STATE OF MICHIGAN

IN THE SUPREME COURT

LEJUAN RAMBIN,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

Supreme Court No. 146256

Court of Appeals No. 305422

Wayne County Circuit Court
No. 10-009091-NF

/

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146256

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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INTRODUCTION

As the Court of Appeals' decision correctly begins, throughout proceedings in the trial court and Court of Appeals, "[t]he material facts (were) undisputed." (COA majority opinion, p 1). These facts are:

1. Scott Hertzog owned a motorcycle, which was stolen on August 4, 2009. (*Id*).

2. On August 22, 2009, Andre Smith told plaintiff that he had an extra motorcycle that plaintiff could ride for a motorcycle club event. Plaintiff went to Smith's house and Smith gave him the keys to Hertzog's stolen motorcycle. (*Id*).

3. Smith told plaintiff that he owned the motorcycle and that plaintiff could use it for the scheduled event at 10:00 p.m. (*Id*, pp 1-2).

4. Plaintiff used the motorcycle to attend the social function. (*Id*, p 2).

5. At the time, Plaintiff "did not possess a valid license to operate a motorcycle." (*Id*, p 2 n 1).

6. While driving the motorcycle to return it to Smith's house, plaintiff collided with a car and was injured. (*Id*, p 2).

Plaintiff-Appellee ("Plaintiff") filed suit to recover PIP benefits. On June 23, 2011, the trial court entered a stipulated order declaring that Defendant-Appellant, Allstate Insurance Company ("Allstate"), insured the motorcycle at the time of the accident. (6/23/11 stipulated order).

Allstate and Plaintiff filed competing motions for summary disposition. Accepting the above facts as undisputed, the motions addressed whether, as a matter of law, Plaintiff unlawfully took the motorcycle under MCL 500.3113(a). On July 15, 2011, the trial court granted Allstate's motion for summary disposition and denied Plaintiff's motion. Relying on the strict liability, "unbroken chain of permissive use" standard in *Amerisure Insurance Co v Plumb*, 282 Mich App 417; 766 NW2d 878 (2009), the trial

court held that, as a matter of law, Plaintiff unlawfully took the motorcycle and is barred from recovering PIP benefits under MCL 500.3113(a).

On August 30, 2012, the Court of Appeals unanimously reversed. Following the Supreme Court's intervening decision in *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co of Michigan*, 492 Mich 503; 821 NW2d 117 (2012), which held that determination whether a taking is unlawful under MCL 500.3113(a) rests on whether the taker violated the Michigan Penal Code, the Court of Appeals held that Plaintiff's innocent taking of the motorcycle was not unlawful:

> *Spectrum Health/Progressive Marathon* thus clarifies that MCL 500.3113(a) requires us to "examine[] the legality of the taking from the *driver's* perspective," and further requires that the "end user" driver has taken the vehicle "contrary to a provision of the Michigan Penal Code." *Spectrum Health/Progressive Marathon*, slip op at 3-4, 16 (emphasis in original). In this case, there is no dispute that plaintiff did not take the vehicle in violation of the Michigan Penal Code, and that, viewed from plaintiff's [the driver's] perspective, there was no "unlawful taking."
>
> Applying the text of the statute and the case law discussed above, we therefore find, based on the record evidence, that there is no genuine issue of material fact that plaintiff did not "take [the motorcycle] unlawfully" under MCL 500.3113(a), and that the first prong of the statutory analysis is not satisfied. Simply put, plaintiff was not the person who took the vehicle unlawfully. He was a person who, with no unlawful intent and with no knowledge of any unlawful taking, used a vehicle that another person may have taken unlawfully. Accordingly, we reverse the trial court's award of summary disposition in favor of defendants, and remand for further proceedings.

(COA majority opinion, pp 13-14; Concurrence, pp 1-2).

Trying to "reboot" its entire appeal, after the Court of Appeals released its decision, Allstate fired its original attorney, hired new counsel, and filed a motion for reconsideration in the Court of Appeals arguing, for the first time, that a genuine issue of material facts on the issue whether Plaintiff intended to unlawfully take the motorcycle

precludes summary disposition. (Allstate's 9/20/12 motion for reconsideration, pp 3-8). This motion conceded that, pursuant to the Supreme Court's decision in *Spectrum, supra*, "for a taking to be 'unlawful' for purposes of MCL 500.3113(a), the taking itself must violate Michigan law." (Id, p 2). The motion similarly admitted that "some element of 'intent' on the part of the actor' is necessary for the taking to be 'unlawful'". (Id, p 3). The Court of Appeals denied Allstate's motion for reconsideration on October 19, 2012. (10/19/12 order).

Allstate then filed an application for leave to appeal to the Supreme Court. Allstate's application again concedes that, under *Spectrum Health*, the Court of Appeals correctly reversed the order granting Allstate's motion for summary disposition. (Allstate's application, p 3). Allstate's application solely argues that "the facts and circumstantial evidence cast doubt on Rambin's story, rendering summary disposition for Plaintiff Rambin inappropriate." (Id).

On May 1, 2013, this Court entered a MOA order. *Rambin v Allstate Insurance Co*, 493 Mich 973 (2013). The order states, in pertinent part:

> At oral argument, the parties shall address whether the plaintiff took the motorcycle on which he was injured "unlawfully" within the meaning of MCL 500.3113(a), and specifically, whether "taken unlawfully" under MCL 500.3113(a) requires the "person ... using [the] motor vehicle or motorcycle" to know that such use has not been authorized by the vehicle or motorcycle owner, see MCL 750.414; *People v Laur,* 128 Mich App 453; 340 NW2d 655 (1983), and, if so, whether the Court of Appeals erred in concluding that plaintiff lacked such knowledge as a matter of law given the circumstantial evidence presented in this case. *Id.*

The order authorized the parties to file supplemental briefs, which should not merely restatement their application papers. *Id.*

Plaintiff now submits his supplemental brief. As demonstrated, the Court of Appeals correctly held that Plaintiff did not unlawfully take the motorcycle because, as a matter of law, he did not "know that such use has not been authorized by the vehicle or motorcycle owner . . ."

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD, PURUSANT TO *SPECTRUM HEALTH*, THAT DETERMINATION WHETHER A PERSON "UNLAWFULLY" TAKES A VEHICLE UNDER MCL 500.3113(a) RESTS ON WHETHER THE PERSON VIOLATES THE MICHIGAN PENAL CODE, WHICH REQUIRES EITHER WILFULL INTENT OR KNOWLEDGE THAT USE OF THE VEHICLE IS UNAUTHORIZED.

The Court of Appeals' correctly held that Plaintiff did not unlawfully take the motorcycle under MCL 500.3113(a) because he believed he had the actual owner's consent to use the motorcycle. Directly following this Court's *Spectrum Health* decision, the Court of Appeals necessarily concluded that "taken unlawfully" under MCL 500.3113(a) is not a strict liability standard depriving innocent people of PIP benefits, but requires the "person ... using [the] motor vehicle or motorcycle" to know that such use has not been authorized by the vehicle or motorcycle owner. Allstate's application for leave to appeal should be denied.

MCL 500.3113(a) states:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

In *Spectrum Health, supra*, this Court began by recognizing that, because the statute does not define "unlawfully," the word must be accorded "its plain and ordinary meaning," which may be ascertained by dictionary definitions. *Id*, 492 Mich at 516. The Court then indicated that "[t]he word 'unlawful' commonly means 'not lawful; contrary to law; illegal.'" *Id* at 516-517 (citation omitted). Based on this common definition, and the ordinary meaning of the word "take," this Court concluded that "the plain meaning of the phrase 'taken unlawfully' readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law." *Id* at 517.

Accordingly, this Court held that the Michigan Penal Code, specifically MCL 750.413 and MCL 750.414, governs whether a vehicle is "taken unlawfully" under MCL 500.3113(a). *Id* at 517-518, 537. The Court emphasized that "the term 'unlawful' can only refer to the Michigan Penal Code . . ." *Id* at 517 n 22 (emphasis added). In doing so, this Court overruled the "chain of permissive use" standard that originated in *Bronson Methodist Hospital v Forshee*, 198 Mich App 617; 499 NW2d 423 (1993) and, as the Court of Appeals in this case explained, spawned the strict liability, "unbroken chain of permissive use" standard in *Amerisure Insurance Co v Plumb*, 282 Mich App 417; 766 NW2d 878 (2009). *Spectrum Health*, 492 Mich at 521-524 (See also COA opinion, pp 6-8, 13).

Michigan law is clear that a taking does not violate MCL 750.413 and MCL 750.414 unless it is done either wilfully or with knowledge that the taker lacks authority

to do so. MCL 750.413,[1] the "unlawful driving away without authority" ("UDAA") statute, states:

> TAKING POSSESSION OF AND DRIVING AWAY A MOTOR VEHICLE--Any person who shall, wilfully and without authority, take possession of and drive or take away, and any person who shall assist in or be a party to such taking possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years.

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), aff'd 446 Mich 435, 449; 521 NW2d 546 (1994); *People v Dutra,* 155 Mich App 681, 685; 400 NW2d 619 (1986). The UDAA requires that the unauthorized use of the vehicle be done "wilfully" or "wilfully and wantonly." *Hendricks*, 446 Mich at 449 (citations omitted). This means that, while the UDAA does not require an intent to steal the vehicle or permanently deprive the owner of his or her vehicle, it does require an intent to take the vehicle unlawfully. *Allen v State Farm Mut Auto Ins Co*, 268 Mich App 342, 350; 708 NW2d 131 (2005); *Landon v Titan Ins Co*, 251 Mich App 633, 640; 651 NW2d 93 (2002); *Mester v State Farm Mut Ins Co,* 235 Mich App 84, 88; 596 NW2d 205 (1999); *Dutra*, *supra*, 155 Mich App at 685. That is, the taker must have "guilty knowledge." *Dutra, supra*, citing *People v Andrews,* 45 Mich App 354, 359; 206 NW2d 517 (1973).

MCL 750.414 sets forth the misdemeanor offense of using a motor vehicle without authority but without intent to steal. The statute provides, in pertinent part:

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[1] No one, including Allstate, has ever suggested that Plaintiff violated MCL 750.413. Plaintiff discusses this statute to demonstrate the point that the Penal Code requires either willful intent or knowledge of an unauthorized taking.

> Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who shall be a party to such unauthorized taking or using, shall upon conviction thereof be guilty of a misdemeanor. . . .

The elements of unlawful use of an automobile under this provision are:

1. The motor vehicle must have belonged to another.

2. Defendant must have taken or used the motor vehicle.

3. The taking or using must have been done without authority.

4. Defendant must have intended to take or use the vehicle, knowing that he had no authority to do so.

People v Laur, 128 Mich App 453, 455; 340 NW2d 655 (1983); *People v Hayward,* 127 Mich App 50, 60-61; 338 NW2d 549 (1983); *People v Crosby,* 82 Mich App 1, 3; 266 NW2d 465 (1978); *People v Shipp,* 68 Mich App 452, 455; 243 N.W.2d 18 (1976); see also *Landon, supra*, 251 Mich App at 643-644.

As this Court recognized in *Spectrum, supra*, MCL 750.413 and MCL 750.414 do not require actual larceny. *Id*, 492 Mich at 518, 537. These statutes, however, are not strict liability provisions. They require either the willful intent to take the vehicle unlawfully, *Hendricks, supra*, (addressing MCL 750.413), or actual knowledge that the person had no authority to take the vehicle, *Laur, supra*; *Hayward, supra*; *Crosby, supra* (addressing MCL 750.414).

An unbroken line of cases, stretching from *People v Crosby* to the Court of Appeals' recent, unpublished decision in *People v Hurd*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2012 (Docket No. 307487) (Exhibit A), have uniformly held that a person taking a vehicle does not violate MCL 750.414 unless that person knew he or she lacked authority to do so. Since the Penal Code governs

whether a taking is unlawful under MCL 500.3113(a), in answer to this Court's MOA order question, "taken unlawfully" under MCL 500.3113(a) inevitably requires the "person ... using [the] motor vehicle or motorcycle" to know that such use has not been authorized by the vehicle or motorcycle owner. As indicated above, both Allstate's Court of Appeals motion for reconsideration and Supreme Court application concede this very point. (Allstate's motion for reconsideration, pp 2-3; Allstate's application, p 3). Any other conclusion would not only change MCL 750.414 into a strict liability provision, but would rewrite the plain wording of MCL 500.3113(a) from "taken unlawfully" to "taken without the actual owner's consent." This Court has repeatedly declared that courts are not in the business of altering unambiguous statutes. *Roberts v Mencosta County General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

In closing, Plaintiff briefly addresses this Court's statement in *Spectrum Health* indicating that the "reasonable belief" exception to the "unlawful taking" rule illustrates the fact that "the phrase "taken unlawfully" in MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner, regardless of whether that person intended to steal." *Id*, 492 Mich at 518 n 26 (original emphasis). The Court's recognition that MCL 750.414, and therefore MCL 500.3113(a), do not require the intent to steal does not alter the fact that they require actual knowledge that the taking was unauthorized.

Justice Griffin's dissent in *Priesman v Meridian Mutual Ins Co*, 441 Mich 60; 490 NW2d 314 (1992) explains how the "reasonable belief" exception is consistent with the principal "unlawful taking" rule requiring actual knowledge of an unauthorized taking:

> Corey Warfield took and used an automobile belonging to his mother. It is conceded that he did not have permission or authority to drive his mother's

> car, and that he knew he did not have permission or authority to drive the car. Nor could he have had a reasonable belief that he was entitled to take and use his mother's car, since he was not licensed and had never been allowed to use the car.

Id at 71 (Griffin, J, dissenting). As Justice Griffin correctly interprets, a person may unlawfully take a vehicle because he knows he lacks authority on that specific occasion, but may still have a reasonable belief he is entitled to take and use the vehicle because he had been previously allowed to use the vehicle. Nothing in the "reasonable belief" exception is inconsistent with the fact that an unlawful taking under MCL 500.3113(a) requires knowledge that the taker lacked authority.

Moreover, questions over the meaning of the "reasonable belief" exception do not, and cannot alter the unambiguous language of the principal portion of MCL 500.3113(a) – which governs use of a vehicle "taken unlawfully." The Legislature's use of the word "unlawfully" linked MCL 500.3113(a) with the Penal Code. This Code, as established, provides that a taking is unlawful only when the vehicle user has "willful" intent or knowledge he has taken the vehicle without authorization.

II. THE UNDISPUTED MATERIAL FACTS RAISE NO GENUINE ISSUE OF MATERIAL FACT THAT PLAINTIFF TOOK THE MOTORCYCLE UNLAWFULLY UNDER MCL 500.3113(a).

Having established that MCL 500.3113(a) requires actual knowledge that the user lacked authority before a vehicle has been "taken unlawfully," the facts, which Allstate did not dispute before the Court of Appeals issued its decision, readily establish, as a matter of law, that Plaintiff did not unlawfully take the motorcycle. As demonstrated in Plaintiff's application response, in both the trial court, in its Court of Appeals brief, and at oral argument, Allstate never disputed that Plaintiff borrowed the motorcycle under the innocent belief he had the authority of the actual owner.

Since Plaintiff neither intended to take the motorcycle unlawfully nor had actual knowledge he lacked the owner's authority, he did not violate MCL 750.414, or any other section of the penal code, and did not unlawfully take the motorcycle under MCL 500.3113(a). The Court of Appeals correctly held "that there is no genuine issue of material fact that plaintiff did not 'take [the motorcycle] unlawfully' under MCL 500.3113(a), and that the first prong of the statutory analysis is not satisfied." (COA opinion, p 14).

Finally, Plaintiff's application response addresses Allstate's unpreserved and misplaced attempt to now argue that there is a material fact question on the unlawful taking issue. For the reasons presented, Allstate's application for leave to appeal should be denied.

Respectfully Submitted,

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Dated: July 2, 2013

Exhibit A

2012 WL 6217035
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Gregory Donte HURD, Defendant–Appellant.

Docket No. 307487. | Dec. 13, 2012.

Berrien Circuit Court; LC Nos.2011–002107–FH; 2011–002108–FH.

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

Opinion

PER CURIAM.

***1** 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 750.81 d(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 750.81 d(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

*2 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

*3 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]

[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).

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 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 U.S. 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.

***4** 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.

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)(c), which only states that relevant information regarding defendant's medical and substance abuse history may be contained in a report submitted to the court.

Defendant also references other alleged errors, such as those based on the Ninth Amendment, U.S. 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]

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.

***5** 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 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.

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STATE OF MICHIGAN

IN THE SUPREME COURT

LEJUAN RAMBIN,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

Supreme Court No. 146256

Court of Appeals No. 305422

Wayne County Circuit Court
No. 10-009091-NF

/

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PROOF OF SERVICE

Donald M. Fulkerson, by his signature, verifies that, on July 2, 2013, by first class or priority mail, he served Plaintiff-Appellee's supplemental brief and this proof of service on Daniel S. Saylor, 1000 Woodbridge Street, Detroit, MI 48207-3108.

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Dated: July 2, 2013

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July 2, 2013

Clerk of the Court
Michigan Supreme Court
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Re: Lejuan Rambin v Allstate Ins Co
Supreme Court No. 146256
Court of Appeals No. 305422
Wayne County Circuit Court No. 10-009091-NF

Dear Clerk:

Please find enclosed for filing the original and seven copies of Plaintiff-Appellee's supplemental brief, along with a proof of service. Please date-stamp and return the extra cover page in the enclosed envelope.

Thank you.

Very truly yours,

Donald M. Fulkerson

Enclosures

cc: Bruce K. Pazner, Esq
Daniel S. Saylor, Esq