

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAL DEREK RIVERS,

Defendant-Appellant.

UNPUBLISHED
November 19, 2019

No. 346037
Wayne Circuit Court
LC No. 16-000197-01-FC

Before: RONAYNE KRAUSE, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of involuntary manslaughter, MCL 750.321. Defendant was originally sentenced, as a fourth-offense habitual offender, MCL 769.12, to 96 to 180 months' imprisonment for his involuntary manslaughter conviction. Defendant appealed as of his right and argued, in relevant part, that the trial court erroneously scored offense variables (OVs) 3 and 17. This Court affirmed defendant's convictions, but remanded the case for resentencing. *People v Rivers*, unpublished per curiam opinion of the Court of Appeals, issued January 16, 2018 (Docket No. 333936), p 3. On remand, defendant was resentenced to the same term of 96 to 180 months' imprisonment. We affirm.

On appeal, defendant argues that his sentence of 96 to 180 month's imprisonment constitutes an unreasonable and disproportionate sentence, an abuse of discretion, and a violation of the federal constitutional guarantee against cruel and unusual punishment, as well as the Michigan constitutional guarantee against cruel or unusual punishment. We disagree.

I. BACKGROUND

This case arises from the fatal shooting of Kaiya Nicole Henderson-Rivers. Defendant and Henderson-Rivers had been married for approximately two and a half years before the shooting. The facts of this case were previously summarized by this Court in defendant's prior appeal:

On December 19, 2015, Henderson-Rivers was shot in the head during a physical altercation that took place in the basement of defendant's mother-in-

law's house. At the time of the shooting, defendant and Henderson-Rivers were living in the basement with Myra Grantham and her two young children, and Grantham and her children were present at the shooting. Defendant and his wife had been engaged in a heated verbal argument which turned physical, and at one point defendant retrieved his gun, and the pair ended up on a bed struggling over the gun. Ultimately, Henderson-Rivers was shot in the head. Grantham testified that, after the gun discharged, defendant stated, "I'm sorry. I love you. I'm sorry. I'm sorry. I never meant to do this." Defendant then told Grantham to call the police, and he took off his sweater and applied it to Henderson-Rivers's gunshot wound. When Grantham was too distraught to tell the 911 operator the address of the house, defendant took the telephone from her and went upstairs to tell the 911 operator the address. Defendant did not return to the basement but went to his cousin's house after unloading the gun and throwing it into a yard. Henderson-Rivers was pronounced dead at the scene after the emergency personnel arrived. Defendant turned himself in to the police the next morning. [*People v Rivers*, unpublished per curiam opinion of the Court of Appeals, issued January 16, 2018 (Docket No. 333936), pp 1-2.]

As noted, defendant appealed his conviction and sentence of right. This Court affirmed defendant's conviction. However, this Court agreed with the prosecutor's concession "that OV 3 and OV 17 were scored erroneously where the instant offense did not involve 'the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.' MCL 777.22(1); MCL 777.33(2)(c)." *Id.* at p 3. Because the erroneous scoring of OVs 3 and 17 resulted in a change to defendant's minimum sentence guidelines range, this Court remanded for resentencing.

In the interim, the original sentencing judge was appointed to this bench, so resentencing occurred before a successor judge. The trial court rescored OV 3 at 25 points and OV 17 at zero points. Consequently, defendant's original minimum sentence guidelines range of 62 to 228 months' imprisonment was reduced to 58 to 228 months' imprisonment. The trial court declined to "disturb the sentence issued by" the predecessor judge and resented defendant to 96 to 180 months' imprisonment. Defendant now appeals. There is no dispute that defendant's recalculated minimum sentence guidelines range is correct or that defendant's minimum sentence is within that guidelines range. Rather, defendant argues that in light of the circumstances, including his positive prison record and expressions of remorse, his sentence is disproportionate.

II. STANDARD OF REVIEW

This Court reviews sentencing issues for an abuse of discretion by the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000). "A trial court abuses its discretion when it imposes a sentence that is not proportional to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 661. We review unpreserved constitutional claims for plain error affecting substantial rights. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750,

763; 597 NW2d 130 (1999). If the error prejudiced the defendant by affecting the outcome of the proceedings, then defendant's substantial rights were affected. *Id.*

III. ANALYSIS

As noted, defendant does not dispute that his sentence guidelines range was correctly calculated, nor does defendant contend that the trial court relied upon inaccurate information. Furthermore, there is no dispute that defendant's minimum sentence falls within his correctly-calculated guidelines range. Therefore, MCL 769.34(10) requires us to affirm that sentence. *People v Schrauben*, 314 Mich App 181, 196, 196 n 1; 886 NW2d 173 (2016). We are only required to consider the reasonableness of sentences that depart from the sentencing guidelines range. *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018), citing *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015). "A sentence that falls within the appropriate sentencing guidelines range is presumptively proportionate." *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011).

Nevertheless, "even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). However, "unusual circumstances" necessarily indicates that the presumption can only be overcome under exceptional conditions. See *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). A defendant's age is not sufficiently unusual to overcome the presumption of proportionality. *Bowling*, 299 Mich App at 558. A defendant's remorse, work history, lack of prior offenses, and family support are also insufficiently unusual to overcome the presumption of proportionality. *People v Davis*, 250 Mich App 357, 369-370; 649 NW2d 94 (2002). A record of good conduct in prison is certainly commendable. However, we are not persuaded that it is sufficiently *unusual* to overcome the presumption of proportionality. In any event, any such circumstances must be considered in the context of defendant's offenses. *Bowling*, 299 Mich App at 558-559. Defendant's sentence was well below the middle of his guidelines range, and defendant simply does not articulate any coherent basis for concluding that such a sentence was "abusive."

Defendant further argues that his sentence constitutes a violation of the guarantee against "cruel and unusual punishment" provided by the United States Constitution and the guarantee against "cruel or unusual punishment" provided by the Michigan Constitution. US Const, Am VIII; Const 1963, art 1, § 16. Defendant did not preserve this argument. Nevertheless, our analysis is similar, because a proportionate sentence cannot be cruel or unusual under the Michigan constitution. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). It therefore is also not cruel or unusual under the United States constitution. See *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). We have already discussed why defendant has not overcome the presumption that his sentence in this matter was proportionate. We do not find persuasive the cases he cites, which involved significantly distinguishable sentences of life imprisonment without parole for nonviolent offenses. See *Solem v Helm*, 463 US 277, 297; 103 S Ct 3001; 77 L Ed 2d 637 (1983); *People v Bullock*, 440 Mich 15, 23; 485 NW2d 866 (1992).

Because defendant's sentence is proportionate, it does not violate any constitutional prohibition against cruel or unusual punishment.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Patrick M. Meter

/s/ Elizabeth L. Gleicher