STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2001
v	No. 222547 Cass Circuit Court
JAMES MARTIN, JR., Defendant-Appellant.	LC No. 97-009004-FC

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of unarmed robbery, MCL 750.530, two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), and kidnapping, MCL 750.349. He was sentenced as a second habitual offender, MCL 769.10, to eight to fifteen years' imprisonment for the unarmed robbery conviction, thirty to sixty years' imprisonment for each of the first-degree CSC convictions, and twenty-five to fifty years' imprisonment for the kidnapping conviction, to be served concurrently. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by failing to suppress a statement made by him because the prosecutor violated a discovery order. We disagree. A trial court must exercise its discretion in fashioning a remedy for noncompliance with discovery rules, orders, or statutes. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991). In deciding how to exercise its discretion, the court must determine what legitimate interests of the courts and of the parties are involved and how they may be affected by the remedial choices available. *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987). Considerations include a criminal defendant's interests in the optimal preparation of his own case and the ability to minimize prosecutorial opportunities to falsify evidence. *Id*. In balancing the defendant's interests with the interest of trial courts to facilitate the search for truth and produce a just result, the court should utilize the remedy of suppression only in the most egregious cases where other remedies such as continuance would not serve to protect the foregoing interests. *Id.* at 229-230

In this case, the trial court determined that defense counsel was aware of the statement shortly after it was made, approximately two years before trial. The mere fact that the evidence was reduced to writing and formally served as part of discovery in an untimely manner does not support defendant's claim that there was an opportunity to falsify the evidence. Further, because defense counsel was aware of the statement for a lengthy period of time before trial, the late

written disclosure did not interfere with counsel's ability to prepare for and try the case. Neither defendant nor his counsel indicated that a continuance would be of any assistance in light of the fact that they knew about the evidence long before trial. In addition, defendant had a week after the statement was reduced to writing to challenge it and waited to do so until the jury was sworn. It is also evident that the trial court allowed defense counsel to raise any objections he had, carefully questioned counsel about the nature of the objections, and did not foreclose any objections. Clearly, this is not an egregious case where fairness would dictate that the statement be suppressed as the result of a discovery violation, and the trial court did not abuse its discretion by declining to suppress the statement.

Defendant also challenges the voluntariness of the statement, which he claims was taken without counsel present and without defendant receiving *Miranda*[1] warnings. However, a thorough review of the record reveals that defendant did not challenge the voluntariness of the statement at trial. Because the issue of voluntariness was not before the trial court, it is unpreserved and will be reviewed only under the plain error rule. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"Statements made voluntarily by persons in custody do not fall within the purview of *Miranda*." *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). Further, spontaneous, voluntary statements made after arraignment need not be suppressed if they were not the product of custodial interrogation. *People v Fisher*, 166 Mich App 699, 709-710; 420 NW2d 858 (1988). Interrogation refers to express questioning and to any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Raper, supra* at 479. Here, the statement was not the product of custodial interrogation. Defendant asked a police officer a question and, after receiving an answer, defendant volunteered the inculpatory statement. Suppression is not warranted where the statement was voluntary and spontaneous, and there is no plain error.

Defendant next complains that his counsel was ineffective in numerous instances. Because the trial court did not conduct a *Ginther*[2] hearing, our review is limited to errors apparent in the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant has to overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Moreover, defense counsel is not required to make frivolous or meritless motions or objections. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998); *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Further, counsel's performance cannot be deemed deficient for failing to advance a novel legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

We have reviewed all of defendant's complaints with regard to his counsel's performance and find that defendant cannot meet the burden of proving that his counsel was ineffective. His counsel's conduct did not fall below an objective standard of reasonableness that affected the result of the proceeding with any reasonable probability. While the prosecutor's first comments during closing argument may have constituted an improper civic duty argument, there is no likelihood that the outcome of the proceeding would have been different if counsel had objected to the brief, improper comment. Contrary to defendant's argument on appeal, the evidence that he was the perpetrator was overwhelming. In addition, the jury was instructed that the lawyers' statements and arguments were not evidence. Defendant's remaining complaints about the prosecutor's closing argument have no merit.

Similarly, counsel's decision not to request an out-of-court photo showup or corporeal line-up to insure that the victim could identify defendant outside of the courtroom did not constitute ineffective assistance. The decision involves a matter of trial strategy, which we will not question in hindsight. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). The identification evidence was substantial even without the victim's identification and thus, there is no reasonable probability that the lack of an out-of-court identification by the victim affected the outcome of the trial.

Further, defense counsel was not ineffective for failing to object to the other bad-acts evidence about defendant's actions a short time before the robbery and rape. The evidence was properly admissible under MRE 404(b) for purposes of showing motive, opportunity, plan, and identity. It was also logically relevant in that the prosecution had to prove defendant's identity as the perpetrator. The evidence of his earlier robbery attempt on the same evening, wearing the same coat and being with the same codefendant, was relevant to his motive, opportunity, scheme and identity. In addition, evidence of the other attempted robbery was essential to "give the jury an intelligible presentation of the full context in which [the] disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

Finally, defense counsel was not ineffective for failing to advocate for an extension of the general rule that defendants are allowed to appear for their trials in clothing other than jail clothing. Defendant argues that his counsel should have objected when his "star" witness testified in jail clothes. As previously noted, counsel cannot be ineffective for failing to advance a novel, legal argument. *Reed, supra* at 695.

Defendant next argues that the evidence of his identity as the perpetrator was insufficient. We find no merit to this argument. Defendant was seen with his accomplice shortly before the incident trying to rob another convenience store. Two witnesses who knew defendant identified him as one of the people involved in the first attempted robbery and described the coats that he and his accomplice were wearing. Defendant's accomplice testified that when they were unsuccessful at the first store, they went to the store where the victim was working. The victim testified that she saw the two men enter the store where she worked, and described their coats in a substantially similar manner to that of the witnesses from the first store. The accomplice further testified that defendant grabbed and hit the victim, instructed her to undress and to tell them how to open the cash register, and stayed there with the victim after the accomplice left the store. Defendant's girlfriend testified that defendant returned to her apartment shortly after the

accomplice arrived, was wearing his green coat, and was nervous. According to the accomplice, defendant made a statement consistent with having raped the victim. Another witness testified that he saw a man wearing a green coat punching and beating a woman on the street. The police were called and directed to the house behind which the man and woman went, and the victim ran from around the house at approximately the same time. The evidence identifying defendant was not only sufficient but was overwhelming.

Finally, defendant argues that his kidnapping conviction should be overturned because the asportation of the victim was in furtherance of the criminal sexual assault and did not support an independent conviction for kidnapping. We disagree. The evidence, when viewed in a light most favorable to the prosecution, was sufficient to prove that there was asportation independent of the other crimes such that the charge of kidnapping was proved beyond a reasonable doubt.

> [A]sportation of the victim is a judicially required element of the crime of kidnapping by forcible confinement or imprisonment. To establish the element of asportation, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime (unless the underlying crime involves murder, extortion, or taking a hostage). [*People v Green*, 228 Mich App 684, 696-697; 580 NW2d 444 (1998) (citations omitted).]

Existing case law analyzing the element of asportation is instructive on whether asportation was proved in this case. In *People v Sawyer,* 222 Mich App 1; 564 NW2d 62 (1997), the defendant forced the victim into a vehicle at gun point and made him drive for at least thirty minutes. Thereafter, the defendant removed the victim from the car, assaulted him, put him back into the car, and drove another thirty minutes before releasing him. We found that the element of asportation was met under these circumstances. *Id*. at 6. Shorter confinements and movements have been considered nonincidental to the crime of rape where they added a danger or threat beyond that inherent in the crime of rape. *People v Eubank,* 121 Mich App 227, 231; 328 NW2d 408 (1982). In *People v McNeal*, 152 Mich App 404, 411-412; 393 NW2d 907 (1986), we found sufficient evidence of asportation where the movement was not "merely incidental" to the underlying crime. See also *People v Johnson,* 171 Mich App 801, 804; 430 NW2d 828 (1988) [forcing a victim at gun point to travel approximately one and one-half miles to an apartment to perpetrate a CSC would satisfy the element of asportation.]

Here, defendant ordered the victim to undress and lie face down on the floor of the store. However, after the unarmed robbery was completed, he ordered the victim to dress and leave the store with him. The victim believed that defendant had a gun and she left the store as instructed. Defendant grabbed her arm and pulled her along the street. They walked some distance and defendant halted the victim's attempt to escape. Eventually, defendant dragged the victim into a school yard. From there, he dragged her behind a house where the first-degree criminal sexual conduct took place. On these facts, a rational jury could find that the element of asportation was in furtherance of the kidnapping and was not merely incidental to the criminal sexual conduct. Clearly, the degree of movement and confinement in this case was much greater than that necessary to complete the rape. We are satisfied that the evidence was sufficient to support the

element of asportation, and the trial court properly denied defendant's motion for a directed verdict on this issue.

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder