

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS WAYNE RUSSELL,

Defendant-Appellant.

UNPUBLISHED

April 20, 2010

No. 291109

Oakland Circuit Court

LC No. 2004-199751-FH

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Following a prior appeal,¹ defendant was resentenced to concurrent prison terms of 3 to 20 years for child sexually abusive activity, MCL 750.145c(2), 3 to 20 years for use of the internet to communicate with another to commit child sexually abusive activity, MCL 750.145d(2)(f), and one to four years for each of three counts of use of the internet to communicate with another to distribute obscene matter to a minor, MCL 750.145d(2)(c). He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that resentencing is required because the trial court improperly relied on the same conduct to score 20 points for prior record variable (PRV) 7 (subsequent or concurrent felony convictions), MCL 777.57, and 25 points for offense variable (OV) 13 (continuing pattern of criminal behavior), MCL 777.43. We disagree.

The interpretation and application of the sentencing guidelines is reviewed de novo as a question of law. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). This court has held that the same conduct may be counted under PRV 7 and an offense variable when “[e]ach variable is directed toward a different purpose.” *People v Jarvi*, 216 Mich App 161, 163-164;

¹ This Court originally affirmed defendant’s convictions and sentences in *People v Russell*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2007 (Docket No. 264597). The Supreme Court subsequently vacated this Court’s decision in part and remanded for reconsideration of the scoring of offense variable (OV) 10. *People v Russell*, 482 Mich 995; 755 NW2d 663 (2008). On remand, this Court held that OV 10 was improperly scored, vacated defendant’s sentences, and remanded for resentencing. *People v Russell (On Remand)*, 281 Mich App 610, 616; 760 NW2d 841 (2008).

548 NW2d 676 (1996). PRV 7 “is concerned with the commission of a number of felonies at the same time,” *id.* at 164, whereas OV 13 is concerned with whether the offense is part of a pattern of felonious criminal activity occurring over a period of time. While defendant’s assessment of points for OV 13 stemmed from crimes committed in the course of pursuing a sexual liaison with a perceived minor rather than from any previous unrelated offenses, three or more concurrent offenses are sufficient for purposes of scoring OV 13 at 25 points. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). Further, in *People v Bemmer*, 286 Mich App 26, 35; 777 NW2d 464 (2009), this Court recently held that with regard to OV 13, “a trial court may properly consider conduct that was already considered when scoring the defendant’s PRVs,” unless the instructions provide otherwise. Because the instructions do not prohibit use of the same conduct when scoring PRV 7 and OV 13, the trial court did not err in using the same conduct to score both variables. See MCL 777.43(2); MCL 777.57(2).

To the extent that defendant challenges the assessment of points under OV 13 without regard to the scoring of PRV 7, review is limited to plain error affecting defendant’s substantial rights because defendant did not object on that basis below. See *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004). The record discloses that defendant’s conduct took place during a month’s time. Further, the verdict form shows that the jury convicted defendant of three counts of use of the internet to communicate with another to distribute obscene matter to a minor for incidents that occurred on November 16, 17, and 23, 2004. Thus, defendant clearly engaged in at least three individual acts rather than a single act and, accordingly, defendant’s 25-point score for OV 13 was not plain error.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly