STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 1997
v	No. 183914 Iosco Circuit Court LC No. 94-002967-FH
RICHARD RODNEY BALLARD, Defendant-Appellant.	

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering a building with the intent to commit larceny, MCL 750.110; MSA 28.305. He was sentenced to 3-1/2 to ten years' imprisonment. We affirm.

Evert Jeffrey Morey testified that he, Kevin Barber and defendant were involved in the breaking and entering. A state police detective also testified that defendant had admitted his involvement. Defendant denied participating in the breaking and entering, but acknowledged his involvement in the later pawning of a bow taken during the breaking and entering.

Defendant first contends that the trial court erred by dismissing Barber as a witness based on Barber's Fifth Amendment privilege against self-incrimination without determining whether Barber actually intended to exercise that privilege or whether assertion of the privilege was legitimate. We note that defendant did not preserve this issue below. We conclude that review is unnecessary as this issue does not present an important constitutional question. *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994). The trial court properly concluded, based on Morey's testimony incriminating Barber and the prosecutor's statement that he intended to pursue charges against Barber, that Barber could validly exercise a Fifth Amendment privilege not to testify. The trial court properly explained this right to Barber. *People v Paasche,* 207 Mich App 698, 709; 525 NW2d 914 (1994); *People v Lawton,* 196 Mich App 341, 346-347; 492 NW2d 810 (1992). While Barber may not have explicitly

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* Circuit judge, sitting on the Court of Appeals by assignment.

stated that he was invoking his Fifth Amendment privilege against self-incrimination, it is evident from his colloquy with the trial court that he wished to invoke this right not to testify. Accordingly, the trial court properly dismissed Barber as a witness. Defendant alternatively asserts that his due process and confrontation rights required that Barber be granted immunity so defendant could obtain his testimony. We disagree. A defendant lacks the power to immunize witnesses or to compel a grant of immunity. *Lawton, supra* at 346.

Next, defendant contends that the state police detective improperly testified that defendant invoked his right to remain silent after being asked some questions during police interrogation. This issue is also unpreserved. Again, we conclude that review is unnecessary as this issue does not present an important constitutional question. *Heim, supra*. The detective testified about defendant's voluntary answers to some questions during police interrogation, but then indicated that defendant was nonresponsive for a period of time. "When a defendant speaks after receiving *Miranda*[1] warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of the right to remain silent." *People v McReavy,* 436 Mich 197, 222; 462 NW2d 1 (1990). Rather, "a defendant who speaks following *Miranda* warnings must affirmatively reassert the right to remain silent." *People v Davis,* 191 Mich App 29, 35-36; 477 NW2d 438 (1991). Accordingly, we conclude that admission of the detective's testimony about defendant's nonresponsiveness before defendant broke off the interview was proper. The detective also testified that the interview ended when defendant stated that he "had best talk to an attorney." This testimony was properly admissible under the rule of completeness because it informed the jury that the detective's testimony was based on his complete interview with defendant and did not place undue emphasis on defendant's exercise of the right to silence. *McReavy, supra* at 215-216.

Contrary to defendant's position, the trial court was not required to sua sponte instruct the jury on an intoxication defense where this was not the defense theory at trial. *People v Johnson*, 215 Mich App 658, 673; 547 NW2d 65, lv gtd on another ground 453 Mich 900 (1996); *People v Blankenship,* 108 Mich App 794, 800; 310 NW2d 880 (1981). We also reject defendant's alternative argument that trial counsel was ineffective by failing to request such an instruction. As in *People v LaVearn,* 448 Mich 207, 214-216; 528 NW2d 721 (1995), counsel's decision not to pursue an intoxication defense did not constitute ineffective assistance because this defense would have been weakened by the apparent purposefulness of defendant's alleged actions and was too inconsistent with defendant's principal defense to be reasonably presented as an alternative defense.

Defendant argues that the prosecutor committed misconduct by introducing testimony from the state police detective that defendant had visited pawn shops seven times in 1992. However, the testimony at issue was not responsive to the prosecutor's question. Accordingly, defendant has not established that any prosecutorial misconduct occurred. We further note that the trial court sustained defense counsel's objection to this testimony. It is presumed that the jury followed the court's instruction to disregard stricken testimony. *People v McAlister,* 203 Mich App 495, 504; 513 NW2d 431 (1994).

Contrary to defendant's assertion that during sentencing the trial court improperly considered him to be guilty of a probation violation, the court properly considered the undisputed facts that defendant was on probation at the time of the instant offense and that commission of a crime while on probation was a violation of the terms of that probation. *People v Newcomb,* 190 Mich App 424, 427; 476 NW2d 749 (1991). Unlike *People v Fortson,* 202 Mich App 13, 15, 21; 507 NW2d 763 (1993), upon which defendant relies, the trial court did not make an independent finding of guilt that was in any way in tension with the jury's verdict.

Finally, we reject defendant's claim that his 3-1/2 year minimum sentence, the highest term within the applicable guidelines range, was disproportionate. A sentence within the guidelines is presumptively proportionate. *People v McElhaney,* 215 Mich App 269, 285-286; 545 NW2d 18 (1996). In light of defendant's serious criminal record, we conclude that defendant's sentence was proportional to this offense and offender.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ John R. Weber

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