STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2012
v	No. 306397
JOHN WESLEY METZELBURG, Defendant-Appellant.	Kalamazoo Circuit Court LC No. 2010-001982-FC

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Defendant appeals by right his convictions of four counts of assault with intent to murder, MCL 750.83; possession of a firearm by a felon, MCL 750.224f; and five counts of possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to imprisonment of 70 to 120 years for each of his four counts of assault with intent to murder, 70 to 120 years' for possession of a firearm by a felon, and five years for each felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred when it denied defendant's motion for appointment of new counsel. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Good cause exists where a dispute between the defendant and defense counsel destroys their ability to communicate. *People v Bass*, 88 Mich App 793, 802; 279 NW2d 551 (1979). A judge should investigate the truth of allegations that the inability to communicate has led to a breakdown in the attorney-client relationship. *Id*.

On appeal, defendant argues the trial court refused his request for new counsel without an adequate inquiry into the alleged breakdown of the attorney-client relationship. But the record shows that the trial court extensively investigated defendant's allegations regarding the breakdown in communication between defense counsel and defendant. Defendant did not have any evidence that defense counsel was working together with the prosecutor, and defense counsel and the prosecutor denied the allegation. In regard to defendant's allegations that defense counsel failed to question witnesses and that defense counsel failed to file various motions, "[a] defendant is entitled to have his counsel prepare, investigate, and present all

substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Here, defendant failed to identify any substantial defenses that counsel failed to investigate. Further, general disagreements with counsel regarding non-fundamental tactics such as the manner of questioning witnesses or the presentation of evidence do not warrant appointment of substitute counsel. *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011). Defendant failed to show good cause for the appointment of substitute counsel. Instead, the record shows that it was defendant who caused the breakdown with defense counsel by not communicating with him. "A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *People v Meyers (After Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983). The trial court did not abuse its discretion in denying defendant's motion for appointment of new counsel. *Traylor*, 245 Mich App at 462.

Defendant next argues that the trial court erred in allowing the introduction of evidence of defendant's criminal conduct unrelated to the charges against him. This unpreserved claim of evidentiary error is reviewed for plain error. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). To avoid forfeiture under the plain error rule, there must exist clear or obvious error that affected defendant's substantial rights. *Id.*

At trial, evidence was introduced that the police chase, which led to defendant's charges, started during an investigation of defendant, a suspect in several home invasions. Defendant argues that the evidence that he was a suspect in other crimes was inadmissible under MRE 404(b). But contrary to defendant's argument, it does not appear that the challenged evidence was admitted as other acts evidence under MRE 404(b). Instead, the evidence was offered to explain why the police engaged defendant in a dangerous high speed chase. A trial court may properly admit evidence of background information for the purpose of providing jurors the ability to examine the full nature of a transaction at issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Malone*, 287 Mich App 648, 662; 792 NW2d 7 (2010). Our Supreme Court explained in *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978):

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence.

Because the challenged evidence here explained to the jury the circumstances that led to the police chase, the evidence was admissible without regard to MRE 404(b). *Malone*, 287 Mich App at 661-662. Plain error did not occur. *Coy*, 258 Mich App at 12. Moreover, any claim that trial counsel was ineffective for not objecting to the evidence must fail because "counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defense counsel's representation did not fall below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant also argues that the prosecutor committed misconduct by improperly appealing to the jurors' civic duty by injecting into the trial the issue of protecting police

officers. Because defendant did not object to the prosecutor's closing arguments, the issue is unpreserved. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

> A prosecutor's remarks are examined in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutors have great latitude to argue the evidence, but "it is improper for a prosecutor to appeal to the jurors' civic duty by injecting issues broader than guilt or innocence or encouraging jurors to suspend their powers of judgment." *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004). Here, the prosecutor argued that defendant's actions in this case were "beyond the pale" of what police officers should encounter. Also, the prosecutor stated that "[n]o police officer should be subjected to" defendant's actions. We agree that these comments imply an appeal to the jurors' civic duty. *Id.*

Nevertheless, the evidence overwhelming supported defendant's guilt. Defendant only disputed that he actually intended to kill the officers. Four police officers testified that defendant aimed directly at them and then fired his gun multiple times. One of defendant's bullets struck an officer's windshield. Also, two other witnesses confirmed that during the chase, defendant fired his gun in the direction of the chasing vehicles. Thus, the evidence overwhelming established that defendant repeatedly used his gun in a manner that could have killed the officers, allowing the inference that defendant intended to kill the officers. *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997). And, minimal circumstantial evidence is sufficient to show intent in this case. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Additionally, the prosecutor's improper argument was brief and the rest of his arguments are not challenged on appeal. A timely instruction, if requested, could have alleviated any possible prejudice. This Court will not find error requiring reversal where a curative instruction could have cured any prejudicial effect. *Unger*, 278 Mich App at 235. Defendant has failed to show outcome-determinative, plain error. *Id.*

Defendant next argues that the sentence the trial court imposed of 70 to 120 years' imprisonment was disproportionate and thus, cruel and unusual punishment under both the federal and state constitutions. We review whether the trial court abused its discretion by imposing a disproportionate sentence. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The United States Constitution provides that "cruel and unusual punishment" shall not be inflicted. US Const, Am VIII. The Michigan Constitution provides that "cruel or unusual punishment shall not be inflicted." Const 1963, art 1, § 16. The principle of proportionality requires that the sentence be "proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record[.]" *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003). The Legislature has subscribed to the principle of proportionality through the sentencing scheme it has adopted for various offenses and by promulgating the sentencing guidelines. *Id.* at 263-264; *Milbourn*, 435 Mich at 635-636. Accordingly, a sentence that is within the guidelines range is presumed to be proportionate, and a proportionate sentence does not violate either the federal or Michigan constitutional prohibition against cruel and/or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A defendant

must establish unusual circumstances to overcome the presumption that a sentence within the recommended guidelines range is proportionate. *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Defendant's sentence is presumptively proportionate because it is within the recommended minimum sentence range under the guidelines of 270 to 900 months or life.

To rebut the presumption of proportionality, defendant notes that he was 36 years old at the time of sentencing, and that under his sentence he would not be released until 2086 when he would be 111 years old. Defendant claims that the trial court should have considered defendant's age as a proportionality factor during sentencing in the light of the United States Supreme Court's holdings in *Graham v Florida*, 560 US___; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and *Miller v Alabama*, ___US___; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In *Graham*, the Supreme Court held that the Eighth Amendment prohibits the imposition of a sentence of life without parole on a juvenile offender who committed a crime other than homicide. *Graham*, 130 S Ct at 2034. In *Miller*, the Supreme Court extended *Graham*'s holding, adopting a blanket rule that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S Ct at 2469. Because defendant was 35 years old at the time he committed the crimes for which he was sentenced, both *Graham* and *Miller* are inapplicable. Accordingly, under Michigan's intermediate sentencing scheme, the trial court need not have considered defendant's age and the likelihood he might survive to obtain a parole. *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997).

Defendant also argues that his sentences were disproportionate because there were no serious injuries as a result of defendant's actions, and defendant did not premeditate his intent to kill. However, the trial court properly considered injuries caused by defendant's actions when it scored offense variable (OV) 3, MCL 777.33 (physical injury to victim), at ten points, and the trial court properly considered defendant's lack of premeditation when it scored OV 6, MCL 777.36 (offender's intent to kill or injure another individual) at 25 points. Defendant has not presented unusual circumstances that would render his presumptively proportionate sentence disproportionate. *Lee*, 243 Mich App at 187. The trial court did not abuse its discretion in sentencing defendant because the sentence was within the recommended guidelines range, presumptively proportionate and was therefore not cruel or unusual punishment. *Powell*, 278 Mich App at 323.

We affirm.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Christopher M. Murray