STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2003
v	No. 239312 Otsego Circuit Court
DAVID PAUL CZINKI, Defendant-Appellant.	LC No. 01-002639-FC

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second degree murder, MCL 750.317. He was sentenced to 35 to 52½ years' imprisonment as a fourth-offense habitual offender, MCL 769.12, with credit for time served. Defendant appeals as of right. We affirm.

I.

In September 1994, defendant was living with Theresa and Pat Kohler. Defendant told the Kohlers that there was a sixteen-year-old young woman whom he wanted to date and with whom he wanted to have sexual intercourse. Mrs. Kohler warned him that he should not do this because of the young woman's age. Defendant had also told the Kohlers that he was going to drive a group of young people to Mancelona and Traverse City on September 22, 1994.

That day, sixteen-year-old Kathy Horn disappeared. After school, she and a group of young people accepted a ride from defendant in his van. On the way from Gaylord to Mancelona, defendant procured some marijuana for the group, which they shared. Once they reached Mancelona, the other young people were dropped off, but Horn wanted to go on to Traverse City with defendant. That was the last time she was seen alive.

In late September 1994, David Lowshaw and his wife were out for a drive when they saw a van on the side of the road near Berrywine and Pike School roads. The rear van doors were open and a pale- and grayish-looking woman was "propped up" inside the van. They also observed a long-haired, "scruffy"-looking man behind the van digging with a shovel. Lowshaw tried to call the police on his cellular phone, but could not get a signal. By the time Lowshaw returned home, he forgot about the incident. In 1999, Lowshaw saw a photograph of Horn in a newspaper and he recognized her face as that of the young woman he had seen in the van five years earlier.

The day after Horn disappeared, on September 23, 1994, defendant told a waiter in a Gaylord coffee shop that "the girls he took to Traverse City changed their mind[s] halfway there." The waiter testified that defendant seemed more quiet than normal, and had a napkin covering the knuckles of his hand. Defendant later told Mrs. Kohler that he only drove Horn halfway to Traverse City because she "freaked out on him." Mrs. Kohler treated the laceration wounds on defendant's hands, and defendant cleaned out his van and did his laundry. Mrs. Kohler thought this was unusual because she had never seen defendant do these chores.

In March 1995, when defendant was questioned by the police about an unrelated drunk driving incident, defendant stated he might as well take any punishment because he was already going to prison for life concerning Horn's disappearance.

On May 8, 1996, two men discovered a full set of women's clothing while they were picking mushrooms in the woods along Pike School Road. Horn's mother identified the clothing as Horn's. Police asked defendant to accompany them to the scene and he complied. The police stated they hoped defendant would react to being there. When they arrived, defendant at first refused to look in the direction of where the clothing was found. The police asked defendant if he knew why the clothes were there, and he said there was nothing to say because they already had all the evidence. Defendant then demanded to be returned home, saying that he wanted to contact an attorney, but the officers continued to drive around the scene for a period of time before leaving. Defendant did not make any further statement that was admitted into evidence after he stated that he wanted to contact an attorney.

On May 18, another mushroom hunter found some human remains covered by a blanket underneath a bush some distance away from Pike Road. The remains were identified as Horn's. Her death was ruled a homicide, but the exact cause was not established. An unclaimed notebook was also found in defendant's abandoned van years after the disappearance that contained the definitions of the terms "rape," "need," "want," and "statutory."

During jury selection in this case, a juror informed the court that a few years before, defendant allegedly stole a gun from a neighbor after becoming intoxicated and being disorderly. The juror stated that he thought that defendant was convicted of a robbery offense. The court excused the juror. Defense counsel did not object, and the trial court issued a cautionary instruction to the jury to disregard the robbery incident the juror described, and if they could not disregard it, to excuse themselves. The jury indicated that it could remain unbiased.

II.

The first issue on appeal is whether the trial court erred in failing to declare a mistrial sua sponte on the basis of juror Behnke's statement concerning the previous incident involving defendant.[1] We hold that the trial court did not err in this regard.

[1] Defendant claims that this issue involves the improper admission of character evidence of other acts. See MRE 404(B). However, the revelation about a previous criminal act of defendant's was not admitted into evidence, it was volunteered by a juror (who was excused) during voir
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> A defendant who chooses to be tried by a jury has a right to a fair and impartial trial. *Duncan v Louisiana*, 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981). The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. *People v Brown*, 46 Mich App 592, 594; 208 NW2d 590 (1973). In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994); MCR 6.412(C). [*People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996).]

By failing to timely object to this issue, defendant forfeited appellate review. See *People v Ho*, 231 Mich App 178, 183; 585 NW2d 357 (1998); *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).[2] Thus, defendant must demonstrate plain error which affected his substantial rights. *Yarger, supra*; *People v Knox*, ___ Mich App ___; ___ NW2d ___ (Docket No. 226944, issued April 8, 2003) slip op p 8.

We conclude that defendant has not demonstrated that plain error occurred. The portion of the proceedings in which defendant's previous criminal act arose was jury selection, not during the trial in which jurors are supposed to hear evidence. The juror who raised the previous act was excused, and defendant did not exercise all of his peremptory challenges. See *People v Taylor*, 195 Mich App 57; 489 NW2d 99 (1992). Moreover, the court repeatedly instructed the jurors that they were to base their decision only on the evidence presented during the trial, and jurors are presumed to follow their instructions. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). Consequently, we do not believe that the trial court erred in failing to declare a mistrial. See *Yarger, supra*; *Knox, supra*.

III.

Defendant next claims that his *Miranda* rights were violated and, therefore, certain statements he made should not have been admitted into evidence. We conclude that defendant was not in custody at the time he made the statements and, therefore, no error occurred.

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dire. Thus, defendant's approach to this appealed issue is not correct. Further, defendant's statement of relief merely claims that defendant's trial attorney should have requested a mistrial and that now defendant is entitled to a reversal of his conviction and a new trial. We note that defendant has not properly raised an ineffective assistance of counsel claim on appeal. Thus, we interpret defendant's appellate brief to argue that the trial court should have declared a mistrial sua sponte and commenced voir dire with a new jury venire.

[2] We note that to preserve a jury selection issue for appeal, a party must generally exhaust its peremptory challenges. *People v Taylor*, 195 Mich App 57; 489 NW2d 99 (1992). Here, defendant did not do so.

The issue whether a person is in custody is a mixed question of law and fact reviewed de novo. *Thompson v Keohane*, 516 US 99, 111; 116 S Ct 457; 133 L Ed 2d 383 (1995); *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). Ordinarily, a hearing on this issue is required before the trial court. *People v Walker*, 374 Mich 331, 338; 132 NW2 87 (1965); *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000). In this case, because defendant did not move for a *Walker* hearing in the court below, the issue is forfeited and can only be reviewed for plain error. *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988); *Manning*, *supra* at 625.

Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Once an accused cites Fifth Amendment rights, the police must stop the interrogation unless the accused initiates further conversation. *Minnick v Mississippi*, 498 US 146, 152; 111 S Ct 486; 112 L Ed 2d 489 (1990); *People v Kowalski*, 230 Mich App 464, 472, 474; 584 NW2d 613 (1998). A custodial interrogation is a questioning initiated by law enforcement after the accused has been taken into custody or otherwise deprived of his freedom in any significant way. *Miranda*, *supra*; *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused is in custody for purposes of *Miranda* depends on the totality of the circumstances – the key question is whether the accused could reasonably believe that he was not free to leave. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). An interrogation triggering *Miranda* includes situations in which the police know or reasonably should know that their conduct was likely to invoke an incriminating response. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995).

In this case, the police asked defendant to accompany them to the scene where the deceased's clothing was found. According to the record, defendant was not under arrest, and he voluntarily went with the police to the scene. While there, he refused to look at the spot where the clothing was found. Then, when the police asked him if he knew why the clothing was found there, he responded, "What's to say? You've got all the evidence." Next, defendant demanded to be returned home, saying that he wanted to contact an attorney. However, the officers continued to drive around the scene for a limited period of time before leaving.

Defendant *voluntarily* went with the police to the scene. While the encounter at the scene was likely an interrogation, see *Anderson*, *supra*, defendant was not "in custody" for purposes of *Miranda*, *supra*, because he was present by his own choice. Further, defendant knew the geographical area well, and, although the police drove him there, defendant was free to leave by walking away of his own accord. See *Marsack*, *supra*. Thus, *Miranda* warnings were not required. See also *Abraham*, *supra*; *Zahn*, *supra*; *Marsack*, *supra*. Moreover, although perhaps the police should have more immediately honored defendant's request to leave the scene to obtain the services of an attorney, see *Kowalski*, *supra*, defendant did not utter another word after this request that was introduced into evidence. As a result, defendant's claim of error on this ground is baseless, and plain error did not occur. See *Ray*, *supra*; *Manning supra*.

Finally, we note that we have reviewed the standard 11 brief defendant recently filed, and we also hold that the issues raised therein are without merit. In particular, defendant has not provided any documentation for his claim that witnesses observed the victim alive after

defendant gave her a ride on September 22, 1994. Nor has defendant cited to the record for his claims that improper evidence was admitted against him. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims[.]") (quotation omitted). Indeed, the evidence presented at trial was sufficient to prove defendant's guilt beyond a reasonable doubt. See *People v Noble*, 238 Mich App 647, 655; 608 NW2d 123 (1999). Thus, defendant's new claims do not alter our opinion.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell