STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v KALA WHITE, Defendant-Appellant.	UNPUBLISHED June 22, 2004 No. 221694 Wayne Circuit Court LC Nos. 98-006773; 98-006796
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v KALA WHITE, Defendant-Appellant.	No. 232606 Wayne Circuit Court LC Nos. 98-006797; 98-006804

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals multiple convictions arising out of sexual assaults against four teenage girls in the Detroit area during 1997-1998. Four separate jury trials were held, resulting in convictions on six counts of first-degree criminal sexual conduct (CSC 1), MCL 750.520b, one count of second-degree criminal sexual conduct (CSC 2), MCL 750.520c, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I. BRIEF OVERVIEW

The evidence of defendant's guilt was overwhelming and virtually insurmountable. All four cases involved defendant approaching young teenage girls while in his automobile as the girls were either walking to school or heading home from school. Defendant would follow the victims, slow down, and then attempt to make some small talk with them or directly voice threats before brandishing a handgun and forcing the girls into his car. Defendant would drive around for a while, with the victims held captive in his vehicle, before stopping in a secluded alley where the sexual assaults would take place. The sexual assaults involved, in part, defendant

forcing the girls, at gunpoint and under threat of harm, to engage in fellatio and to fondle defendant's penis. In two of the cases, defendant photographed his victim during the sexual assault with a Polaroid camera. Evidence of defendant's guilt included a confession to the crimes by defendant, identification of defendant's vehicle as being involved in the abductions and assaults, the victims' swift identification of defendant as the perpetrator in corporeal lineups and at trial, the discovery of the incriminating Polaroid photographs in defendant's bedroom, MRE 404(b) evidence of another consistent sexual assault that was not tried, and the discovery of a handgun and a Polaroid camera in defendant's vehicle, which were present in the automobile when defendant was pulled over by police. Defendant denied any involvement in the sexual assaults and maintained that he was framed as part of a conspiracy. According to defendant, the evidence presented by the prosecutor in regard to the initial seizure of defendant, the confession, the search of defendant's home and vehicle, and the lineups and positive identifications, along with the testimony of the victims, was all predicated on lies by the victims and police and on police threats, coercion, and violence.

II. ANALYSIS

A. Effective Assistance of Counsel

Defendant first argues on appeal that he was denied the effective assistance of counsel when his attorney tricked him into signing an order for counseling and testing for disease and infection. This argument lacks merit.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The record contains an order for counseling and testing for disease/infection that is signed by defendant and the district court judge who bound defendant over for trial after defendant waived his preliminary examination. The record does not support a finding that defendant was intentionally "tricked" into executing the document, although he may have signed

the document without fully realizing what he had signed. Regardless, considering that defendant was being bound over to the circuit court for trial following waiver of the preliminary examination, an order for testing was appropriate under MCL 333.5129(3), which provides, in pertinent part:

> If a defendant is bound over to circuit court . . . for a violation of section . . . 520b, 520c . . . and the district court determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant, the district court shall order the defendant to be examined or tested for venereal disease and hepatitis B infection and for the presence of HIV or an antibody to HIV.

Because defendant was bound over to circuit court on charges of CSC 1 (MCL 750.520b) and CSC 2 (MCL 750.520c), and because the crimes involved fellatio and ejaculation, defendant was subject to an order for testing irrespective whether he consented to the testing. Counsel's actions in obtaining defendant's signature did not constitute a deficient performance.

Moreover, defendant fails to show prejudice where the matter had no impact whatsoever on the fairness and outcome of the subsequent trials. It cannot be said that, had counsel not sought defendant's signature on the counseling and testing order, there existed a reasonable probability that the outcome of the trials would have been different. Defendant's unfounded fears that a test result would be used against him and that his signature indicated he was conceding guilt, along with his claim of resulting mental anguish, simply do not support a finding that his right to a fair trial was prejudiced.[1] There was no evidence presented at the four trials regarding defendant's execution of the counseling and testing order. Reversal is not warranted.

B. Judicial Disqualification

Defendant argues that the chief judge abused his discretion in denying defendant's motion for disqualification of the trial judge after the trial judge had rejected defendant's motion for disqualification. Defendant filed several motions seeking the disqualification of the trial judge, all of which were denied by the trial and chief judge. Defendant's argument lacks merit.

The procedure and grounds to disqualify a judge are set forth in MCR 2.003. Relevant here is MCR 2.003(B)(1), which provides for disqualification where a "judge is personally

[1] We note that MCL 333.5129(3) provides for confidentiality. We further note that it appears that defendant was not subject to testing before the first trial. In a hearing one week before the trial, defendant told the trial court that he was victorious in his resistance and did not undergo the test. Defendant informed the trial court that "[t]hey needed an additional signature from me in order to administer the test. They needed me to sign a consent form, and I told them I had no intentions of taking that test, and I never would have signed that document had I known what I was signing." In regard to defendant's claim that the alleged trickery was part of a murder conspiracy, with defendant as the intended victim, thereby establishing prejudice, the assertion lacks any validity.

biased or prejudiced for or against a party or attorney." The factual findings made by the chief judge with respect to the motion to disqualify are reviewed for an abuse of discretion. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996). This Court is to defer to the factual findings and conclusions rendered by both the chief judge and the trial judge on matters of judicial disqualification. *Id.* The applicability of the facts to the relevant law, however, is reviewed de novo. *Id.* at 503 n 38; *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

With respect to the issue of judicial disqualification, the *Wells* panel stated:

> Absent actual personal bias or prejudice against either a party or the party's attorney, a judge will not be disqualified. A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality. Where a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible. Comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality. [*Wells, supra* at 391 (citations omitted).]

An adverse ruling alone is insufficient to disqualify a judge. See *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). Keeping in mind these principles that guide our analysis of the judicial disqualification issue, we now address the specific arguments made by defendant.

Defendant claims that the trial judge acted with bias and prejudice in not allowing defendant to address the court at a pretrial conference on September 11, 1998, where defendant wished to voice that there had been a complete breakdown of the attorney-client relationship and that counsel was acting inappropriately. The record reflects that the trial judge merely declined to hear and receive any comments by defendant because defendant was represented by counsel. In October 1998, defendant's counsel moved to withdraw and defendant indicated his approval to the trial judge; the judge agreed and ordered withdrawal and gave defendant several weeks to obtain new counsel. These events do not show actual bias or prejudice on the part of the trial judge but rather reflect appropriate judicial action. Moreover, the claim of improper conduct on the part of counsel, i.e., alleged trickery in obtaining signature on counseling and testing order, lacks merit for the reasons stated previously in this opinion.

Defendant next claims that the trial judge acted with bias and prejudice in ordering a competency and criminal responsibility evaluation after defendant informed the judge that he had already been found competent to stand trial and despite the fact that defendant was in full possession of his faculties. The record contains a finding of competency by the Third Circuit Court Criminal Psychiatric Clinic, dated October 29, 1998, which is after the date on which defendant informed the judge that he had already been found competent. The record indicates, however, that there had been prior referrals for psychiatric testing.[2] The prosecutor notes in its

[2] One psychiatric report states that an examination was not conducted after defendant indicated (continued…)

appellate brief that a competency hearing had been held previously and that defendant had indeed been found competent to stand trial. The record reflects that, while the case was pending in the district court, a competency examination was conducted and defendant was found competent to stand trial. An insanity defense was not pursued at any of the trials by defendant following his decision to represent himself at trial.

The trial judge's referral for an examination, which defendant's counsel requested, cannot be deemed an act of actual bias or prejudice. The record suggests that the renewed request for a competency hearing was made because defense counsel felt it appropriate where he believed that defendant's mental health had deteriorated during incarceration and since the first competency hearing. Defense counsel stated "it's been brought to my attention that the defendant's state of mind is beginning to be impacted upon by the pressures and the stress of the particular ordeal." The judge's act of honoring defense counsel's request could not constitute an act of bias or prejudice but rather was a favorable ruling. Moreover, the act of a trial judge in referring a defendant for a psychiatric examination to determine competency and legal responsibility does not constitute actual bias or prejudice against the particular defendant but is better coined an act of judicial responsibility and an effort to protect the defendant's rights.

Defendant next claims that the trial judge acted with bias and prejudice in appointing a standby attorney who was already assigned or appointed to represent another defendant in a CSC case. Defendant contends that the trial judge, knowing the tremendous workload of the standby attorney, appointed the attorney in an attempt to provide defendant with counsel who could not offer vigorous advocacy. Initially, we note that the record is devoid of information regarding standby counsel's actual workload. The record does indicate that the trial judge thought highly of standby counsel. Assuming that standby counsel had another CSC case to handle, it defies logic to suggest that a criminal defense attorney cannot handle two cases at any given time. Moreover, standby counsel was just that, standby counsel. He was appointed to provide defendant legal knowledge on issues of law as they arose during the trials, not to represent defendant and advocate on his behalf. Therefore, standby counsel's involvement in the case did not require in-depth preparation. The record does not support a finding that the particular appointment of standby counsel constituted an act of actual bias and prejudice.

Defendant next claims that the trial judge acted with bias and prejudice in refusing to address defendant's request to be placed in protective custody outside of the Wayne County Jail, thereby showing a complete disregard for defendant's safety. Although not entirely clear, it appears that defendant had already been removed and secluded from the general jail population by request of the district court. The trial judge's decision not to order protective custody when requested indicated that the judge did not believe that defendant was in danger based on the judge's courtroom observations; it did not indicate that the judge was actually biased or prejudiced against defendant. All that exists is an adverse ruling, which is insufficient. Moreover, the trial judge did in fact address the request as reflected in an order denying defendant's motion to be removed from the Wayne County Jail.

(…continued)

the desire to confer with counsel upon learning that the examination was not confidential.

Defendant next claims that the trial judge acted with bias and prejudice in ignoring defendant's claim that he had been assaulted with feces and urine while detained in jail. Defendant asserts that the judge's indifference established that the judge is a "twisted, warped, and depraved human being." Again, the trial judge's action, or inaction, indicates a belief that defendant's claims lacked merit and were not worthy of belief based on the judge's courtroom observations. This does not constitute grounds for finding that the trial judge was actually biased or prejudiced against defendant.

Defendant next claims that the trial judge acted with bias and prejudice in not allowing defendant to discuss the claim that counsel had tricked him into signing the order for counseling and testing for disease and infection and in not allowing defendant the opportunity to question counsel at a subsequent evidentiary hearing on the issue.[3] As held above, the issue concerning testing lacks legal merit. It was therefore not necessary for the trial judge to address the issue, or allow questioning on the matter. The trial judge's rulings were sound and did not reflect actual bias or prejudice against defendant.

Overall, defendant fails to overcome the presumption of judicial impartiality. Further, defendant's claims of bias and prejudice are not tied to any actions or decisions by the trial judge during the four trials.[4] Therefore, assuming error in the trial and chief judges' rulings not to order disqualification, any error is harmless; there is a complete lack of prejudice to defendant. MCL 769.26; MCR 2.613(A); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Finally, all of the appellate attacks by defendant against the rulings, reasoning, and comments by the chief judge in affirming the trial judge's denial of the motions for disqualification lack merit in light of the fact that the claims of bias and prejudice on the part of the trial judge are legally unsound and there was no prejudice. The chief judge did not abuse his discretion in refusing to disqualify the trial judge, and there is no legitimate basis to disqualify the chief judge as argued by defendant. Defendant was provided a fair trial, and all of defendant's arguments fail to establish the need for judicial disqualification.

C. Assistance of Counsel and Self-Representation

Defendant, who proceeded in propria persona in all four trials, argues that he did not effectively waive his Sixth Amendment right to counsel and that he was actually and constructively denied the effective assistance of counsel. Defendant's arguments lack merit.

[3] The evidentiary hearing addressed, in part, defendant's waiver of his preliminary examination, which he argued resulted from counsel's incompetence and scheming.

[4] Defendant asserts that the trial judge held him in contempt during the third trial because he chose to testify. Actually, the judge threatened contempt because defendant repeatedly indicated that he was not going to testify and then at the last moment changed his mind. The judge then allowed defendant to testify. There was no actual bias or prejudice on the part of the trial judge.

Legal Principles

"The right to counsel is guaranteed by both the Fifth and Sixth Amendments of the United States Constitution, as well as Const 1963, art 1, §§ 17 and 20." *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). The Sixth Amendment directly guarantees the right to counsel in all criminal prosecutions, while the Fifth Amendment right to counsel is a corollary to the amendment's stated right against self-incrimination and to due process of law. *Id.* at 372-373. The right to counsel guaranteed by the Michigan Constitution is generally the same as that guaranteed by the Sixth Amendment; absent a compelling reason to afford greater protection under the Michigan Constitution, the right to counsel provisions will be construed to afford the same protections. *People v Reichenbach*, 459 Mich 109, 118-120; 587 NW2d 1 (1998). The "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and state statute, Const 1963, art 1, § 13 and MCL 763.1. *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996); *People v Kevorkian*, 248 Mich App 373, 417; 639 NW2d 291 (2001). The right is not absolute, however, and several requirements must be met before a defendant may proceed in pro se. *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976); *People v Hicks*, 259 Mich App 518, 523; 675 NW2d 599 (2003).

A defendant's request to represent himself must be unequivocal. *Adkins*, *supra* at 722; *Anderson*, *supra* at 367; *Hicks*, *supra* at 523. This requirement prevents frivolous appeals by defendants who were convicted and represented by counsel. *Anderson*, *supra* at 367. A request to proceed pro se with standby counsel can constitute an unequivocal request by a defendant to represent himself. *Hicks*, *supra* at 527-528.

The trial court must also determine that the defendant's assertion of his right to self-representation and the waiver of counsel is knowing, intelligent, and voluntary. *Adkins*, *supra* at 722; *Anderson*, *supra* at 368. The existence of a knowing and intelligent waiver of counsel depends on the particular facts and circumstances of a case, including the background, experience, and conduct of the accused. *People v Riley*, 156 Mich App 396, 399; 401 NW2d 875 (1986), overruled in part on other grounds *People v Lane*, 453 Mich 132; 551 NW2d 382 (1996). Every presumption should be made against waiver. *Adkins*, *supra* at 721. Although a defendant's general competence is relevant to the determination whether he is knowingly and intelligently asserting his right to self-representation, his legal competence is not. *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994) (GRIFFIN, J.); *Anderson*, *supra* at 368. The court must make known the availability of counsel to a defendant and make the defendant aware of the dangers and disadvantages of self-representation. *Adkins*, *supra* at 721. An explanation of the risks of self-representation requires more than merely informing the defendant that he waives counsel at his own peril, *People v Blunt*, 189 Mich App 643, 649-650; 473 NW2d 792 (1991), such as explaining the special skills and training necessary for effective representation, *People v Kimber*, 133 Mich App 184, 189; 348 NW2d 60 (1984), but a defendant who knowingly exercises his right to defend himself need not be repeatedly pressured and badgered into relinquishing that right, *People v Morton*, 175 Mich App 1, 7; 437 NW2d 284

(1989). The trial court is in the best position to decide whether a defendant has made a waiver knowingly and voluntarily. *Adkins, supra* at 723.

Further, the trial court must determine that the defendant's self-representation will not disrupt, inconvenience, or burden the court and the administration of the court's business. *Anderson, supra* at 368. That trial has already begun does not preclude a defendant's assertion of his right to self-representation. *Id*.

Finally, the trial court must comply with MCR 6.005. *Adkins, supra* at 722. A court may not permit the waiver of counsel without first advising the defendant of the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risks of self-representation, and without offering the defendant the opportunity to consult with a lawyer. MCR 6.005(D); *Hicks, supra* at 523. And, once a defendant has waived his right to counsel, the record must at each subsequent proceeding affirmatively show that the court advised the defendant of his right to counsel and that the defendant waived that right. MCR 6.005(E); *Lane, supra* at 137.

Where there is error in regard to the waiver requirements, but not complete omission, reversal is not necessarily mandatory. *Dennany, supra* at 439; *Guilty Plea Cases,* 395 Mich 96, 122-124; 235 NW2d 132 (1975). Whether a particular departure justifies a reversal of the defendant's conviction will depend on the nature of the noncompliance. *Dennany, supra* at 439; *Guilty Plea, supra* at 113. Failure to comply with MCR 6.005 is to be treated as any other trial error, and where the noncompliance issue is unpreserved, this Court must determine if the error was plain and affected defendant's substantial rights. *Lane, supra* at 140.

Proceedings

We now turn to the events occurring before and during the trials associated with issues of counsel. On September 11, 1998, approximately six months before the initial trial, a pretrial conference was held in which defendant was represented by attorney Cornelius Pitts, and in which, defendant did not voice a desire for self-representation. On October 23, 1998, a status conference was conducted on the record, and the trial court also entertained Pitts' motion to withdraw as defendant's counsel. Pitts indicated that there had been a breakdown of the attorney-client relationship and he wished to withdraw; defendant noted his full agreement with Pitts' assessment and withdrawal. Defendant indicated that he was considering a few other attorneys as possible future counsel. There was no indication that defendant at this point sought to proceed pro se. On November 13, 1998, another pretrial conference was held on the record, during which the following colloquy occurred:

> *Defendant*. I have decided to utilize my constitutional right to go pro se and represent myself. And I would also like to take advantage of my constitutional right to receive standby counsel, a court-appointed attorney to aid and assist me in what I assure you will be an out-and-out effort to exonerate myself.
>
> *Court*. Okay. Such being the case, we will appoint Mr. Winters to represent you and/or aid in you representing yourself during the course of these proceedings.

This was the full extent of the discussion concerning self-representation at the hearing. Defendant had not presented a written request for self-representation, and the trial court's comments suggest that it had not definitively decided to allow defendant to proceed pro se, but rather it was simply appointing attorney Winters as either defendant's actual counsel or as a standby attorney for defendant.

At a November 20, 1998, pretrial conference, the trial court stated:

> Mr. White, as you know, I believe it was last week, you indicated you had not retained counsel to represent you. I indicated that I have appointed Mr. Winters, who is a very experienced and distinguished member of the criminal defense bar here, to represent you and/or assist you in preparing your case.

Subsequently, the following pertinent colloquy took place at the hearing after defendant's attempt to personally address the trial court:

> *Court*. You're not going to make any statements to me unless you have first discussed it with Mr. Winters. Do you wish to have Mr. Winters represent you or assist you?
>
> *Defendant*. Well, I wanted assistance, not representation.
>
> *Court*. Okay. He will assist you, therefore.
>
> *Defendant*. Excuse me, your Honor. But as far as this particular attorney representing me, I have no problems with him personally or anything like that. But he didn't come to see me during this week. And therefore, we haven't been able to make each other's acquaintance. And I do not have any knowledge of this man or his intentions for me.
>
> And, therefore, I would have to at this time ask to receive a new Court-appointed attorney to act in his place.
>
> And also, sir, I would also like to make a statement that I was very upset that I didn't receive the immediate gratification of not only my request or my motion to be allowed to represent myself in all and any courtroom proceedings --.
>
> *Court*. Okay. First of all, Mr. White, I do not wish you to discuss any matters with respect to your case without having had the opportunity to discuss it beforehand with Mr. Winters who is going to be assisting you in the preparation of your defense and trying the case. . . .

Later in the hearing, attorney Winters referenced himself as defendant's standby attorney, and defendant made the following statement:

> Okay. Well, first of all, your Honor, all right. I have never received a formal reply on my motion for self-representation, which is my constitutional right to do so.

I also understand MCLA also allows me that right and the Michigan Constitution, sir. And I've already undergone two competency examinations against my own will. And I, I'm still not receiving any acknowledgment in this courtroom. I'm still being silenced and hushed even though I approach you and everyone else with the utmost respect.

I feel my rights are still being violated at this present time. I don't know if you heard me tell you that I didn't see my attorney any time this week until today about a half an hour ago before coming into this courtroom.

And I did in fact, did in fact motion for another attorney. . . .

But you're steadily pushing, pushing, pushing forward when you haven't dealt with the situations that I've already brought to your attention.

At this time, I would like to formally, because I was informed that the reason why you may not have issued, or granted that motion for self-representation is because it wasn't in writing. And I did take the time, though I wasn't sure if I was going to be brought here to this courtroom today, I did take the time to write out a written motion, sir, about my, my request to receive the right to represent myself in all and any courtroom proceedings.

And I would like to know since this is written in pencil and after I submit it, it can be erased and altered, I would like to know if I could verbalize it first and make it a matter of court record in two different forms.

The trial court responded by stating that all motions would be heard in January 1999, and Winters interjected, stating:

Mr. White is indicating, he does indeed wish to represent himself. I will be available as his standby attorney. I will not be addressing the Court, the jury or any of the parties involved in this case. Mr. White will represent himself. I will be available for consultation, to answer any questions.

The trial court then engaged defendant in a short examination.

Q. It's my understanding, based upon Mr. White's statements this morning, that he wants to represent himself and have Mr. Winters assist him. Is that correct, Mr. White?

A. Correct, sir.

Q. Okay. Do you understand that you have a constitutional right to an attorney, to have this Court appoint an attorney to assist you and try this case for you? Do you understand that?

A. Yes. I'm fully aware of that.

Q. Okay. And is it your own decision of your own free will to try this case, to represent yourself?

A. Yes, sir, your Honor. . . .

* * *

Q. Have there been any threats or promises made to you to get you to relinquish your constitutional right to have this Court appoint an attorney --

* * *

A. No. No.

A hearing on numerous motions was held on February 5, 1999, and the first motion addressed by the trial court was defendant's motion for self-representation. At the hearing, the trial court expanded its discussion from the earlier hearing regarding self-representation, and the court conducted an examination of defendant on the matter.

Q. And it's my understanding that you wish to represent yourself through the course of these proceedings, is that correct?

A. Correct.

Q. Okay. Has anyone made any promises towards you or threats towards you to, for you to give up your right to counsel? This is something you want to do yourself?

A. For me to represent myself?

Q. Right.

A. I haven't given up my right to counsel. I believe he's standby counsel.

* * *

Q. So, you wish to represent yourself and have Mr. Winters available to you, is that correct?

A. True.

Q. All right. You do know you have a right to counsel in this matter, is that correct?

A. Yes.

Q. All right. And you have the right to have an attorney represent you, argue on your behalf, question witnesses on your behalf, you understand that? Is that right?

A. Correct. You mean . . .

Q. You have, you have the right to have an attorney come up and argue these motions for you, give an opening statement at trial, question witnesses --

A. Oh, I was going to serve as my own attorney.

Q. Yeah. But you understand that I could appoint an attorney to do that for you? You understand that?

A. No, I don't. I don't see the relevance of –

Q. No. Just you understand that I could, if you so desired, appoint an attorney to represent you who would question witnesses, give statements to the Court on your behalf? Do you understand that?

A. Oh, I wouldn't prefer to do it that way.

Q. I know.

A. Oh, yes. I understand that I have that right.

Q. Okay.

A. Yes. Under the Constitution of the United States of America. Yes. I am aware of that.

Q. And again. You wish to have this Court waive your right to have representation, is that correct, outside of Mr. Winters being available to answer any questions you may have?

A. Outside of having standby counsel, correct, sir. I'm not saying what form or who that standby counsel will be at this time, but correct. I would like an attorney by my side to answer any questions that I may have during the course of this trial and any pretrial proceedings or hearings.

Q. Okay. Are you aware that there are certain dangers, Mr. White, are you aware that there are certain dangers and disadvantages of representing yourself? Do you understand that?

A. Certain dangers and disadvantages?

Q. Yes. For instance, you don't have a legal education. You understand that?

A. Correct.

Q. And an attorney such as Mr. Winters has tried hundreds and hundreds of cases, but this is – you haven't tried any cases, have you?

A. No, I have not, sir.

Q. You understand you're not experienced in the practice of law, is that correct?

A. I do believe I mentioned that in the motions. However, I do have knowledge going beyond just general knowledge concerning the law and the practice of law.

Q. Did you, did you attend high school?

A. Yes, I did.

Q. Where did you attend high school?

A. Northwestern High. Well, the first year I went to Cass Tech, got kicked out of Cass Tech, went to Northern, then I went to Northwestern High.

Q. Did you finish Northwestern?

A. No, I didn't.[5]

Q. You can read and write, can't you?

A. Sir, I think that's quite apparent by this time.

Q. I think, Mr. White, it's certainly apparent to us that you write and you write pretty well. And it appears to this Court that you're also very articulate.

A. Thank you, sir. I take that as a compliment.

Q. All right. Pursuant to People v Mack 190 Michigan Appeals, 7, a 1991 case, it certainly appears to me that Mr. White has knowingly, intelligently and voluntarily waived his right to representation.

However, again, as I've noted previously on the record, Mr. Winters will be with Mr. White during the course of these proceedings should he have any questions or anything at all that he needs to discuss with Mr. Winters regarding the questioning of witnesses, trial strategy, et cetera, unless the People have an objection.

Prosecutor. No.

Court. All right. Mr. White, your first motion is granted.

[5] Other portions of the record reflect that defendant received his GED and was attending community college at the time of his arrest.

Later in the February 5th hearing, the trial court addressed defendant's motion for a different standby attorney in order to obtain, according to defendant, effective assistance of counsel. The trial court denied the motion, asserting that attorney Winters had a stellar reputation and would serve defendant well. Orders were entered by the trial court granting the motion for self-representation and denying the motion to replace or substitute standby counsel. The trial court also denied a motion seeking its disqualification.

On February 23, 1999, a hearing was held before the chief judge in a challenge to the trial judge's denial of the motion to disqualify. The chief judge did not enunciate any rights related to self-representation. We do note that the chief judge, as part of a general discussion regarding defendant's apparent refusal to consider a guilty plea offer and the representation by Cornelius Pitts, stated:

> I represented a lot of people as a defense lawyer, and I represented a number of people charged with multiple cases of a serious nature that carried life in prison, and when that happens sometimes, among other things, the lawyer's obligation is to talk to the prosecutor maybe to see if something can be worked out, because if you were to be convicted on any one of these cases, and if the Judge was duly impressed with the severity of your conduct in these cases, assuming you were guilty, it is reasonable to expect that the sentence that would be imposed would be much greater than the 17-year minimum.
>
> And when you add up all these cases, you might end up with the kind of sentence that would virtually guarantee that you might not see the light of day.

On February 26, 1999, a hearing was conducted in order to address some additional motions filed by defendant and to allow the court to discuss the mechanics and procedures related to voir dire and trial, which was scheduled for the following week. The trial court again reminded defendant that he was a layman without legal experience and not educated in law, and, therefore, defendant could be at a disadvantage. The trial court additionally informed defendant of his right to an attorney and again noted that attorney Winters is a very experienced counselor. Defendant responded, stating: "I'm representing myself just fine." The trial court then indicated that Winters would be available to defendant as a standby attorney during trial. The trial court asked defendant a second time whether he was sure he wished to represent himself, and defendant responded affirmatively. Defendant again expressed his desire to have someone other than Winters act as his standby attorney, asserting that Winters was not sufficiently interested in the case and that Winters had another similar case that required his attention. Defendant maintained that he was "uncomfortable" with Winters. The trial court answered, stating:

> [I]'m not going to ask Mr. Winters to step away because, A, he's a very bright criminal lawyer, very experienced. And he's been with us through the course of these proceedings. And we are starting a trial next Tuesday and we will be conducting certain evidentiary hearings on Monday. So, that's the position of the Court.

On the day before trial, an evidentiary hearing was held on matters involving the waiver of the preliminary examination and suppression of defendant's statements to police (*Walker* hearing). The trial court did not initiate the hearing with any references to self-representation.

The following day, the evidentiary hearing was continued and concluded and the trial then commenced. At the beginning of the day, the trial court briefly questioned defendant.

> *Q*. Again, Mr. White, as I mentioned to you yesterday, there are inherent dangers in representing yourself in that you do not have legal training as well as the usual legal skills associated with trying a case and conducting a capital offense case. Is it still your desire to represent yourself?
>
> *A*. Yes.

The transcript of the second day of trial reflects no discussion by the trial court regarding self-representation prior to trial continuing. The transcript of the third day of trial reflects that, prior to testimony commencing, the trial court asked defendant if he still wished to represent himself, and defendant responded affirmatively. The transcript of the fourth day of trial reflects no discussion of self-representation prior to proceedings commencing. The transcripts of the fifth, sixth, and seventh day of trial reflect that the trial court asked defendant if he still wished to represent himself, and defendant responded affirmatively. The trial court also indicated, on each of those days, that defendant could confer with Winters if necessary. The transcript of the eighth and final day of trial reflects that the trial court made no mention of self-representation. During the course of the first trial, a hearing was held before the chief judge on yet another motion for the disqualification of the trial judge. The chief judge made no reference to matters concerning self-representation.

With respect to the second trial, the trial court commenced the first day of trial by again asking defendant if he wished to represent himself, and defendant responded that he so wished. The trial court also noted that defendant could confer with Winters if necessary, and the court cited the statute and some case law regarding self-representation. The trial court further threatened that should defendant make reference to the conviction in the first trial, the court would likely preclude defendant from continuing to represent himself. On each day of trial, except the final day on which the jury returned its verdict, the trial court asked defendant if he wished to continue representing himself, and it informed defendant that he could confer with Winters when necessary. Defendant responded each day by stating that he indeed wished to continue representing himself.

The third trial was not conducted until about a year after the second trial had concluded. During the interim, a few hearings were conducted. On August 20, 1999, a hearing was held on several motions filed by defendant, including another motion to disqualify the trial judge. At the hearing, the trial court informed defendant that he was appointing a second standby attorney, aside from Winters,[6] for purposes of the last two trials. The trial court did not make any references to issues regarding self-representation. On September 27, 1999, a hearing was held to set dates for pretrial motions and the trial itself. The trial court did not engage in any discussion concerning self-representation. Pretrial motions were held on February 11, 2000, and the trial court granted defendant's motion to have a personal investigator appointed to assist in

[6] It appears that the other attorney was an associate of Winters.

the defense. The trial court also granted defendant's request to have attorney Winters locate a private investigator. The trial court once again denied a motion for disqualification. There was no mention of any matter concerning self-representation.

The day before the third trial commenced, the trial court conducted *Walker* and *Wade*[7] hearings. The trial court initiated the proceeding by discussing rather extensively defendant's choice to proceed in propria persona at the hearings and the third trial. In response to direct questioning from the trial court, defendant indicated that he wished to represent himself, that he understood that Winters could be appointed to conduct the trial, that he recognized the inherent dangers in representing himself as those dangers were explained to him by the trial court, that no promises or threats had been made in order to obtain his waiver of counsel, that the choice to proceed pro se was made freely, and that he did have the opportunity to conduct research in preparation for trial. The trial court noted its belief that defendant was literate, competent, and understanding,[8] and that the waiver of counsel and assertion of the right of self-representation was made knowingly, intelligently, and voluntarily. The trial court informed defendant that Winters and his associate would be available to confer on issues as they arose if necessary. The court asked defendant if he had the opportunity to talk about self-representation with his father, and defendant replied "[f]rom time to time." The trial court told defendant that it would accommodate defendant should he wish to discuss the matter any further with his father. The court further informed defendant that if he should change his mind about self-representation, defendant needed to tell the court. Defendant acknowledged understanding his right to change his mind and request representation. The trial court concluded by citing constitutional provisions and case law that addressed self-representation. Trial three was conducted over six days, and the trial court did not reference or discuss self-representation prior to trial commencing on those days.

On the first day of trial number four, the trial court questioned defendant concerning self-representation. In response to direct questioning from the trial court, defendant indicated that he wished to represent himself, that he understood that Winters and the associate attorney were available for consultation should the need arise, that he recognized the inherent dangers in representing himself as those dangers were explained to him by the trial court, that no promises or threats had been made in order to obtain his waiver of counsel, and that the choice to proceed in propria persona was made freely. The trial court found that defendant had invoked his right to self-representation, pursuant to the Michigan and United States Constitutions, and did so knowingly and intelligently without threat or promise. The trial court did not reference or discuss self-representation prior to testimony commencing on the following five days of trial.

Discussion

We first hold that the invocation of defendant's right to self-representation during all four trials and pertinent hearings was unequivocal. Following the withdrawal of attorney Pitts,

[7] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)(challenge to identifications made at corporeal lineups).

[8] The trial court referenced defendant's post-high school education.

defendant was adamant throughout the lower court proceedings that he wished to represent himself, and in fact he became angered at the trial court when the court initially acted in disregard to the request to proceed pro se by making defendant confer with Winters before speaking. Defendant, relying on *Dennany, supra,* argues that his request for self-representation was equivocal because he requested standby counsel. Indeed, Justice GRIFFIN, who wrote the lead plurality opinion, stated:

> Because there is no substantive right to standby counsel, the trial court is under no obligation to grant such a request. Consequently, a request to proceed pro se with standby counsel – be it to help with either procedural or trial issues – can never be deemed to be an unequivocal assertion of the defendant's rights. [*Id.* at 446.]

However, this Court in *Hicks, supra* at 527-529, addressing an argument similar to that made here by defendant and specifically referencing the above-stated quote by Justice GRIFFIN, ruled:

> We agree with the first proposition, that there is no substantive right to hybrid representation and that the trial court is under no obligation to grant a request for standby counsel. However, the second proposition upon which defendant relies to argue that, because he requested standby counsel when he announced his desire to represent himself, his request was equivocal as a matter of law, is one that we reject. We note that while Justices MALLETT and BRICKLEY concurred with Justice GRIFFIN, the four other justices deciding *Dennany* disagreed that a request for standby counsel makes a request for self-representation equivocal.
>
> * * *
>
> The lead plurality opinion in *Dennany* does not represent binding authority, and we are not inclined to follow it. On the contrary, we conclude that a request for self-representation can be accompanied by a request for standby counsel and maintain its unequivocal nature. As Justice BOYLE stated, a request for standby counsel does not necessarily indicate that the defendant is vacillating concerning his desire to represent himself. Inherent in the trial court's ability to evaluate a waiver of counsel is the ability to determine whether the defendant is vacillating in his choice or merely requesting that which, as Justice CAVANAGH noted, will likely be granted to the defendant anyway. [Citations omitted.][9]

[9] We also note a statement by our Supreme Court in *Adkins, supra* at 720 n 15, which was decided two years after *Dennany*, which reads that "[a] judge . . . has discretion to appoint, either sua sponte or by request, standby counsel to assist the pro se defendant." This statement would lack reason if a defendant who proceeds pro se and requests standby counsel could argue on appeal, after conviction, that his request for self-representation was equivocal thereby necessitating reversal.

Here, defendant's request for standby counsel did not indicate that he was vacillating with respect to whether he desired to represent himself. To the contrary, defendant emphatically and repeatedly voiced his desire to represent himself. We find that his request for a standby attorney did not reflect uncertainty on proceeding pro se.

Further, we hold that the record supports the conclusion that defendant's assertion of his right to self-representation and the waiver of his right to counsel was made knowingly, intelligently, and voluntarily. Nothing in the record suggests that defendant did not fully understand his right to counsel, and he repeatedly stated that he understood the right. In fact, the record reveals that defendant was very knowledgeable concerning constitutional rights with respect to the assistance of counsel. Additionally, nothing in the record suggests that defendant asserted his right to represent himself and waived his right to counsel under threat of harm, force, or coercion. It is quite evident in reviewing the lower court proceedings, including the voluminous briefs filed by defendant, that he is an intelligent and articulate individual. We would be remiss, however, if we failed to note that portions of the record could possibly be interpreted, and we emphasize possibly, as suggesting that defendant suffers from some form of mental illness. Nonetheless, two competency examinations resulted in the psychiatric conclusion that defendant was competent to stand trial and was not suffering from any delusional thinking. Also, defendant's occasional conspiratorial comments and claims, though possibly reflecting mental illness, could just as easily reflect defendant's ill-conceived attempt to deflect the overwhelming evidence of guilt. More importantly, there is no indication that defendant was incapable of understanding and invoking his right to self-representation and waiving his right to counsel.

With respect to explaining to defendant the inherent dangers of self-representation, the trial court on several occasions warned defendant of the dangers and disadvantages, including an explanation or warning prior to the first trial and before argument on the initial substantive motions. Defendant was warned of the inherent dangers and disadvantages before the third and fourth trials. We hold that the trial court's warnings were sufficient.

Defendant argues that before the first trial he invoked his right to have the trial court provide him with effective assistance of counsel, which the trial court denied, thereby depriving defendant of his constitutional right to counsel. Defendant's argument is taken out of context. The record reveals that defendant was seeking the appointment of an effective substitute standby attorney, not an attorney to represent defendant at trial. The record does not support any claim that attorney Winters was ineffective or incapable of acting as standby counsel. The record further reflects that the trial court repeatedly indicated its willingness to appoint trial counsel for defendant if he so desired, and the court repeatedly made it known to defendant that he could confer with attorney Winters.

Defendant focuses on the trial court's failure to strictly comply with MCR 6.005(D) and (E). It is true that the trial court failed to inform defendant, at the time of the initial waiver and thereafter, of the charge, the maximum possible prison sentence of the offenses, and any mandatory minimum as provided in MCR 6.005(D). We find that this does not render defective the trial court's decision to allow defendant to represent himself, nor does it mandate reversal.

Before the first trial, the chief judge indicated to defendant that there was a possibility of a life sentence, and the trial judge, prior to the first trial, noted on the record that this was a

"capital offense case." In the district court, at the time set for the preliminary examination, the charges against defendant were read. We recognize that these statements were not part of a formal recitation intended to comply with MCR 6.005(D). Our review of the entire record, however, makes it abundantly clear that defendant was well aware of the nature of the offenses and the possible penalties, and there can be no doubt that following sentencing on the initial convictions and before the final trials, defendant was fully aware of the nature of the offenses and possible penalties. Considering the nature of the noncompliance and the fact that reversal is not necessarily mandatory where there is error in regard to the waiver requirements, *Dennany, supra* at 439; *Guilty Plea, supra* at 113, we hold that the trial court's failure to enunciate the charge, the maximum possible prison sentence of the offenses, and any mandatory minimum before accepting defendant's waiver of counsel did not negate defendant's clear and unequivocal waiver of counsel and his assertion of self-representation.

In *Adkins, supra* at 726-727, our Supreme Court stated that the principles regarding waiver of counsel and the assertion of the right to self-representation as enunciated in case law and MCR 6.005 must be substantially complied with as opposed to strict compliance. The Court found that, where the trial court merely told the defendant, when accepting the defendant's waiver of counsel, that the case was very serious, and where the defendant knew of the charges on the basis of the arraignment, substantial compliance existed in light of a clear waiver on the record. *Id.* at 731. Our Supreme Court noted that "[t]he fact that the judge did not specifically address the charged offense and the range of possible punishment is not enough to defeat a finding of substantial compliance with the waiver procedures in this case." *Id.* Overall, the trial court here likewise substantially complied with the case law and court rule in accepting defendant's waiver of counsel and in allowing defendant to represent himself.[10] Moreover, we find that any error was harmless, nor did it affect defendant's substantial rights. *Lane, supra* at 140.

MCR 6.005(E) provides in relevant part:

> If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, . . . hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance . . . and that the defendant waived that right. Before the court begins such proceedings,
>
> (1) the defendant must reaffirm that a lawyer's assistance is not wanted[.]

In light of the language contained in the court rule, it was unnecessary for the trial court, as argued by defendant, to reaffirm defendant's insistence to proceed in propria persona on each day of the four trials; it sufficed to undertake the relevant inquiry on the first day of each trial as done by the court.

[10] MCR 6.005(D) also requires a judge to inform a defendant of the risks involved in self-representation and to offer the defendant the opportunity to consult with an attorney. These pronouncements were satisfied here.

Finally, we reject defendant's argument that the trial court needed to fully comply with the case law and court rule requirements regarding waiver of counsel at the hearing on November 13, 1998. Although defendant initially raised the matter of self-representation on that date, it is clear that the trial court did not fully recognize or acknowledge defendant's attempt at self-representation until formally requested and addressed at the motion hearing on February 5, 1999, where an extensive and sufficient examination on the issue was undertaken by the court. This was prior to any of the trials and substantive argument on pretrial motions.

None of defendant's arguments concerning the right to counsel and self-representation are meritorious. He was not actually or constructively denied his right to counsel. There is no basis for reversal.

D. Trial Court Rulings

Defendant takes issue with several of the rulings made by the trial court. First, defendant argues that it was improper for the trial court to render any decision on matters regarding representation and self-representation, as discussed above, before holding a competency hearing following defendant's last competency examination. Defendant maintains that the trial court abused its discretion in allowing him to proceed pro se absent a finding of competence.

Defendant fails to cite any law supporting the proposition that a competency evaluation or examination and hearing is mandatory before a trial court can determine whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel and asserted the right to self-representation. Considering that defendant emphatically resisted any claim that he was incompetent or legally insane and refused to pursue the issue of competency following the second examination and before a court hearing regarding the examination could be held, we find it disingenuous of defendant to assert now on appeal that the court should have conducted a hearing. Further, defendant does not claim on appeal that he was incompetent to waive counsel below. Moreover, both competency examinations indicated that defendant was competent and not delusional. There is no psychiatric testimony to the contrary.

Defendant next argues that the trial court abused its discretion by failing to remand the case to the district court for a preliminary examination that had originally been waived by defendant. An evidentiary hearing was held on the matter, in which the trial court heard testimony by defendant's counsel who by this time had withdrawn from representing defendant. Defendant, who claims that the waiver of the preliminary examination is invalid, argues that the trial court improperly handled the evidentiary hearing by finding some of defendant's questions for attorney Pitts to be irrelevant, by failing to allow defendant to put the prosecutor on the stand, and by failing to adjourn the hearing so defendant could locate a witness.

We need not spend time analyzing the alleged errors committed by the trial court during the hearing. Although we find that the trial court's rulings are sound as was the waiver of the preliminary examination, assuming that the rulings were made in error, this Court in *People v McGee*, 258 Mich App 683, 685; 672 NW2d 191 (2003), citing MCL 769.26, MCR 2.613(A), and *People v Hall*, 435 Mich 599, 602-603, 613; 460 NW2d 520 (1990), stated that "in light of defendant's subsequent conviction, any error in failing to conduct a preliminary examination does not warrant reversal because defendant has not shown that the alleged error affected the trial." Here, defendant has not even argued how the failure to conduct the preliminary

examination affected the trials. Moreover, in light of the overwhelming evidence of guilt, any mistake or misstep that resulted in no preliminary examination being conducted was harmless. Accordingly, any evidentiary or procedural errors committed at the hearing to remand for a preliminary examination were harmless.

Defendant next argues that the trial court abused its discretion in denying defendant's motion to be moved from the Wayne County Jail and placed in protective custody in a neighboring facility in light of the alleged assaults against defendant while incarcerated. Defendant asserts that he was assaulted with feces, urine, sour milk, spit, rotten food, and other foreign objects, and the court should have minimally held an evidentiary hearing. Defendant maintains that the trial court thereby denied him due process of law.

Defendant does not argue how the trial court's ruling prejudiced or impacted defendant during the four trials. Assuming that defendant was assaulted as claimed, that defendant was not already removed from the general jail population, and that the trial court should have held an evidentiary hearing and placed defendant in protective custody, any error was harmless with respect to defendant's CSC and felony-firearm convictions. MCL 769.26; MCR 2.613(A); *Lukity*, *supra* at 495.

Finally, defendant argues that the trial court abused its discretion in denying defendant's motion for suppression of all the prosecutorial evidence without conducting an evidentiary hearing and that the court ruled before hearing defendant's testimony. The record reflects that the trial court did indeed hold evidentiary hearings on suppression of defendant's statements, suppression of evidence garnered from the searches, a challenge to the warrants, the alleged illegality of defendant's arrest, and on a challenge to the lineup identifications. Further, defendant was permitted to timely testify. Defendant's arguments are simply baseless.

E. Search and Seizure

Defendant's vehicle was a black Pontiac 6000, which was consistent with the vehicle described by the victims. The victims also described the vehicle as having the license plate displayed in the rear window. The Detroit Police Department conducted an extensive investigation to find the perpetrator of the sexual assaults, and officers in marked and unmarked vehicles were deployed and patrolled the streets in an effort to make an arrest. Defendant was pulled over by police, and one of the officers who stopped defendant testified as follows regarding the stop:

> *Q*. Didn't you in fact stop me because there was a city sweep and you were in search of someone driving a Pontiac 6000?
>
> *A*. We were instructed to look for a Pontiac 6000 with an improperly displayed plate in the back window. But the initial stop was made because the plate was improperly displayed. That's why a citation was issued.

During the stop, police found a Polaroid camera beneath defendant's feet and Polaroid photographs that had been taken out of the glove compartment and placed on the seat by defendant as he retrieved vehicle documents. After the officers contacted superiors about the situation, defendant was taken into custody, and defendant was subsequently brought to police

headquarters for questioning. There was police testimony indicating that Pontiac 6000s were being stopped all over the city, possibly over one-hundred, and that several suspects were detained and questioned; however, defendant was the only suspect retained by police for any significant period of time.

Defendant argues that his constitutional right to be free from unreasonable searches and seizures was violated when police stopped his vehicle and placed him under arrest. Particularly, defendant argues that the vehicle stop violated *Sitz v Dep't of State Police,* 443 Mich 744; 506 NW2d 209 (1993), that probable cause was lacking, that he was stopped because he is African American, that a warrant was necessary, that the police officers lied during their testimony, and that the trial court failed to allow defendant to testify on the matter prior to ruling. Defendant's arguments all lack merit.

This Court reviews a trial court's findings of fact in a suppression hearing for clear error; however, we review de novo a trial court's ultimate decision on a motion to suppress. *People v Garvin,* 235 Mich App 90, 96; 597 NW2d 194 (1999). The factual findings shall be affirmed unless this Court has a definite and firm conviction that a mistake has been made. *People v Brzezinski,* 243 Mich App 431, 433; 622 NW2d 528 (2000).

The right to be protected against unreasonable searches and seizures is guaranteed by the federal and Michigan constitutions. US Const, Am IV; Const 1963, art 1, § 11; *Brzezinski, supra* at 433. The constitutions do not forbid all searches and seizures, but only unreasonable ones, and the reasonableness of a search and seizure depends on the facts and circumstances of each case. *Brzezinski, supra* at 433. In general, a search without a warrant or a seizure without a warrant is unreasonable per se unless there exists probable cause and one of the specifically established and well-delineated exceptions to the warrant requirement is applicable. *People v Champion,* 452 Mich 92, 98; 549 NW2d 849 (1996); *In re Forfeiture of $176,598,* 443 Mich 261, 265-266; 505 NW2d 201 (1993). Probable cause exists when the facts and circumstances warrant a reasonably prudent person to believe that a crime was committed and that evidence will be found in a stated place. *Brzezinski, supra* at 433. Whether probable cause exists is determined through consideration of the totality of the circumstances. *Garvin, supra* at 102. "One of the well-established exceptions to the [search] warrant requirement is known as the automobile or motor vehicle exception." *People v Kazmierczak,* 461 Mich 411, 418; 605 NW2d 667 (2000).

In *People v Whalen,* 390 Mich 672, 682; 213 NW2d 116 (1973), our Supreme Court stated:

> A review of the cases cited above leads this Court to conclude that the following rules apply today with respect to the stopping, searching and seizing of motor vehicles and their contents:
>
> 1. Reasonableness is the test that is to be applied for both the stop of, and the search of moving motor vehicles.
>
> 2. Said reasonableness will be determined from the facts and circumstances of each case.

3. Fewer foundation facts are necessary to support a finding of reasonableness when moving vehicles are involved, than if a house or a home were involved.

4. A stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search is conducted by the police.

It is well established that brief investigative stops of motor vehicles, short of a stop to arrest, are permitted where police officers have a reasonable suspicion of ongoing criminal activity. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). The criteria necessary to support a constitutionally valid investigative stop of a vehicle are that the police have a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing. *Id.* at 664-665.

A witnessed traffic violation/civil infraction presents sufficient cause to justify stopping a vehicle and temporarily detaining the driver while a general vehicle check is undertaken. *Kazmierczak, supra* at 420 n 8; *People v Haney*, 192 Mich App 207, 210-211; 480 NW2d 322 (1991); see also MCL 257.742(1). Our Supreme Court has stated that "[t]he constitution requires 'individualized, articulable suspicion' for a stop *in the absence of traffic or equipment violations.*" *People v Burrell*, 417 Mich 439, 450; 339 NW2d 403 (1983)(citations omitted; emphasis added). An arrest or stop may not be used as a pretext to search for evidence of a crime. *Haney, supra* at 209. It is an objective analysis of the facts and circumstances of a stop, and not an inquiry into the officer's subjective intent, that is appropriate in determining whether a stop was a pretext. *Id.* at 210.

Here, the police had a reasonable basis and probable cause to stop defendant's vehicle because of the improperly displayed license plate. The police testimony supported the factual finding that the license plate was improperly displayed, and we defer to the trial court's assessment regarding officer credibility, *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Thus we reject defendant's claim that the officers were lying. The objective fact that the license plate was improperly displayed overcomes any claim that the stop was a pretext. Moreover, even if the police pulled over defendant's vehicle ostensibly to investigate whether defendant was involved in the sexual assaults,[11] we find that reasonable suspicion existed to support the stop, where defendant was driving a dark Pontiac 6000 with a license plate displayed in the rear window, which was consistent with the descriptions given by the victims. A dark Pontiac 6000, in and of itself, may have been insufficient, and an improperly displayed plate, in and of itself, may have been insufficient, but together the characteristics certainly gave rise to a reasonable belief or suspicion that defendant's vehicle was involved in the crimes such that

[11] There was varying officer testimony during the trials suggesting that the vehicle was stopped because of the improperly displayed plate, because of suspicion that the vehicle was involved in the sexual assaults, and because of both the license plate and the suspicion of involvement in the CSCs.

further investigation was appropriate. Where reasonable suspicion is aroused, an investigatory stop is authorized for brief questioning. *Burrell, supra* at 456.

Having legally stopped defendant for a brief detention, observation of the Polaroid photographs and camera in plain view and within defendant's immediate reach,[12] along with observation of defendant's general physical characteristics, all of which evidence was consistent with the statements and accounts given by the victims, supported probable cause to arrest defendant and subsequently conduct an impound search of the vehicle[13] and defendant's home pursuant to warrants.

Contrary to defendant's arguments, the police had a constitutionally valid basis to stop his vehicle and detain defendant, there was probable cause to take defendant into custody,[14] a search warrant was unnecessary to stop the vehicle and to permit observation or discovery of the camera and photographs, the warrants that were subsequently obtained were valid and predicated on proper and accurate affidavits, there is no record basis for the claim that defendant was stopped merely because he is African American, and, in regard to the argument that the officers were lying, we defer to the trial court's assessment of credibility. The trial court's factual findings did not constitute clear error.

With respect to the *Sitz* argument, in which defendant maintains that the police could not simply pull over all Pontiac 6000s, the argument lacks merit. In *Sitz, supra* at 747, our Supreme

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[12] The plain view doctrine arises when officers are lawfully in a position from which they view an item. *Champion, supra* at 101. A police officer may, when making an investigatory stop based on reasonable suspicion of criminal activity short of probable cause to make an arrest, conduct a limited protective search for concealed weapons if there is a reasonable belief that the suspect is armed and dangerous. *People v Gewarges*, 176 Mich App 65, 69; 439 NW2d 272 (1989). Here, the officers were aware that the CSC perpetrator had used a handgun in the assaults. We note that the limited nature of any so-called search becomes evident where the handgun was not even found by the officers but rather was found later during the impound search. There was testimony indicating that the camera was found either because it was in plain view or after an officer asked defendant where the camera was located, on observation of the photographs, and defendant pointed out the location. Regardless, whether discovered in plain view, on consensual questioning, or within defendant's immediate reach, there was no constitutional violation in regard to the discovery of the camera. Moreover, the evidence clearly established that the camera was a Polaroid camera. We reject defendant's contention that there was police collusion and lies regarding the camera as evidenced, according to defendant, on the discovery of another type of camera or camcorder at defendant's residence and some mild confusion in the testimony regarding the cameras.

[13] The affidavit supporting the warrant for a search of defendant's vehicle contained references to not only the circumstances of the vehicle stop but also to the confession, in which defendant stated that the gun was under the steering column, and to the fruits of the home search.

[14] Defendant argues that police officer testimony that he was not being arrested but merely being taken in for further investigation is not constitutionally sound and that he indeed was arrested; therefore, probable cause was necessary. We need not address this matter in any detail because probable cause did exist to take defendant into custody.

Court ruled: "Because there is no support in the constitutional history of Michigan for the proposition that the police may engage in warrantless and suspicionless seizures of automobiles for the purpose of enforcing the criminal law, we hold that sobriety checklanes violate art 1, § 11 of the Michigan Constitution." Here, the police were not stopping *all* cars and searching for a perpetrator without suspicion as in *Sitz*, where all vehicles were to be stopped at sobriety checkpoints regardless of any suspicion of drunk driving. The Detroit police had a vehicle description that formed the factual basis for the investigation and stops. The actions of the police did not violate the principle set forth in *Sitz*.

In regard to defendant's claim that the trial court improperly refused to allow defendant to testify concerning suppression, the record reflects that defendant did indeed testify on the issue. The trial court allowed defendant to fully explain why he believed there was an unconstitutional search and seizure. Accordingly, the argument lacks merit.

Finally, defendant presents numerous suggestions for changes in existing law, e.g., all police cars should be equipped with audio and video recorders, the state should not permit warrantless searches of a person's mind, custodial interrogations should take place in front of a judge or magistrate, and independent basis analysis in regard to identifications should be precluded. We are not in a position to address these matters, nor are we authorized to make changes in existing law; rather, we are bound by the enactments of the Legislature and controlling precedent. We therefore decline defendant's invitation. As part of this argument, defendant appears to blend in substantive challenges to his confession and the corporeal lineups.

As to the confession, defendant claims that it was involuntary, given before *Miranda* rights were read, and fabricated.

In *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003), this Court stated:

> A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, and must be the product of an essentially free and unconstrained choice by its maker. [Citations omitted.]

Our review of the testimony at the *Walker* hearing and the waiver of rights signed and initialed by defendant overwhelmingly shows that defendant was timely and extensively read and provided his *Miranda* rights, that the confession was voluntary without any force, intimidation, or coercion, and that the confession was not fabricated. Minimally, the trial court's factual findings were not clearly erroneous. *Akins*, *supra* at 563.

As to the corporeal lineups, defendant argues that the victims were shown photographs of defendant before the lineups and instructed to select defendant as the perpetrator. Our review of the testimony of the witnesses and the officers involved with conducting the lineup expressly reflects that no such improprieties occurred. The evidence shows that the police did not indicate or suggest in any manner whatsoever that defendant was the perpetrator and that the victims should choose defendant. To the contrary, the evidence established that the lineups were conducted fairly, objectively, and properly, with an attorney standing in to voice any concerns about problems with the lineups. No concerns were raised.

In conclusion, there were no unconstitutional searches and seizures, and the confession and lineup identifications were legally sound. There is no basis to exclude any of the evidence submitted to the jury by the prosecution.

F. Motion for Adjournment

Defendant argues that the trial court abused its discretion in denying defendant's motion for an adjournment that was addressed by the court about one month prior to the first trial. Defendant argued below and on appeal that he needed more time to prepare his defense, especially considering that there had been a change in representation and that he had yet to receive the discovery package at the time the motion was heard. The trial court denied the motion without discussion.

This Court reviews for an abuse of discretion a ruling on a motion for an adjournment. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). Additionally, a defendant must show prejudice resulting from the denial of a motion to adjourn. *Id.*

We reject defendant's argument. Defendant fails to reveal what he could have accomplished had trial been adjourned or what particular defense strategy was lost because no adjournment was granted. As the record stands, defendant's argument is mere speculation. Defendant was timely provided with the discovery materials, and the trial court ordered, as requested, that defendant be permitted to use the law library twice a week for two hours a visit. There is no evidence of prejudice. Accordingly, reversal is not mandated.

G. Right to Present Motions

Defendant argues that the trial court erred in denying his motion requesting the opportunity to file additional motions after receipt of the discovery package. The only motion that defendant alludes to with any specificity that he was allegedly prevented from filing is a "motion to suppress all prosecutorial evidence." Defendant, however, presented motions to suppress the damaging evidence, including his confession and items found pursuant to searches and seizures, and the trial court heard the motions after conducting evidentiary hearings. Defendant does not identify what other evidence he would have attempted to suppress or the basis for suppression. Hence, aside from not adequately briefing the issue, there is no showing of prejudice. MCL 769.26; MCR 2.613(A); *Lukity*, *supra* at 495. As ruled above, there was no basis to exclude any of the evidence presented by the prosecutor.

H. Transcripts

Defendant argues that transcripts to certain portions of the lower court record have not been produced thereby depriving him of a fair appeal. It is evident that all transcripts have been received by this Court. To the extent, and assuming, that defendant did not have access to the full transcripts when preparing his appellate brief, there is no basis for reversal in light of the specific arguments made by defendant on this issue.

Defendant argues that he did not have transcripts containing the testimony of one of the officers who stopped defendant's vehicle, the testimony of a detective involved in the investigation, the motion to suppress and the trial court's ruling thereon, and the motion for

directed verdict. The alleged resulting prejudice was, respectively, the inability to properly challenge the stopping of his vehicle and his arrest, the inability to challenge his confession as coercive, the inability to properly challenge the suppression ruling where the court allegedly did not allow him to testify, and the inability to raise issues regarding the denial of his motion for a directed verdict. Our review of the full record shows, as discussed earlier in this opinion, that there was no error related to the vehicle stop and the seizure of the vehicle and defendant, nor was there error related to defendant allegedly being precluded from testifying in connection with the suppression hearing. In regard to any attempt to challenge the denial of the *Walker* hearing motion concerning defendant's confession, defendant contends that an investigating detective threatened to shoot him; however, a review of the record reflects that the detective merely testified that she was wearing her gun while at the police station. Our review of the *Walker* hearing transcript shows that the confession was legally sound. Finally, there is absolutely no basis to conclude that the trial court erred in denying defendant's motion for directed verdict as there was sufficient evidence of guilt presented at all four trials when viewed in a light most favorable to the prosecutor. See *People v Kris Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

III. CONCLUSION

Defendant's appellate claims include ineffective assistance of counsel, where counsel allegedly tricked defendant into signing an order for counseling and testing for disease and infection, improper denial of judicial disqualification motions, insufficient waiver of counsel, actual and constructive denial of counsel, abuse of discretion on various pretrial decisions and rulings, unreasonable and invalid searches and seizures, an invalid confession, improper lineup identifications, error in denying a motion for adjournment, denial of right to file additional motions, and the improper withholding of transcripts. None of defendant's arguments have merit for the reasons proffered in this opinion. Accordingly, there is no basis to reverse defendant's convictions.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski