STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2018
v	No. 339789 Wayne Circuit Court
SONYA NELMS, Defendant-Appellant.	LC No. 17-001459-01-FC

Before: JANSEN, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of involuntary manslaughter, MCL 750.321,[1] as well as felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to concurrent terms of 12½ to 30 years in prison for the manslaughter conviction and 5 to 10 years in prison for the felon-in-possession conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. She appeals as of right. We affirm.

I. SENTENCING

Defendant argues that her sentence of 12½ to 30 years for manslaughter is unreasonable, disproportionate, and unconstitutionally cruel and unusual. We disagree.

As an initial matter, although defendant correctly states that a sentence that exceeds the advisory sentencing guidelines minimum sentence range is reviewed for reasonableness, see *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015), defendant did not receive a departure sentence. Rather, she was sentenced at the top end of the applicable guidelines range of 50 to 150 months as enhanced for defendant's habitual-offender status. When a trial court does not depart from the recommended minimum sentence range, the minimum sentence must be affirmed unless there was an error in scoring the guidelines or the trial court relied on inaccurate

[1] Defendant had been charged with second-degree murder, MCL 750.317 but was acquitted of that offense.

information. MCL 769.34(10). Defendant does not argue that the trial court relied on inaccurate information or that there was an error in scoring the guidelines. Therefore, we must affirm defendant's sentence, absent any constitutional violation. *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016).

With respect to defendant's constitutional argument, the Eighth Amendment, US Const, Am VIII, prohibits a court from imposing "cruel and unusual punishment." Also, "courts are not allowed to impose disproportionate sentences[.]" *People v Skinner*, 502 Mich 89, 125; 917 NW2d 292 (2018).[2] Thus, a sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). But "[a] sentence within the guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual. In order to overcome the presumption that [a guidelines] sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013).

In this case, defendant argues that her sentence is unreasonable and disproportionate because: (1) it was at the top of the guidelines; (2) her prior offenses were not severe; and did not justify the instant sentence; and (3) her advanced age may mean that she will spend the rest of her life in prison. None of these factors are unusual or overcome the presumption of proportionality. The fact that defendant's sentence is at the top of the guidelines range is of no consequence because there was no departure. *Schrauben*, 314 Mich App at 196. According to the presentence report, defendant's criminal history includes prior convictions for obtaining personal identity information without authorization, uttering and publishing, and obstruction by disguise. The trial court did not sentence defendant for her less serious crimes, but for the instant crime, which caused the death of the victim. Defendant emphasizes her lesser culpability, but the trial court recognized this lesser culpability by acquitting defendant of second-degree murder and convicting her of the lesser offense of involuntary manslaughter. Her prior record and level of culpability also do not overcome the presumption of proportionality. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994) (observing that a defendant's "lack of criminal history and minimum culpability" do not present "unusual circumstances" that surmount the presumption of proportionality). In addition, a trial court is not required to consider a defendant's advanced age in determining the proportionality of a sentence that may surpass the defendant's lifespan. See *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997) (recognizing that *Milbourn* does not require that a trial court fashion a sentence in relation to the defendant's age). In any event, given defendant's age of 44 years, defendant inaptly characterizes her sentence as closely resembling a sentence of life without parole. In sum, defendant fails to overcome the presumption of proportionality. Accordingly, she has not demonstrated that her sentence constitutes cruel and unusual punishment. For these reasons, we reject defendant's argument that she is entitled to resentencing.

[2] The Michigan Constitution similarly prohibits the infliction of "cruel or unusual punishment[.]" Const 1963, art I, § 16.

II. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several additional issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which warrant appellate relief.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several claims of ineffective assistance of counsel. Because defendant did not raise her claims in a motion for a new trial or request for a *Ginther*[3] hearing, our review of this issue is limited to errors apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

In *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018), the Michigan Supreme Court recently articulated the principles that govern our review of a defendant's claim alleging ineffective assistance of counsel:

> [E]stablishing ineffective assistance requires a defendant to show (1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant. Prejudice means a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Footnotes, citations and quotation marks omitted.]

Defendant must "overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). The burden lies with defendant to establish the factual predicate for her claim that trial counsel's performance was constitutionally infirm. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

1. FAILURE TO INVESTIGATE OR CALL WITNESSES

Defendant argues that trial counsel was ineffective for failing to contact or interview defendant's friend "Tasty," for failing to obtain defendant's medical records or to present the testimony of defendant's therapist, and for failing to present character evidence on her behalf.

Trial counsel bears the obligation to prepare, investigate, and present all substantial defenses. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id*. (Citation and quotation marks omitted.) Decisions concerning which witnesses to call at trial are matters of trial strategy. *People v Solloway*, 316 Mich App 174, 189; 891 NW2d 255 (2016). Failure to

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

call a witness at trial will amount to ineffective assistance of counsel only where the defendant is deprived of a substantial defense. *Id*.

Defendant asserts that Tasty should have been called as a witness because she was on the telephone with defendant contemporaneously with the shooting, and thus may have heard defendant speaking with the victim. However, the record evidence does not definitively establish that defendant was in fact on the telephone with Tasty at the time of the actual shooting. In addition, defendant has not established any factual support for her belief that Tasty heard anything that would be favorable to defendant. At trial, defendant provided inconsistent testimony concerning the timing of her call or calls with Tasty. However, her testimony did not establish that Tasty heard the actual gunshot, or any conversation with the victim immediately before it. In fact, defendant's daughter testified during cross-examination that defendant ended her telephone call with Tasty before a gunshot was heard. In addition, defendant has not presented any affidavit from Tasty indicating that she actually heard anything, or could have provided any other testimony helpful to defendant. Without a showing that Tasty actually heard anything of significance, defendant has not demonstrated that trial counsel's failure to call Tasty deprived her of a substantial defense. *Chapo*, 283 Mich App at 271.

Likewise, where defendant faults trial counsel for not introducing defendant's mental health records or testimony from her therapist, defendant has not presented any affidavit or medical records to support her claim that she suffered from any sort of mental illness. Although defendant argues that her therapist's testimony would have caused her to change her assertion at trial that she did not have any psychological problems, she does not explain how or why. Importantly, defendant has not overcome the presumption that trial counsel's decision to not introduce any evidence relating to her mental state was sound trial strategy, particularly where defendant's defense at trial was that the victim was shot accidentally, and defendant herself testified that the firearm went off when both she and the decedent were struggling over it after exchanging words with each other. We are therefore not persuaded that defendant was denied the effective assistance of counsel.

Defendant also maintains that trial counsel was ineffective for not offering a character witness to testify on her behalf. She appears to refer to a letter written by a friend of several years. "Under MRE 404(a)(1) a defendant may offer evidence that he or she has a character trait that makes it less likely that he or she committed the charged offense." *People v Roper*, 286 Mich App 77, 93; 777 NW2d 483 (2009). However, had defendant offered evidence of her good character at trial the prosecution would then have been able to offer contrary evidence to rebut defendant's contention that she was of good character. Specifically, MRE 404(a)(1) allows the prosecution to introduce evidence to rebut a defendant's claim of good character. See also *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995) (recognizing that where a defendant put his or her character at issue "it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed.") Trial counsel may have reasonably surmised that the risk involved in bringing forth evidence of defendant's good character outweighed the benefit of introducing such evidence, particularly where the record demonstrated that defendant's relationship with the victim, her long-time boyfriend, was at times turbulent. Under such circumstances, defendant has not overcome the strong presumption that trial counsel's actions resulted from sound trial strategy. *Solloway*, 316 Mich App at 189.

Defendant also asserts that trial counsel failed to call any other witnesses and instead decided only to cross-examine the prosecution's witnesses. However, defendant does not identify any other witnesses who trial counsel could have called, or explain what testimony additional witnesses could have provided. The only other witness to the shooting, defendant's daughter, testified at trial and was subject to vigorous cross-examination. Again, where defendant has not provided factual support for this allegation of ineffective assistance of counsel it is unsuccessful. *Carbin*, 463 Mich at 600.

2. FAILURE TO CONSULT WITH EXPERT WITNESS

Defendant also argues that counsel should have consulted with a mental health expert "to determine [defendant's] state of mind at the time of the incident." Again, however, defendant fails to explain how a mental health expert could have assisted in supporting a substantial defense, particularly where defendant's theory of the case at trial was that the firearm that shot and killed the victim was fired accidentally when both she and the victim were reaching for the firearm after exchanging words with each other. Accordingly, defendant's allegation that trial counsel's performance was objectively unreasonable in this regard is not persuasive. *Randolph*, 502 Mich at 9.

3. FAILURE TO REVIEW VIDEO RECORDINGS

Defendant also asserts that "to the best of her knowledge, [counsel] did not listen to the tapes of her interviews" with police officers. However, defendant merely speculates as to what counsel did or did not do. Defendant has not established any factual support for her mere belief that counsel did not listen to the tapes. Therefore, this claim of ineffective assistance of counsel also cannot succeed. *Carbin*, 463 Mich at 600.

B. BREAKDOWN IN THE ATTORNEY/CLIENT RELATIONSHIP.

Defendant argues that she is entitled to a new trial because of a breakdown in the attorney-client relationship. Defendant acknowledges that she did not request new counsel or inform the trial court that there had been a breakdown in her relationship with appointed counsel. Therefore, this issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Thus, defendant must demonstrate a plain error affecting her substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To be entitled to substitution of counsel, a defendant must demonstrate good cause, such as "a legitimate difference of opinion [that] develops between a defendant and his appointed counsel as to a fundamental trial tactic, . . . a destruction of communication and a breakdown in the attorney-client relationship, or when counsel shows a lack of diligence or interest." *People v McFall*, 309 Mich App 377, 383; 873 NW2d 112 (2015) (citation and quotation marks omitted). A defendant's mere allegation that he has lost confidence in trial counsel's representation, or that he is unhappy with such representation, will not rise to the level of good cause. *Id*. Decisions regarding "what evidence to present and what arguments to make, are matters of trial strategy, and disagreements with regard to trial strategy or professional judgment do not warrant appointment of substitute counsel." *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011) (footnotes omitted).

Defendant has not shown that the trial court erred by failing to provide substitute counsel, or by failing to inquire into the nature of the attorney-client relationship. Most significantly, there is no indication that defendant requested substitute counsel or expressed dissatisfaction with counsel's performance. Moreover, defendant has not shown that she and counsel disagreed on her chosen defense. Instead, defendant restates her claims of ineffective assistance. As discussed earlier, defendant has not demonstrated that she is entitled to relief on her claims alleging ineffective assistance of counsel. In addition, as discussed further below, defendant's claims concerning the admissibility of her statements are without merit. Therefore, she cannot show that counsel acted unreasonably by failing to move to suppress the statements. Additionally, it cannot go unnoticed that defendant's complaints involve disagreements about strategic decisions. Therefore, even if she had presented them to the court, she cannot show that she would have succeeded in obtaining substitute counsel. *Id*. Likewise, although defendant also asserts that there was a breakdown in the attorney-client relationship because she only met with counsel twice before trial, she does not explain why this alone would have required the appointment of substitute counsel. For example, she does not advance an alternate theory that could have resulted in a more favorable outcome if she and counsel had met more frequently. Accordingly, defendant's claim that she is entitled to a new trial because of a breakdown in the attorney-client relationship is unpersuasive.

C. SUPPRESSION OF STATEMENTS TO POLICE OFFICERS

Defendant next argues that her constitutional rights were violated when the police questioned her at the hospital, and again thereafter at the police station, without advising her of her *Miranda*[4] rights. Defendant acknowledges that she did not file a motion to suppress her statements in the trial court, leaving this issue unpreserved. Unpreserved issues are reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. Defendant also argues that trial counsel was ineffective for failing to file a motion to suppress.

"It is well settled that *Miranda* warnings need be given only in situations involving custodial interrogation." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); see also *People v Elliott*, 494 Mich 292, 305; 833 NW2d 284 (2013) (recognizing the circumstances under which a custodial interrogation will take place). In determining whether a person was subjected to a custodial interrogation, this Court considers the totality of the circumstances to determine whether a reasonable person in the accused's position would have believed that he or she was not free to leave. *Zahn*, 234 Mich App at 449. Factors relevant to this objective determination include "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning[.]" *Howes v Fields*, 565 US 499, 509; 132 S Ct 1181; 182 L Ed 2d 17 (2012) (citations omitted).

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In this case, defendant challenges the admission of her statements to the police at the hospital and when first present at the police station. Defendant acknowledges that she was not formally arrested before either of these questionings. She argues, however, that she felt that she was not free to leave the police station after being summoned there. She also asserts that she did not initially want to speak with officers at the hospital. However, it is clear from the record that defendant was not under arrest when she made her initial statements at the hospital. She states that she did not want to talk to the officers, but she does not claim that she was forced to or somehow coerced into answering their questions. Moreover, when questioned at the hospital defendant's friends and family were there with her. In addition, defendant testified that when an officer requested that she come to the police station, he specifically told her that she was not being detained. Although she testified that the officer drove her to the station, she also testified that her family and friends accompanied her. Thus, she was not stranded at the station without a way to leave if she elected to do so. Her description of her initial time at the police station also fails to support a conclusion that she was not free to leave at that time. She testified that she spent 45 minutes in the waiting room before officers called her back to be interviewed and there is no indication in the record that she was not free to leave the police station, particularly where she had family and friends waiting for her. In sum, the circumstances in this case do not demonstrate that defendant was "in custody" at the time she made the challenged statements. Accordingly, there is no basis for concluding that defendant's statements should have been suppressed.

We recognize that this Court has recently observed that the fact that questioning of a defendant takes place in a police station is not determinative in considering whether the defendant was subjected to a custodial interrogation. *People v Barritt*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 341984); slip op at 3-4. However, in *Barritt*, this Court ultimately concluded that where the defendant was questioned in a police station, this factor weighed in favor of a determination that he was subjected to a custodial interrogation, particularly where the questioning took place in the constant presence of armed law enforcement officers and the defendant was transported to the police station in a marked police vehicle. *Id*. at ___; slip op at 5. The present case is factually distinguishable from *Barritt* where defendant was not in the constant presence of armed police officers, and she was free to leave the police station at any time and had family and friends to transport her from the police station.

Consequently, where a motion seeking suppression of defendant's statements would not have been successful, defendant's concurrent claim of ineffective assistance must also fail. "Failing 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).

D. ASSESSMENT OF FEES

Defendant also argues that the trial court improperly assessed $400 in attorney fees for the cost of her court-appointed counsel, as well as other court costs, without providing her with proper notice and an opportunity to object. We disagree.

Where defendant did not preserve this issue by raising it in her motion seeking relief from judgment following sentencing, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

Pursuant to MCL 769.1k, a court may impose "[t]he expenses of providing legal assistance to the defendant" as well as other costs, in cases "where the court determines after a hearing or trial that the defendant is guilty[.]" Further, under MCL 769.1*l*, a court may order that "50% of the funds received by the prisoner in a month over $50.00" be collected and remitted to the court toward satisfaction of the amount owed. The Michigan Supreme Court has upheld the statute authorizing recoupment of the costs of providing legal assistance to a convicted defendant. *People v Jackson*, 483 Mich 271, 298; 769 NW2d 630 (2009).

With respect to defendant's claim that she did not receive adequate notice of imposition of the fees themselves, the trial court's register of actions indicates that, after an arraignment on January 11, 2017, a court-appointed attorney request was faxed to the court. The prosecution correctly notes that the standard SCAO form for requesting appointed trial counsel contains a specific statement advising the defendant that he or she may be required to contribute to the cost of court-appointed counsel. Defendant has not provided authority to support her claim that the trial court was required to somehow estimate the amount of these fees at that time. To the contrary, *Jackson* holds that courts are not required to conduct an "ability-to-pay assessment" before imposing a fee for a court-appointed attorney. *Jackson*, 483 Mich at 298. Rather, an ability-to-pay assessment is only required when the imposition of a fee is enforced and the defendant challenges his ability to pay. *Id*. Nor is a court required to consider a defendant's ability to pay other court costs before imposing them. *People v Wallace*, 284 Mich App 467, 470; 772 NW2d 820 (2009). Accordingly, defendant has not demonstrated that the trial court's procedure in this case constituted plain error.

Defendant is correct that due process requires that a defendant be afforded notice and an opportunity to be heard. *Jackson*, 483 Mich App 291-292. In this case, the record reflects that defendant received notice of the amount of the attorney fees at sentencing. The trial court signed an order of remittance to garnish defendant's prisoner account the same day that it sentenced defendant, effectively placing defendant on notice of the enforcement action. She then moved for relief from judgment of this order, albeit unsuccessfully. Under these circumstances, we disagree with defendant that she was denied due process.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello