STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2001
v	Nos. 221490, 222709 Berrien Circuit Court
WAYNE ESTELL SNYDER, Defendant-Appellant.	LC No. 99-410630- FC

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of stalking a minor, MCL 750.411h(2)(b); MSA 28.643(8)(2)(b), and was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of ten to seventy-five years' imprisonment. In these consolidated appeals, defendant appeals numerous issues as of right. We affirm.

Defendant first claims that the trial court erred in allowing him to represent himself at trial. We review for an abuse of discretion the trial court's decision to allow defendant to represent himself. *People v Adkins (After Remand),* 452 Mich 702, 721 n 16; 551 NW2d 108 (1996).

We conclude that the trial court did not abuse its discretion. The trial court properly conveyed the substance of MCR 6.005(D). The requirements set forth in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976) were met. The record reflects that defendant's assertion of his request to represent himself was unequivocal and the record supports the trial court's determination that defendant had the requisite intelligence to represent himself and that his request was knowing, intelligent and voluntary. Defendant's general competence was relevant to the determination of self-representation but, contrary to defendant's assertion on appeal, his legal competence was not. See *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994) (Griffin, J), quoting *Anderson*, *supra* at 367-368. Further, although defendant complains that the trial court did not offer to allow him to consult with an attorney, other than the attorney appointed to assist him on a standby basis, the record does not reflect that defendant made a request to do so. Even if defendant had made such a request, defendant was not entitled to new advisory counsel based solely on his dissatisfaction with his present advisory counsel. *People v Mitchell,* 454 Mich 145, 166-167; 560 NW2d 600 (1997). Indeed, defendant was not entitled to *any* advisory counsel where he asserted his right to self-representation. *Dennany*,

supra at 443; *People v Davis*, 216 Mich App 47, 55-56; 549 NW2d 1 (1996). The appointment of standby counsel was a matter of grace, not of right. *Dennany, supra* at 443.

In a related claim, defendant contends that he was denied the right to the effective assistance of his standby counsel at trial. We hold that this claim is foreclosed. Defendant had either a right to counsel or a right to represent himself at trial, but not both. *Adkins, supra* at 720. Defendant cannot use these competing rights as an appellate parachute. *Id.* at 725. In choosing to represent himself at trial, defendant was held to the same standards of representation as an attorney and he cannot now complain on appeal that the quality of his defense, even as assisted by standby counsel, amounted to a denial of "effective assistance of counsel." *People v Burden*, 141 Mich App 160, 164; 366 NW2d 23 (1985), quoting *Faretta v California*, 422 US 806, 835 n 46; 95 S Ct 2525; 45 L Ed 2d 562 (1975).

Second, defendant claims that he was denied his right to an impartial jury by the trial court's denial of his challenges for cause with respect to two jurors. Defendant's claim is without merit.

A juror is presumed qualified. *Poet v Traverse City Osteopathic Hospital*, 433 Mich 228, 235-236; 445 NW2d 115 (1994). However, a prospective juror may be removed for cause if the challenging party shows that the juror has a demonstrated bias for or against a party, if the juror shows a state of mind that will prevent the juror from rendering a just verdict, or if the juror has opinions that would improperly influence the juror's verdict. MCR 2.511(D)(3), (D)(4) and (D)(5); *Poet, supra* at 236; *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000). We defer to the trial court's superior ability to assess a juror's demeanor to determine whether that person would be impartial. *Id.* at 522.

We agree with the trial court that defendant has not shown that the challenged jurors had a state of mind that would prevent them from rendering a just verdict, that they would be biased in favor of the victim, or that they had an opinion about what the outcome should be at trial. See *People v Lee*, 212 Mich App 228, 248-250; 537 NW2d 233 (1995). Each of the jurors assured the court that he or she could be fair and impartial and decide the case on the merits. MCR 2.511(D)(3) and (D)(5). The trial court did not abuse its discretion in denying defendant's challenges for cause as to these jurors. *Williams, supra* at 521-522; *Lee, supra* at 249-250.

Third, defendant asserts that the trial court abused its discretion by allowing the prosecutor to impeach him with a prior conviction, specifically a 1991 felony conviction for concealing or misrepresenting the identity of a motor vehicle with the intent to mislead.

Crimes of dishonesty or false statement are directly probative of truthfulness and are admissible under MRE 609(a)(1), without regard to the balancing test of MRE 609(a)(2)(B). *People v Allen*, 429 Mich 558, 593-594; 420 NW2d 499 (1988), amended and reh den sub nom *People v Pedrin*, 429 Mich 1216 (1988). MCL 750.415(2); MSA 28.647(2) states that "[a] person who, *with the intent to mislead another* as to the identity of a vehicle, *conceals or misrepresents* the identity of a motor vehicle . . . is guilty of a felony, . . ." (emphasis added). Defendant's prior conviction was admissible under MRE 609(a)(1), without regard to the balancing test of MRE 609(a)(2)(B), because the offense contains an element of dishonesty or false statement. *Allen, supra* at 593-594.

Contrary to defendant's additional argument on appeal regarding this prior conviction, the record reflects that the prosecutor did give notice before trial of his intent to impeach defendant with the prior conviction. Nevertheless, the prosecutor was not obligated to do so. Unlike MRE 404(b)(2), which is the rule for admission of "other crimes, wrongs, or acts," MRE 609, the rule applicable here for impeachment by evidence of prior convictions, does not contain a notice requirement.

Fourth, defendant contends that a witness' in-court identification of him was unduly suggestive where the witness had at least two opportunities to see defendant within twenty-four hours of her identification of him at trial including defendant's participation in a lineup and the witness' purported observation of defendant at the defense table in the courtroom the day before she testified.

To sustain his due process challenge, defendant must show that a pretrial identification of him by the witness was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of her misidentification of him at trial. *People v Kurylczyk,* 443 Mich 289, 302 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). Defendant has not made this requisite showing.

Moreover defendant agreed to allow the witness to attempt an identification in the courtroom on the condition that he be allowed to sit among the spectators in the courtroom. Because defendant agreed to this at trial he cannot now complain that this procedure was unduly suggestive. In any event, based on the witness' testimony at trial, it appears that the witness had an independent basis for her in-court identification of defendant. See generally, *People v Gray,* 457 Mich 107, 116; 577 NW2d 92 (1998). Where there were other indicia of reliability the witness' initial inability to identify defendant does not invalidate her identification of him at trial. Her inability to identify defendant pertains to the weight and credibility, not the admissibility, of her identification testimony. *Kurylczyk, supra* at 309; *People v Davis,* 106 Mich App 351, 352; 308 NW2d 206 (1981) (witness' in-court identification of the defendant was proper even though the witness was unable to identify the defendant's picture during a photographic showup); *People v Jordan,* 34 Mich App 360, 365-366; 191 NW2d 58 (1971) (in-court identification of the defendant admissible where witness was unable to identify defendant at a lineup and preliminary examination).

Fifth, defendant claims that various acts of misconduct by the prosecutor denied him his right to a fair trial. We note that defendant failed to object at trial to any of the challenged comments by the prosecutor and, therefore, defendant has not preserved this issue for our consideration. Because defendant has not shown that the challenged remarks constituted plain error, or that his substantial rights were adversely affected due to any conduct of the prosecutor, our review of defendant's claim is precluded. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000).

Sixth, defendant argues that his due process rights were violated because a police officer failed to preserve his original notes, subsequently incorporated into a formal report, of an interview he conducted with defendant. We conclude that no due process violation has been shown.

A defendant has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the defendant and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1997), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Upon defendant's request, the prosecutor had the duty to provide defendant with: "(1) any *exculpatory* information or evidence known to the prosecuting attorney; (2) any police report concerning the case, except so much of a report as concerns a continuing investigation; and (3) any *written or recorded* statements by a defendant[.] " MCR 6.201(B) (emphasis added).

We first note that it is doubtful that the notes of the interview were discoverable. In *People v Holtzman*, 234 Mich App 166, 168, 178-179; 593 NW2d 617 (1999), this Court held that the term "statement," as used in MCR 6.201(A)(2),[1] does not include notes of an interview with a witness unless the notes comply with the definition of "statement" found in MCR 2.302(B)(3)(c)[2]. Specifically, this Court held that "[u]nless the 'notes' were a 'substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded,' or unless the witness signed or adopted the notes as his statement, they are not subject to disclosure under MCR 6.201(A)(2)." *Id.* at 179. There is no contention here that the notes at issue fit within the above definition. See also *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997) (prosecutor under no obligation to disclose statement that is not "written or recorded" or that is not exculpatory).

Defendant bears the burden of showing that the evidence was exculpatory. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). He has not met this burden because he has not shown that the notes contained favorable or exculpatory evidence. With regard to evidence of unknown probative value, which is thus only potentially exculpatory, a defendant is denied due process by loss of the evidence only where the police acted in bad faith in destroying the notes. *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989), citing *Arizona v Youngblood*, 488 US 51; 109 S Ct 333, 337; 102 L Ed 2d 281 (1988). The police officer who interviewed defendant testified that he destroyed his original notes as a matter of routine after the police report was prepared from the notes and after he ensured the accuracy and completeness of the police report when compared to the notes. Defendant has offered nothing to contradict the officer's testimony and has not established that the officer acted in bad faith. *Johnson, supra* at 365. Defendant did receive a copy of the police report and he has not shown that it materially differed from the interview notes. Finally, defendant has not demonstrated that if the notes had

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[1] MCR 6.201(A)(2) mandates, among other things, that a party provide the opposing party with "any written or recorded statement by a lay witness whom the party intends to call at trial" upon request by the opposing party.

[2] This Court noted that MCR 6.001(D) provides that the civil procedural rules apply to criminal proceedings except where otherwise indicated, and that the civil discovery rule in MCR 2.302(B)(3)(c) expressly defines "statement" as: "(i) a written statement signed or otherwise adopted or approved by the person making it; or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded." *Holtzman, supra* at 168-169.

been provided to defendant, it is reasonably probable that the result of the trial would have been different. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000); *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). The trial court did not abuse its discretion in determining that the prosecution complied with its discovery obligations. *Stanaway*, *supra* at 680.

Seventh, defendant contends there was insufficient evidence to support his conviction of stalking a minor.

Viewing the evidence in a light most favorable to the prosecutor, *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000), we conclude there was sufficient evidence presented, either direct or circumstantial, from which the jury could find beyond a reasonable doubt that defendant was guilty of stalking a minor. MCL 750.411h(2)(b); MSA 28.643(8)(2)(b). The evidence, and reasonable inferences arising from the evidence, was sufficient to establish that defendant engaged in a course of unconsented contact with the victim, and that defendant's unconsented contact with the victim reasonably and in fact caused her to feel emotional distress and fear. MCL 750.411h(1)(a), (1)(d), and (1)(e); MSA 28.643(8)(1)(a), (1)(d), and (1)(e).

Eighth, defendant maintains that his right to a fair trial was violated because the police failed to advise him of his right to remain silent before questioning him.

Defendant did not object below to the failure of the police to give him his *Miranda*[3] warnings, nor did he move below to suppress his statements on this basis. Nor did defendant contend below that his statements made during the interview were involuntary. Because defendant did not preserve this issue it is forfeited unless defendant can establish plain, prejudicial error. *Carines, supra* at 763-764.

Miranda warnings need not be given unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). Contrary to defendant's assertion, the triggering mechanism for the duty to issue *Miranda* warnings is custody, not focus. *Id; People v Mayes (After Remand)*, 202 Mich App 181, 196; 508 NW2d 161 (1993) (Corrigan, C.J., concurring). Custodial interrogation is questioning initiated by a law enforcement officer after the accused has been taken into custody or otherwise deprived of his freedom in a meaningful way. *Miranda*, *supra* at 444; *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused was in custody depends on the totality of the circumstances, with the key question being whether the defendant reasonably believed he was not free to leave. *Id.*

The record does not support defendant's assertion that he was in "custody" and therefore entitled to *Miranda* warnings prior to questioning by the police officer. Defendant went to the police station voluntarily. He was not under arrest. He was told that if he felt uncomfortable he could leave at any time, and he was, by his own admission, not worried about going there or answering questions. Additionally, the record does not reflect, and defendant does not suggest,

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

that the interview was lengthy or coercive in any way. Defendant has not shown that the trial court committed plain error in admitting his statements made during the police interview. *Carines, supra* at 763-764.

Because the record also does not support defendant's bare allegation, raised for the first time on appeal, that his statements were involuntary, remand for further consideration of this issue is not warranted.

Next, defendant claims that his sentence of ten to seventy-five years constitutes an abuse of discretion. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990). We disagree. Where defendant's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, the court's sentence, which is within the allowable statutory limits for a fourth felony offender pursuant to MCL 769.12(1)(a); MSA 28.1084(1)(a), is proportionate and reflects defendant's low potential for rehabilitation. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). See also *People v Lemons*, 454 Mich 234, 258-260; 562 NW2d 447 (1997). The trial court did not abuse its discretion in sentencing defendant. *Milbourn, supra* at 634-635.

Finally, defendant argues that the trial court erred in failing to sua sponte declare a mistrial based on his allegations that the prosecutor, the victim, and the victim's sister lied at the initial sentencing hearing. We agree with the trial court that defendant has not shown that the victim or her sister committed perjury at the sentencing hearing or that the prosecutor presented false evidence. Further, a mistrial is not properly granted at a sentencing hearing. "A mistrial is a 'trial which has been terminated prior to its normal conclusion.'" *People v Tracey*, 221 Mich App 321, 327; 561 NW2d 133 (1997), quoting Black's Law Dictionary (5th ed), p 963. To the extent that defendant implies that the allegedly false testimony at sentencing entitles him to a new trial, such a proposition is not logical and we will not search for logic to support defendant's position.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey