STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2002
v	No. 221484 Oakland Circuit Court
RICHARD D. COURTEMANCHE, Defendant-Appellant.	LC No. 98-162410-FC

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89. He was sentenced, as a fourth-offense habitual offender, MCL 769.12, to a prison term of twenty to forty years. He appeals as of right. We affirm.

This case stems from an assault of the complainant in the parking lot of her workplace, Unique Fabricating in Rochester Hills, during the early morning of September 14, 1998. The complainant testified that, after she parked her car, she walked around to the passenger side and opened the door in order to remove certain items. As she was backing out of the car, defendant grabbed her from behind, held her tightly, with her arms pinned at her side, and held a pair of scissors at her neck. Defendant put his mouth next to her ear, told her not to scream, and indicated that he only wanted her pantyhose. The complainant testified that, although she did not previously know defendant, she "got a good look" at him and was certain he was her assailant. As the complainant struggled to escape, she received minor cuts on her neck and her hand.

Bruce Leonard, who worked at Smart Eye, which is directly across the street from Unique Fabricating, testified that he saw a gray pickup truck with a utility rack on it pull into the Smart Eye parking lot. He saw defendant get out of the truck, run across the street toward a car, and grab a woman from behind. When Leonard heard the complainant's loud screams, he went outside and yelled at the parties in an attempt to stop the attack. At that point, the complainant escaped defendant's hold and ran into her workplace. Defendant, who was holding something with a long metal blade at his side, ran toward the Smart Eye parking Lot and Leonard. In response to Leonard's inquiry of what he was doing, defendant claimed that he was serving the complainant with some papers. Cindy Wright, another Smart Eye employee, testified that she saw defendant run from Unique Fabricating into the Smart Eye parking lot, saw Leonard speak to defendant, and, after going outside to investigate, she had a "clear view" of defendant as he

left the scene. The complainant testified that, when she saw the gray truck leaving, she recalled seeing the same truck in her rear view mirror as she was driving to work on that morning.

As defendant sped away from the scene, Leonard noted his license plate number and reported it to the police. When the police ran the license plate number, they received information concerning defendant. Defendant's stepfather testified that the gray pickup truck was co-owned by him and defendant, but that defendant was the sole driver. On the day following the incident, the police set up surveillance in order to secure defendant's arrest. When defendant arrived at the location, driving the same gray pickup truck, he attempted to evade the police, but eventually surrendered. When searching defendant's truck, the police recovered a pair of women's pantyhose and a pair of needled-nose pliers.

I

Defendant first argues that the trial court abused its discretion by failing to consider the issues raised in his motions for new trial, filed *in propria persona*. We disagree.

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MCR 2.119(A)(2), which governs motion practice, provides, in relevant part:

> A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based. *Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits*. . . . [Emphasis added.]

We find no abuse of discretion. Here, defendant, *in propria persona*, filed a *sixty-page* motion for new trial, accompanied by a motion to exceed the twenty-page limit. The trial court dismissed the motion for new trial on procedural grounds, denied the motion to exceed the twenty-page limit, and directed defendant to file a new motion limited to twenty pages. (Appendix B.) Instead of complying with the court's order to file a brief within the twenty-page limitation, defendant endeavored to undermine the order by filing five separate motions for new trial raising the same issues presented in the initial sixty-page motion. Indeed, on appeal, apart from a general allegation, defendant has not identified any issue that could not have been addressed within the twenty-page limit. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims[.]" *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Moreover, in the interim, defendant was appointed substitute appellate counsel, who filed a motion for new trial, which the trial court considered and denied. Under these circumstances, the trial court properly declined to address defendant's five motions for new trial.

II

Defendant next argues that the trial court abused its discretion by denying his motion to dismiss because of alleged discovery violations. To this end, defendant claims that the police (1) failed to provide him with a copy of his handwritten statement, (2) paraphrased the witnesses' statements in the typed reports, but failed to provide him with their handwritten notes from the witness interviews, and (3) frustrated his efforts to present a defense by failing to indicate on the police reports which officers interviewed which witnesses.

This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). Evidentiary matters, including the trial court's rulings on discovery issues, are also reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

Upon request, a prosecutor must provide a defendant with police reports concerning the case and any written or recorded statements by a defendant, among other things. MCR 6.201(B); *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). Having considered each of defendant's contentions, we find that none presents a cognizable claim for relief. First, despite defendant's request for a copy of his handwritten statement during trial, the officer-in-charge, who interviewed defendant, testified that defendant did not write out a statement. Rather, defendant made an oral statement, and the officer took notes and subsequently typed the statement on the basis of those notes. It is undisputed that defendant received a copy of the typewritten statement. Moreover, during trial, defendant asked to review the officer's notes, which the court allowed.

Although defendant was not provided with the officers' handwritten notes from witness interviews, it appears that defendant failed to timely request the notes. In any event, the record shows that defendant was provided with the officers' typewritten reports concerning the witness interviews, and the testimony revealed that the officers' notes were incorporated into the those reports.

Finally, defendant claims that he was denied his right of confrontation because the police reports did not make clear which officer had interviewed which witness. During trial, the officer-in-charge explained that if an officer failed to sign a police report, he signed the bottom as the investigating officer. Nonetheless, the record shows that, during trial, defendant, as well, as the jury, were apprised of which officer interviewed which witness, and were also aware that, in some instances, the officer-in-charge had signed his name on certain reports, even though other officers may have gathered the information. More compelling, however, is the fact that the police reports at issue contained the statements of the complainant and the two eyewitnesses, all of whom testified at trial and were extensively cross-examined by defendant. In addition, the officer who interviewed the complainant, as well as one of the eyewitnesses, also testified at trial, and was cross-examined by defendant. Under these circumstances, any harm caused by the officer-in-charge signing certain police reports is tenuous, at best. In sum, the trial court did not

abuse its discretion in denying defendant's motion to dismiss on the basis of alleged discovery violations.[1]

III

Defendant also argues that he is entitled to a new trial because an eyewitness' in-court identification was impermissibly tainted. To support this claim, defendant relies on the witness' testimony that she had been shown defendant's photo on the previous day to "refresh her memory."

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

Although identification procedures that are unnecessarily suggestive and conducive to irreparable misidentification deny a defendant due process, *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), the record contains no indication that any impermissible or unduly suggestive identification procedures occurred here. Although the witness initially indicated that she was shown defendant's photo on the day before she testified, she subsequently clarified that she was not *shown* a photo. Rather, in response to the trial court's inquiry, the witness explained that she had inadvertently seen a photo array that contained defendant's photo, which had been admitted as an exhibit, laying on counsel's table after the proceedings had ended on the previous day.

Moreover, defendant did not contend that the photo array was unduly suggestive, but that the witness' testimony was tainted merely because she saw the exhibit. In any event, even if the alleged identification procedure could be considered tainted because the witness viewed the exhibit, the record establishes that there was an independent basis to admit her in-court identification of defendant. See *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977); *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000). The witness testified that she had a "clear view" of defendant as he was getting into his truck and that she saw him from approximately three feet away when he drove by her as he was leaving the scene. The witness provided the police with a detailed description of defendant and identified him at the preliminary examination. She maintained that there was "no doubt in [her] mind" that defendant committed the offense. For these reasons, reversal is not warranted on this basis.

IV

Defendant next argues that the trial court abused its discretion in allowing a prosecution witness to testify that a pair of panty hose and a pair of pliers were found in his truck because,

[1] Despite defendant's argument in his brief, he was not denied his right of cross-examination as guaranteed by the Confrontation Clause, and this issue does not implicate a denial of defendant's constitutional right to present a defense and confront his accusers. See US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993) (citations omitted)

despite his discovery requests, he was not notified that such evidence would be presented during trial. The trial court overruled defendant's objection, finding that he had been notified of the evidence.

We find that the trial court did not abuse its discretion in allowing the evidence. In response to the trial court's inquiry, the prosecutor indicated that defendant was provided with a copy of the impound sheet from his vehicle, as well as the police reports listing the items seized from his vehicle. Further, defendant's former attorney, who acted as defendant's advisory counsel during trial, confirmed that the defense had received all of the evidence that had been presented. In addition, even assuming that defendant had not been provided timely notice, it is not apparent, and defendant has not persuasively argued, how he would have reacted differently to this evidence. Contrary to defendant's suggestion, the evidence was relevant. MRE 401. Moreover, evidence is not inadmissible simply because the very nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403; *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Under these circumstances, we are not persuaded that the court abused its discretion in allowing the evidence.[2]

V

Defendant, who represented himself during trial, also argues that the trial court abused its discretion by failing to *sua sponte* appoint substitute trial counsel. Again, we disagree.

Because defendant failed to timely raise this claim below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

An indigent defendant is constitutionally guaranteed the right to appointed counsel. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Flores*, 176 Mich App 610, 613; 440 NW2d 47 (1989). Appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001); *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Further, criminal defendants have a constitutional right to proceed *in propria persona* in any criminal proceeding. *People v Kevorkian*, 248 Mich App 373, 417; 639 NW2d 291 (2001).

Here, defendant initially *retained* counsel in September 1998. Defendant sent a letter to defense counsel on March 2, 1999, providing him with certain options, including withdrawing or assisting him in an advisory capacity. On March 12, 1999, less than one month before the scheduled trial date, defense counsel filed a motion to withdraw. On March 16, 1999, defendant filed a waiver of attorney and requested to proceed *in propria persona*. Thereafter, defendant

[2] We note that, even if there was merit to defendant's contention, defendant has not established that it is more probable than not that the alleged error was outcome determinative, particularly given the eyewitness testimony and his connection to the vehicle used during the crime. *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

filed a grievance against his retained counsel. The court directed the attorney to remain on the matter as an advisory attorney. On March 24, 1999, defendant appeared before the court and waived his right to counsel. The trial court accepted defendant's waiver of counsel, with his former attorney serving as advisory counsel, and warned defendant that there would be no adjournments of the impending trial date. The court expressed concerns that a new advisory counsel could not timely prepare for the case, and that defendant was attempting to delay the start of trial. The court then appointed a new attorney to assist defendant, directing the first attorney to assist the new attorney. Ultimately, at the commencement of trial, defendant proceeded *in propria persona*, as requested, with two attorneys acting as advisory counsel.

Under these circumstances, we conclude that defendant's claim that the trial court should have *sua sponte* appointed substitute counsel is wholly without merit. Although defendant was dissatisfied with the performance of his retained counsel before trial, he did not request an opportunity to retain new counsel, nor did he request the court to appoint him counsel because he was indigent. Rather, the record reveals that defendant unequivocally requested to represent himself. Indeed, defendant does not argue that the trial court failed to substantially comply with the requirements of *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D) in accepting his waiver. Further, it is established that a defendant who asserts his right to self-representation is not entitled to advisory counsel, nor entitled to the effective assistance of advisory counsel. See *Kevorkian, supra* at 420, 425-426; *People v Davis*, 216 Mich App 47, 55-56; 549 NW2d 1 (1996). Accordingly, there was no basis for the trial court to *sua sponte* appoint substitute counsel, and defendant cites no authority for this proposition. This Court will not search for authority to sustain a party's position. *Watson, supra*. In sum, defendant has failed to demonstrate plain error, and, thus, reversal is not warranted on this basis.[3]

VI

Defendant challenges his sentence, contending that he should not have been sentenced as a fourth-offense habitual offender because two of his prior convictions actually stemmed from one transaction. We disagree.

Defendant is correct that multiple convictions arising out of a single transaction may count only as a single prior conviction for purposes of the habitual offender statute. *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987), modified by *People v Preuss*, 436 Mich 714, 717; 461 NW2d 703 (1990); *People v Jones*, 171 Mich App 720, 726; 431 NW2d 204 (1988). However, if the convictions arise from separate criminal incidents, each conviction may be counted as a prior conviction under the statute. *Id*. Here, defendant presents no evidence that two of his convictions stemmed from a single transaction. According to the record, the offenses occurred hours apart on the same day and involved two different residences, on two different streets. Consequently, there was no error in considering them as separate convictions for

[3] We note that any implication that defendant was prejudiced by his self-representation is without merit. A defendant who succeeds in asserting his right to self-representation will be held to the same standards of representation as a lawyer, and his errors and omissions cannot be the basis of a successful appeal on the ground of ineffective assistance of counsel. *Faretta v California*, 422 US 806, 834 n 46; 95 S Ct 2525, 45 L Ed 2d 562 (1975); *People v Burden*, 141 Mich App 160, 164; 366 NW2d 23 (1985).

purposes of establishing defendant's status as a fourth-offense habitual offender. *Id*. We also note that, following the jury's verdict, defendant admitted under oath that he had five prior felony convictions. Accordingly, the trial court did not abuse its discretion in sentencing defendant as a fourth-offense habitual offender, and defendant is not entitled to resentencing.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio