STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2016
v	No. 326739 Kalamazoo Circuit Court
ROBERT HEZEKIAH PRESCOTT, Defendant-Appellant.	LC No. 14-000053-FC

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Defendant, a taxicab driver, assaulted and raped a young woman at gunpoint after she rebuffed his sexual advances during a taxicab ride. After ejaculating inside of her vagina, defendant cried, expressed his love for the victim, threatened to kill her if she told anyone about the incident, and drove her home. He was convicted of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e), one count of unlawful imprisonment, MCL 750.349b, one count of felonious assault, MCL 750.82, one count of carrying a concealed weapon, MCL 750.227, one count of felon in possession of a firearm, MCL 750.224f, and seven counts of possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b, and sentenced as a fourth-offense habitual offender, MCL 769.12, to 40 to 60 years for the CSC I convictions, 15 to 40 years for the unlawful imprisonment conviction, five to 15 years for the assault conviction, four to ten years for the carrying and possession convictions, and two years for the felony firearm convictions. We affirm defendant's convictions but remand for further proceedings as it relates to defendant's sentence in light of our Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

On appeal, defendant first argues that the victim's testimony regarding defendant's statements that he did not want to return to prison and that he was on parole at the time of the instant offenses were inadmissible under MRE 403. We disagree. Because this issue was not raised before the trial court, it is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). MRE 403 bars the admission of relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488 (2002) (citations and internal quotation marks omitted). "Evidence is unfairly prejudicial when there exists a danger that

marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Defendant first takes issue with the victim's testimony that, after assaulting and raping her at gunpoint, he threatened to kill her if she told anyone because he did not want to return to prison.[1] This testimony is highly probative, *People v Schaw*, 288 Mich App 231, 237-238; 791

[1] While defendant contends that the victim testified that defendant was a convicted felon and on parole directly in response to questions that the prosecutor "knew or should have known . . . were improper," the statements at issue, when reviewed in context, simply reflects otherwise. Specifically, the victim testified regarding defendant's prior incarceration as follows:

> *Prosecutor*: After the Defendant ejaculated did his, ah, demeanor change?
>
> *Victim*: Yes . . . yes.
>
> *Prosecutor*: How did his demeanor change?
>
> *Victim*: He got off of me and sat next to me and started crying.
>
> *Prosecutor*: Did the Defendant continue yelling at you at that point?
>
> *Victim*: He wasn't yelling anymore.
>
> *Prosecutor*: Did he say something to you?
>
> *Victim*: He told me that he loved and he wanted to be with me, and that we were gonna be together now, and if I didn't want to be with him then I could die. And he . . . .
>
> *Prosecutor*: I'm sorry; I didn't catch that part.
>
> *Victim*: If I didn't want to be with him, if I didn't agree to be with him and not tell anybody what he had done, then he would leave me in the parking lot and he would shoot me, and leave my body in the parking lot. And he kept talking about how we were meant to be together, and he couldn't go back to prison, and nobody can know about what he did because he can't go back to prison, and he won't go back to prison, and he'll kill us both, and made me swear not to tell anybody or to call the police.
>
> *Prosecutor*: Did you agree with him that you wouldn't tell anybody?
>
> *Victim*: Yes.
>
> *Prosecutor*: Why did you agree to tell him that?
>
> *Victim*: I didn't want to die.

NW2d 743 (2010) (explaining that the admission of a "defendant's statements that he was a convicted felon and that he spent time in prison" "were highly probative of consciousness of guilt" when "made as part of a concerted effort to manipulate [the victim] into lying to the authorities prosecuting the case."), and minimally prejudicial in light of the fact that the jury was already aware of defendant's status as a convicted felon, *People v McDonald*, 303 Mich App 424, 436; 844 NW2d 168 (2013) (explaining that a defendant cannot show the requisite prejudice in circumstances such as this because "[t]he jury knew that defendant had a prior felony conviction because he was charged with felon in possession of a firearm and because the parties stipulated that defendant had a prior felony conviction."). Thus, defendant has failed to demonstrate plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

Defendant next takes issue with the victim's testimony that she had a problem with defendant's taxicab company because defendant was a convicted felon.[2] This testimony was also highly probative, *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001) (explaining "that evidence of bias is 'almost always relevant.' "), and minimally prejudicial, again, in light of the fact that the jury was already aware of defendant's status as a convicted felon, *McDonald*, 303 Mich App at 436 (explaining that a defendant cannot show the requisite prejudice in circumstances such as this because "[t]he jury knew that defendant had a prior felony conviction because he was charged with felon in possession of a firearm and because the parties stipulated that defendant had a prior felony conviction."). Thus, defendant has failed to demonstrate plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

Finally, even if we assume that the testimony described above was erroneously admitted, our conclusion remains the same because defendant has not demonstrated "prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. Ignoring the victim's relatively minor testimony regarding defendant's prior convictions and status as a parolee, there remains an overwhelming amount of damning evidence against defendant. Specifically, the victim testified that defendant pointed a gun to her head, told her that he would shoot her if she did not have sex with him, struck her in the face with his hand multiple times, drove her to a dark parking lot, and raped her. Thus, even if we assume a plain error occurred, defendant has not demonstrated that he was prejudiced by that error. Reversal is, therefore, not required. *Carines*, 460 Mich at 763.

Defendant also, in a conclusory fashion, claims that trial counsel's performance constituted ineffective assistance of counsel based on the alleged failure to effectively challenge the testimony described above. We disagree. To prevail on an ineffective-assistance claim, "a

[2] Again, defendant's argument fails to acknowledge, much less appreciate, the context in which the testimony at issue was made. Specifically, toward the end of defense counsel's cross-examination of the victim, defense counsel asked the victim whether she had "filed [a] lawsuit against the taxi company," which she denied, and whether she had "retain[ed] counsel to attempt to do that," which she admitted. Then, only moments later on redirect-examination, the prosecutor asked the victim "what [her] problem with the taxicab company" was, and she answered that it was defendant's status as a felon on parole. Defense counsel objected prior to any additional testimony.

defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). On appeal, we will not use the benefit of hindsight to second-guess strategic decisions made by trial counsel. *People v Bahoda*, 448 Mich 261, 287, n 54; 531 NW2d 659 (1995). Furthermore, trial counsel's failure "to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In this case, as it relates to the victim's testimony that defendant was a convicted felon and on parole, any objection by trial counsel would have been futile, *Ericksen*, 288 Mich App at 201, in light of the parties' stipulated admission of defendant's status as a convicted felon. Furthermore, there are certainly conceivable strategic reasons that counsel may have wished not to draw attention to this testimony, especially in light of the stipulation discussed above. *Bahoda*, 448 Mich at 287, n 54. Additionally, we cannot ignore the fact that trial counsel *did* object when it appeared as though the victim was going to testify regarding the specific crime that defendant was on parole for. Thus, defendant has not demonstrated that counsel's performance fell below an objective standard of care nor has he demonstrated that he was deprived of a fair trial. *Pickens*, 446 Mich at 303; *Strickland*, 466 US at 687.

Finally, defendant argues that resentencing is required because the trial court used judicially found facts to score several offense variables (OVs). In light of our Supreme Court's decision in *Lockridge*, we agree. This issue is unpreserved and, thus, reviewed for plain error. *Lockridge*, 498 Mich at 397. In *Lockridge*, our Supreme Court held that Michigan's sentencing guidelines are unconstitutional to the extent that they require judicial fact-finding beyond facts that are admitted by a defendant or found by a jury. *Id*. at 364. Accordingly, it explained, plain error exists when the facts admitted by a defendant or found by a jury are insufficient "to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced." *Id*. at 394. When plain error exists, a remand to the trial court for a hearing pursuant to *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005), is required to allow the trial court to determine whether, in light of the advisory nature of the sentencing guidelines, it would have imposed a materially different sentence. *Id*. at 396-397. If so, resentencing is required. *Id*. Here, the trial court scored, at a minimum, OVs 1, 3, and 4 based on conduct that was not admitted by defendant or found by a jury. Thus, we remand this matter for a *Crosby* hearing under *Lockridge*. On remand, pursuant to *People v Stokes*, ___ Mich App ___, ___; ___ NW2d ___ (2015); slip op at 11-12, defendant is to be provided with an opportunity to avoid resentencing by promptly notifying the trial court that resentencing will not be sought.

Affirmed but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood