STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 21, 2013
v	No. 308157 Wayne Circuit Court
LAMAR WILLIAM ETTER, Defendant-Appellant.	LC No. 11-005435-FC

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions of one count of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (person under 13 years of age), two counts of first-degree CSC, MCL 750.520b(1)(b) (person at least 13 but less than 16 years of age and actor related to victim), and two counts of second-degree CSC, MCL 750.520c(1)(b) (person at least 13 but less than 16 years of age and actor related to victim). The trial court sentenced defendant to 25 to 50 years' imprisonment for each count of first-degree CSC, and 5 to 15 years' imprisonment for each count of second-degree CSC. The court also made defendant subject to lifetime electronic monitoring. We affirm defendant's convictions and sentences, except we remand for deletion of the lifetime electronic monitoring requirement.

Defendant's convictions arose from the sexual abuse of the 14-year-old complainant by defendant over a period of approximately 10 years. Defendant first argues that the circuit court lacked jurisdiction to try, convict, and sentence defendant on count one because there was evidence that defendant was as young as 12 years old when that offense occurred. According to defendant, the family division of the circuit court had exclusive personal jurisdiction over him because of his age at the time of the offense. We disagree.

"Whether defendant was of an age that made circuit court jurisdiction appropriate is . . . a question of personal jurisdiction." *People v Kiyoshk*, 493 Mich 923; ___ NW2d ___ (Docket No. 143469, entered January 18, 2013). "[A] party may stipulate to, waive, or implicitly consent to *personal* jurisdiction." *Id.*, quoting *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011). Defendant's failure to contest the circuit court's jurisdiction over him waived that issue.

Even if defendant did not waive personal jurisdiction, his argument still fails. "If the prosecuting attorney has reason to believe that a juvenile 14 years of age or older but less than 17 years of age has committed a specified juvenile violation,[1] the prosecuting attorney may authorize the filing of a complaint and warrant on the charge with a magistrate concerning the juvenile." MCL 764.1f(1) (footnote added). "[T]he family court only has jurisdiction if the prosecutor chooses to file a petition in the family court instead of authorizing a complaint and warrant to proceed against the juvenile as an adult. . . . Under the automatic waiver provisions, no hearing is held to determine whether the juvenile should be tried as an adult." *People v Conat*, 238 Mich App 134, 141-142; 605 NW2d 49 (1999), citing MCL 712A.2(a)(1).

Count one of the Felony Information charged that defendant "did engage in sexual penetration . . . with [the complainant], said person being under 13 years of age." The complainant testified that defendant molested him at least five times when he was three to six years old. Because the complainant was born on March 24, 1997, the first series of offenses for which defendant was convicted began in either 2000 or 2001 and ended in either 2003 or 2004. Defendant was born on June 16, 1987, meaning that he would have been 12, 13, or 14 years old when the assaults started in 2000 or 2001, and 15, 16, or 17 when they ceased in 2003 or 2004.

Defendant argues that the criminal division of the Wayne Circuit Court lacked jurisdiction to try him on count one because he might have been 12 or 13 years old at the time of the offense. While this argument may have had merit if the charge specified a date on which defendant was under 14 years old, that is not the case here. Based on the complainant's testimony, defendant was no younger than 15 years old when the first series of assaults ended, and was therefore subject to the automatic waiver statute because at least one of the offenses occurred when he was "14 years of age or older but less than 17 years of age." MCL 764.1f(1). The prosecution filed one charge for the first series of assaults in the criminal division of the circuit court, and by doing so, automatically waived the family division's jurisdiction. See *People v Thenghkam*, 240 Mich App 29, 39; 610 NW2d 571 (2000), overruled on other grounds *People v Petty*, 469 Mich 108; 665 NW2d 443 (2003).

Defendant next argues that he was denied a fair trial with respect to counts two, three, four, and five, by the erroneous admission of prior bad acts evidence relating to count one. We disagree.

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Because defendant did not object to the admission of the assaults alleged to have taken place from approximately 2000 to 2003, this issue is unpreserved.

If an objection to the admission of evidence is unpreserved, this Court reviews the trial court's decision to admit the evidence for plain error that affects the defendant's substantial

[1] First-degree criminal sexual conduct, MCL 750.520b, is a "specified juvenile violation." MCL 764.1f(2)(a).

rights and will reverse "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999*)*. A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

"[I]n a criminal case in which the defendant is accused of committing a listed offense[2] against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant," MCL 768.27a(1) (footnote added), subject to the rule that balances the probative value of relevant evidence against the danger of unfair prejudice, *People v Watkins*, 491 Mich 450, 481-482; 818 NW2d 296 (2012). "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." MRE 403.

Defendant's argument with respect to this issue relies on his previous argument that the criminal division of the circuit court lacked jurisdiction over him with respect to count one of the Felony Information. As discussed above, this argument is without merit. However, even if defendant was improperly charged for the first series of assaults, evidence of those assaults would nevertheless have been admissible. The complainant's testimony about the first assaults belongs to the category of evidence contemplated by MCL 768.27a(1), which creates an exception to the general proscription on the use of prior bad acts in cases in which the defendant is accused of sexually assaulting a minor. *People v Smith*, 282 Mich App 191, 204-205; 772 NW2d 428 (2009). Defendant cites nothing in the complainant's testimony that was so prejudicial under MRE 403 that the trial court should have shifted it from the purview of MCL 768.27a.

Defendant next argues that the trial court's imposition of the 25-year mandatory minimum sentence, enacted in 2006 as an amendment to MCL 750.520b, was an improper ex post facto application of the new law and a violation of defendant's due process rights, and that the trial court departed upwards from the sentencing guidelines without stating on the record substantial and compelling reasons for doing so. We disagree.

To preserve a constitutional challenge for appellate review, a defendant must first raise the issue in the trial court. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Defendant has not preserved the constitutional issue. Unpreserved claims of constitutional error are reviewed for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-765. A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *Vaughn*, 491 Mich at 665.

[2] A "listed offense" includes "violation of . . . MCL 750.520b." MCL 768.27a(2); MCL 28.722(w)(*iv*).

A sentencing court must, absent substantial and compelling reasons, impose a minimum sentence, not to exceed two-thirds of the statutory maximum, within the statutory guidelines on defendants convicted of enumerated[3] felonies. MCL 769.34(2), (2)(b); *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007). The court may depart from the guidelines if it states on the record a substantial and compelling reason or reasons for doing so. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10).

Defendant's guidelines range, which he does not contest, was 135 to 450 months (11 to 37½ years). The sentence he argues was erroneous was the 25-year sentence for count one. Because defendant's sentence is within the guidelines range for those convictions, this Court must affirm. Moreover, defendant's argument that he was improperly sentenced to a 25-year mandatory term of imprisonment cannot be substantiated, as the record of the sentencing hearing contains only references to the sentencing guidelines and not a mandatory minimum sentence. Immediately before the court imposed the sentence, it stated:

> finding the defendant guilty of criminal sexual conduct in the first degree involving a person under the age of 13, the court is sentencing as a habitual fourth, it should be clearly understood the guidelines for habitual fourth as scored by the parties and the court, habitual fourth one hundred and thirty-five months to four hundred and fifty.

Defendant next argues that the lifetime electronic monitoring requirement is a violation of the ex post facto clauses of the United States and Michigan Constitutions. We do not reach the constitutional question, because defendant did not fall under the purview of the lifetime electronic monitoring statute. "A person convicted under [MCL 750.520b] . . . for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring." MCL 750.520n(1). Defendant's date of birth is June 16, 1987. The record evidence indicates, and the prosecution concedes, that the first series of assaults ended before defendant turned 17 years old. Therefore, as the prosecution concedes, defendant was not subject to lifetime electronic monitoring for his conviction on count one. The trial court's imposition of lifetime electronic monitoring was error that requires amendment of the judgment of sentence.

Defendant next argues that he is entitled to credit on count one for jail time he served prior to sentencing in this case. We disagree. As this Court has explained, a parolee is not entitled to credit for time that is served on a parole detainer:

> When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense. MCL 791.238(2). A

[3] MCL 777.11 *et seq.*

> parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted. [*People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004) (case citations omitted).]

In this case, defendant acknowledges that he was on parole at the time he was arrested for the count one offenses. Once arrested, the time he served in jail was a continuation of the unexpired portion of his prior sentence. *Id*., see also *People v Idziak*, 484 Mich 549, 562; 773 NW2d 616 (2009). Accordingly, any sentencing credit would be applicable only to the sentence for which defendant was on parole at the time of his arrest. He was not entitled to credit against the sentences for the crimes at issue in this case.

Defendant's convictions and sentences are affirmed, and we remand with instructions to amend the judgment of sentence to remove the requirement for lifetime electronic monitoring. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell