

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIRK MATTHEW MEYER,

Defendant-Appellant.

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UNPUBLISHED

February 1, 2002

No. 223399

Genesee Circuit Court

LC No. 99-004163-FC

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

PER CURIAM.

Defendant was convicted, following a jury trial, of kidnapping, MCL 750.349, and second-degree criminal sexual conduct, MCL 750.520c(1)(c). He was sentenced to concurrent terms of 225 to 360 months' imprisonment for the kidnapping conviction and 100 to 180 months' imprisonment for the second-degree CSC conviction. Defendant appeals as of right, and we affirm.

The victim, a thirteen year old girl, was waiting at a bus stop when defendant grabbed her. She was forced into defendant's vehicle. As defendant drove and after he stopped for gas, the victim tried to get the attention of others by screaming, but failed. Defendant told her if she screamed again, he would kill her. Defendant moved his hand in between the victim's legs and touched her vaginal area outside of her clothing. When she tried to move defendant's hand, he hit the victim's hand. In the struggle with defendant, the victim lost a fingernail and braided hair. The victim was forced into an apartment, struck in the head, and passed out. When the victim woke up, she was naked, and defendant was getting dressed. Defendant put the victim back into his car and pushed her out of the car near a muffler store. Defendant told the victim not to call police or he would kill her. Based on information given by the victim, police officers found defendant's vehicle and went to his apartment. Defendant was not there, but the officers gained entry from an apartment employee to ensure that there were no other victims. Items described by the victim, including "girlie" magazines, were visible in the apartment. Officers waited for defendant to return. Another apartment tenant opened a common storage area. The tenant closed the door and gestured to police. Police found defendant in the storage room. When defendant was apprehended, he asked police why he was being arrested. When advised that there was a complaint of an assault by a female, without disclosure of the victim's race, defendant told police that he picked up a young black lady at a bus stop and took her to school.

Defendant first argues that the trial court abused its discretion by denying his motion for a mistrial when the prosecution failed to preserve his automobile in accordance with a discovery order. We disagree. Our review of the trial court's decision regarding the appropriate remedy for noncompliance with a discovery order is for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). In this context, exercise of discretion involves balancing the interests of the courts, the public, and the parties. *Id.* at 598. The court inquires into all relevant circumstances, including the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice. *Id.*

The denial of a motion for a mistrial is also reviewed for an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to receive a fair trial. *Id.* Review of the order requiring preservation of the vehicle reveals that it afforded defendant the opportunity to inspect it. The record further reveals that defendant's representatives were able to examine the car on at least two occasions. Furthermore, the relevancy of the examination was to allow defendant to test the accuracy of the victim's description of the car, and there was other evidence available at trial to challenge the victim's testimony. Thus, we conclude that defendant was not prejudiced by the failure to preserve the vehicle, and the trial court did not abuse its discretion by denying defendant's motion for a mistrial. *Cunningham, supra.*

Defendant next argues that he was deprived of a fair trial when evidence regarding the victim's truancy from school was excluded. We disagree. We review the trial court's decision to exclude evidence for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 461; 591 NW2d 26 (1999). In order to admit impeachment evidence, a proper foundation for the admission must be established. *People v Weatherford*, 193 Mich App 115, 122; 483 NW2d 924 (1992). In the present case, defense counsel failed to establish a proper foundation for admission of evidence. Defense counsel merely asked the victim if it was "easy" for her to get up and go to school. He did not question her regarding her attendance, any absences, and the reasons for any absences. He also failed to ask whether the victim had lied about attending or skipping school. In light of the insufficient foundation, the trial court properly excluded admission of the victim's school records. Accordingly, the trial court did not abuse its discretion by excluding the evidence.<sup>1</sup> *Brownridge, supra.*

Defendant next argues that he was denied a fair trial because police conducted a photographic lineup when defendant was in custody *after* the victim could not identify him in a live lineup. We disagree. The trial court's decision to admit identification evidence is reviewed for clear error. *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). Subject to certain exceptions, a photographic identification should not be utilized when the defendant is in custody. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973). In the present

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<sup>1</sup> We note that MCL 600.2165 precludes admission of the school records. Defendant argues that admission is permissible consistent with *People v Fink*, 456 Mich 449, 455; 574 NW2d 28 (1998). However, in order to admit evidence protected by privilege, the court must find that the evidence is essential to the defense. *Id.* at 455. As previously stated, the inadequate foundation precluded the trial court from reaching such a conclusion.

case, defendant had altered his physical appearance at the time of the lineup, thus frustrating the identification procedure. When the victim was unable to identify defendant in the live lineup, a photographic lineup was conducted. The photographic lineup reflected defendant's appearance at the time of arrest, before alteration of his appearance. There is no indication that the photographic lineup was improper or suggestive, and under the circumstances, the trial court did not abuse its discretion by allowing the evidence of the photographic lineup. See *People v Baker*, 114 Mich App 524, 528; 319 NW2d 597 (1982). Defendant has not shown that it was necessary to establish an independent basis for identification. *People v McElhaney*, 215 Mich App 269, 288; 545 NW2d 18 (1996).

Defendant next argues that the trial court erred by denying his motion to suppress statements made to the police at the time of his arrest. We disagree. When examining the trial court ruling regarding a motion to suppress, we review the trial court's factual findings for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). When the trial court's ruling on a motion to suppress involves an interpretation of law or application of a constitutional standard to uncontested facts, appellate review is de novo. *Id.* When taken into custody, a police officer asked a question directed at another officer regarding defendant's location. Defendant answered the question and indicated that he would not resist. Defendant then asked police why he was being taken into custody. When an officer gave a brief description of the complaint, defendant stated that he encountered a young black female and took her to school. The trial court properly concluded that the officer's statement and defendant's response did not constitute an interrogation. When a defendant is not subjected to conduct that the police should have known was reasonably likely to elicit an incriminating response, the defendant was not deprived of his *Miranda*<sup>2</sup> rights. *People v Raper*, 222 Mich App 475, 480; 563 NW2d 709 (1997). Therefore, suppression of the statement was not warranted.

Defendant next argues that there was insufficient evidence of asportation to convict defendant of kidnapping and the trial court erred in submitting two different theories to the jury. We disagree. Defendant forced the victim into his vehicle then drove to a gas station. When the victim tried to alert other drivers or the gas station attendant, defendant prevented her from doing so and threatened her. Defendant did not drive directly to his apartment, but circled the area. If defendant had simply wanted to assault the victim, he did not need to remove her from the area. Nonetheless, defendant moved her from the bus stop, to his car, to a gas station, and then on to his apartment. The asportation was established. *People v Sawyer*, 222 Mich App 1, 5-6; 564 NW2d 62 (1997).

Defendant next argues that the trial court erred in allowing "girlie" magazines and testimony regarding photographs into evidence. We disagree. Defendant did not object to the admission of the magazines, but objected to the jury's examination of the magazines. Defendant objected to the photographs based on relevancy and the privacy interests of the consenting model, an ex-girlfriend of defendant. This issue is not preserved for appellate review because defendant failed to object based on 404(b) grounds in the trial court. *People v Aguwa*, 245 Mich App 1, 6; 626 NW2d 176 (2001). Unpreserved claims of nonconstitutional error are reviewed to determine whether a plain error occurred that affected the defendant's substantial rights. *Id.*

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<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant has failed to demonstrate a plain error that affected substantial rights.

Lastly, defendant argues that the trial court improperly assessed offense variable seven at fifty points and that the sentence was not proportionate to defendant's background. We disagree. Scoring decisions for which there is any evidence in support will be upheld on appeal. *People v Leversee*, 243 Mich App 337, 348-349; 622 NW2d 325 (2000). Review of the record reveals that there was sufficient evidence to support the scoring. Defendant was sentenced within the recommended guideline range and has failed to establish a scoring error. Accordingly, we affirm the sentence. *Id.* at 348; MCL 769.34(10).

Affirmed.

/s/ Harold Hood

/s/ William B. Murphy

/s/ Jane E. Markey