to preserve this issue, defendant was required to object to the jury instructions in question. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). Defendant failed to object to the instructions as read to the jury, accordingly, this issue is not preserved for appellate review. *Id.* In fact, the error regarding the reading of the home invasion instruction was addressed prior to the commencement of jury deliberations. Defense counsel did not request that the instructions be read to the jury a second time, but rather, requested that the appropriate written instructions be submitted to the jury prior to deliberations. A defendant may not waive objection to an issue before the trial court then raise it as an error before this Court. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). To do so would allow defendant to harbor error as an appellate parachute. *Id.* Furthermore, we find no error in the DNA instruction presented to the jury. There is no error if the instructions fairly presented the issues to be tried and sufficiently protect a defendant's rights. *Whitney, supra*. Defendant's contention that the instruction took the factual issue of identification away from the jury is without merit.

Lastly, defendant argues that prosecutorial misconduct occurred based upon comments made during closing argument. We disagree. This claim is not preserved because defendant failed to object at trial. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Therefore, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in manifest injustice. *Id.* Our review of each of the alleged instances of prosecutorial misconduct reveals that the prosecutor's comments were proper or a curative instruction could have alleviated any prejudice to defendant. We also note that the prosecutor did not improperly comment on defendant's right to remain silent when defendant was not in custody at the time and did not invoke his Fifth Amendment right. *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996).

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ E. Thomas Fitzgerald

¹ The sentences for criminal sexual conduct, armed robbery and home invasion were to be served concurrently, but consecutive to the felony-firearm sentence. We note that defendant was convicted of four counts of first-degree criminal sexual conduct. However, the trial court granted defendant's motion to vacate two criminal sexual conduct convictions. Accordingly, defendant's request for this relief on appeal is moot.