STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2012
v	No. 307487 Berrien Circuit Court
GREGORY DONTE HURD, Defendant-Appellant.	LC Nos. 2011-002107-FH; 2011-002108-FH

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of unlawfully driving away an automobile, MCL 750.413, transporting or possessing an open container of alcohol in a motor vehicle, MCL 257.624a, and resisting and obstructing, MCL 750.81d(1). Defendant was sentenced as a third-habitual offender, MCL 769.11, to 36 to 120 months for unlawfully driving away an automobile, 90 days for transporting or possessing an open container of alcohol in a motor vehicle, and 1 to 2 years for resisting and obstructing. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

The victim drove to defendant's residence and exited the vehicle upon her arrival. Defendant entered the vehicle, sitting in the driver's seat. Intending to use the bathroom, the victim entered the house and took the keys with her. Defendant, however, claimed that he wanted to listen to the radio, so he entered the bathroom to ask for the keys to the vehicle. The victim gave defendant the keys, although she did not give him permission to drive the vehicle.

Upon emerging from the bathroom, the victim discovered that defendant had driven away with the vehicle. She contacted the police and reported his behavior. The police pursued defendant, and a car chase ensued. Defendant eventually drove through a chainlink gate, exited the vehicle, and began to flee on foot. Another passenger in the vehicle, a minor, also exited the vehicle and began to flee. The passenger eventually surrendered, and the police subdued defendant with a taser. When the police searched the vehicle, they discovered an open bottle of liquor. Defendant was convicted of unlawfully driving away an automobile, MCL 750.413, transporting or possessing an open container of alcohol in a motor vehicle, MCL 257.624a, and resisting and obstructing, MCL 750.81d(1). Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

On appeal, defendant challenges the sufficiency of the evidence supporting his conviction of unlawfully driving away in an automobile (UDAA). "Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). This Court reviews "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). Lastly, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

B. Analysis

Defendant and the prosecution agree that there was insufficient evidence to support his conviction of UDAA, MCL 750.413. "The essential elements of UDAA are (1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) the possession and driving away must be done without authority or permission." *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993). As illustrated, the prosecution must prove that defendant possessed *and* drove the vehicle without authority or permission. *Id.*

We agree that there was insufficient evidence to support a finding that defendant possessed the vehicle without authority. It is undisputed that the victim allowed defendant to enter the vehicle and listen to the radio. More importantly, the victim gave defendant the keys. Thus, defendant had actual possession of the keys, permission to occupy the vehicle, and permission to use the vehicle at least for the limited purpose of listening to the radio. While defendant did not have authority or permission to drive the vehicle, he had authority or permission to possess the vehicle. See *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997) (the victim's possession of keys demonstrated that he had possession of the automobile for purposes of supporting the defendant's conviction for carjacking).

Therefore, we agree that there was insufficient evidence to support defendant's conviction of UDAA. However, we remand with instructions that the trial court enter a conviction for the lesser included offense of unlawful use of an automobile (UUA), MCL 750.414. The elements of UUA are: (1) the automobile did not belong to defendant; (2) defendant had lawful possession of the automobile; and (3) defendant intentionally used the automobile beyond his lawful authority, knowing he did not have lawful authority to use the automobile in such a manner. MCL 750.414; *People v Hayward*, 127 Mich App 50, 60-61; 338

NW2d 549 (1983). "Unlawful use of a motor vehicle is a lesser included offense of unlawfully driving away a motor vehicle (UDAA), a felony commonly known as 'joyriding'." *Hayward*, 127 Mich App at 61. Further, "when a conviction for a greater offense is reversed on grounds that affect only the greater offense," we may direct the lower court to enter a conviction for the lesser offense. *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001) (internal quotations and citation omitted). Here, the grounds for reversal are that there was insufficient evidence that defendant's possession of the vehicle was without authority. This does not affect the lesser included offense of UUA, as a defendant can be convicted of UUA if he possessed the automobile lawfully but used the automobile beyond his lawful authority. MCL 750.414.

Consequently, we remand for the trial court to enter a conviction for the lesser included offense of UUA and to resentence defendant on this offense. Since we agree with defendant's claim regarding his UDAA conviction, we decline to address his argument relating to the bind over on the UDAA charge, failure to instruct on the UUA charge, and sentencing for the UDAA charge. These issues are now moot, and we need not consider them. See *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010) (internal quotation and citation omitted) ("this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before it.").

III. OTHER ACTS EVIDENCE

Next, defendant contends that the trial court erred in admitting evidence of a prior incident when defendant took the victim's vehicle without permission. He also contends that the trial court erred by failing to instruct the jury regarding the limited relevancy of the evidence.

Defendant has waived this issue. Rather than objecting to the admissibility of the evidence at trial, defendant actually stated: "I fully intend to introduce that [evidence] also because [the victim] told the police it never happened and the charge was dismissed." Counsel's express approval "constitutes a waiver that *extinguishes* any error." *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000) (emphasis in original); see also *People v Breeding*, 284 Mich App 471, 486; 772 NW2d 810 (2009) ("[a] defendant should not be allowed to assign error to something that his own counsel deemed proper.").[1]

To the extent that defendant contends his trial counsel was ineffective for waiving this issue, we do not agree that "counsel's performance fell below an objective standard of reasonableness[.]" *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). In order to succeed on a claim of ineffective assistance of counsel, "[t]he defendant must overcome the

[1] There is no miscarriage of justice in failing to review this issue because, as discussed below, introducing this evidence at trial was potentially beneficial to defendant as it severely undermined the credibility of the victim. Moreover, in regard to the alleged instructional error, defendant failed to request a limiting instruction, and "[t]his Court will not reverse a conviction on the basis of alleged instructional error unless the defendant has requested the omitted instruction or objected to the instructions given." *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996).

presumption that the challenged action could have been sound trial strategy." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). As defense counsel implied in his statement, his intention was to use the victim's previous report, which she later recanted, to undermine her credibility. Consistent with this strategy, defense counsel elicited testimony from the victim that she lied to police and prosecutors during the prior incident. Though this strategic choice may have been unsuccessful, that does not transform counsel's behavior into ineffective assistance. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

IV. SENTENCING

A. Standard of Review

Next, defendant raises numerous challenges to his resisting and obstructing sentence. Defendant failed to object at sentencing or file a motion for resentencing or remand based on the grounds he now asserts on appeal, rendering these claims unpreserved. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Unpreserved claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

Defendant makes several unsubstantiated claims, all of which are meritless. Defendant first alleges that his sentence was invalid because the trial court failed to consider mitigating evidence when sentencing him. However, this Court has held that while the federal sentencing guidelines may require consideration of mitigating factors pursuant to *Blakely v Washington*, 542 US 296, 298; 124 S Ct 2531; 159 L Ed 2d 403 (2004), this is not required under Michigan's sentencing scheme. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011). We also note that the trial court satisfied the articulation requirement when it "expressly relie[d] on the sentencing guidelines in imposing the sentence[.]" *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Consequently, defendant is not entitled to relief on this issue.

Defendant also suggests that he was entitled to a lesser sentence because of alleged mental illness. Contrary to this bald assertion on appeal, nowhere in the lower court record, including the presentence investigation report, is there any evidence that defendant was actually diagnosed or considered mentally ill. Moreover, a downward departure from the sentencing guidelines requires a "substantial and compelling reason for departing[,]" *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003) (internal quotations and citation omitted), and defendant fails to cite any legal authority for the proposition that an unsubstantiated mental illness meets this threshold.

Defendant also argues that his sentence is disproportionate and constitutes cruel and unusual punishment. Yet, defendant was sentenced within the applicable guidelines range. "'If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's

sentence.'" *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010), quoting MCL 769.34(10) (emphasis omitted).[2] Moreover, "a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (internal citation omitted). Defendant fails to articulate any reasoning that would overcome this presumption and has therefore failed to establish any error requiring reversal.

Defendant also references other alleged errors, such as those based on the Ninth Amendment, US Const Amend IX. However, defendant fails to articulate why such constitutional precepts require resentencing in the instant case, considering his sentence fell within the guidelines range. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (internal citation omitted). Lastly, defendant is not entitled to relief based on ineffective assistance of counsel because all of his claims are meritless, and any objection would have been futile. *People v Payne*, 285 Mich App 181, 191; 774 NW2d 714 (2009).

V. CREDIT FOR TIME SERVED

Next, defendant contends that the trial court erred when denying him credit for time served based on his status as a parolee at the time he committed the instant offenses. Defendant has waived this issue. When the trial court stated that credit for time served would be zero days, defense counsel replied, "[t]hat's correct; consecutive to parole." As noted above, an express approval "constitutes a waiver that *extinguishes* any error." *Carter*, 462 Mich at 216 (emphasis in original).[3]

Additionally, to the extent that defendant claims his counsel was ineffective for waiving this issue, we disagree. Pursuant to MCL 769.11b, "[o]ne who serves time in jail before sentencing for denial of bond or inability to post bond is entitled to receive credit for that time served in jail before sentencing." *People v Seiders*, 262 Mich App 702, 705-706; 686 NW2d 821 (2004). However, MCL 769.11b does not apply to parolees who commit new felonies while on

[2] While defendant claims that he was sentenced based on inaccurate information, he only offers unsupported allegations that the trial court failed to consider undiagnosed mental illness and rehabilitative potential. Defendant has cited no legal authority to support his contention that such factors, even if they do exist, render his sentence inaccurate or that they warrant resentencing. Additionally, defendant fails to cite any legal authority for the proposition that the trial court was obligated to conduct a rehabilitative assessment pursuant to MCR 6.425(A)(1)(e), which only states that relevant information regarding defendant's medical and substance abuse history may be contained in a report submitted to the court.

[3] Further, failing to review this issue is not a miscarriage of justice because, as discussed below, defendant was not entitled to credit for time served and his claims based on double jeopardy, the ninth amendment, due process, and equal protection are therefore meritless.

parole, *People v Idziak*, 484 Mich 549, 562; 773 NW2d 616 (2009), because "when a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense[,]" *Seiders*, 262 Mich App at 705. Defendant does not dispute that he was on parole at the time he committed the instant offenses. Therefore, the trial court correctly recognized that defendant was not entitled to a jail credit for time served for the instant offense. See *Seiders*, 262 Mich App at 705. While defendant invites us to ignore *Idziak* and find that *Seiders* was wrongly decided, we are bound by Supreme Court cases and published opinions of this Court issued after November 1, 1990. *People v Watson*, 245 Mich App 572, 597; 629 NW2d 411 (2001). Since the trial court correctly found that defendant was not entitled to any jail credit, any objection would have been futile, and counsel was not ineffective for failing to raise a futile objection. *Ericksen*, 288 Mich App at 201.

VI. ATTORNEY FEES

A. Standard of Review

Lastly, defendant argues that the trial court erred when ordering him to reimburse the county for his attorney fees. Defendant did not object to the attorney fees imposed, rendering this issue unpreserved. Our review is therefore limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

B. Analysis

Pursuant to MCL 769.1k(1)(b)(iii), the trial court may impose expenses of legal assistance on defendant. Defendant cites *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), for the proposition that the trial court was required to assess his ability to pay the fees before imposing them. However, in *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009), the Michigan Supreme Court expressly overruled *Dunbar* and held that the trial court is not required to assess a defendant's ability to pay attorney fees as a perquisite to imposing them. Considering this binding authority, we conclude defendant has failed to establish any violation of due process or equal protection. Since defendant's argument is meritless, defense counsel was not ineffective for failing to raise a futile objection. *Ericksen*, 288 Mich App at 201.

VII. CONCLUSION

Since there was insufficient evidence to support defendant's conviction of UDAA, we vacate his conviction and remand for entry of a conviction for UUA. Defendant must be resentenced for this UUA charge, as this is now a misdemeanor conviction. In all other aspects we affirm, as defendant failed to establish any errors requiring reversal based on other acts evidence, sentencing, credit for time served, or attorney fees. Resentencing of defendant's remaining convictions is not required. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan