STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK R. HOLMES,

Defendant-Appellant.

UNPUBLISHED
February 26, 1999

No. 189499
Lake Circuit Court
LC No. 95-003093 FC

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and unlawfully driving away a motor vehicle, MCL 750.413; MSA 28.645.[1] He was sentenced to concurrent terms of twenty-five to forty years, and forty to sixty months, respectively, and appeals as of right. We affirm.

Defendant first argues that he was denied his right of confrontation, and deprived of a fair trial, when the prosecutor referred to a co-defendant's expected testimony in his opening statement and called him to testify, knowing that the witness was likely to assert his Fifth Amendment right to remain silent. Defendant argues that he was prejudiced not only because the jury relied on what they expected the witness to say, but also because defendant's own attorney referred to the witness' expected testimony during his opening statement, and because the witness was allowed to assert his rights in the jury's presence. We disagree. We review this constitutional question de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

When a witness asserts the right to remain silent in the presence of the jury, the issues are: (1) whether any constitutional error occurred and, (2) if not, whether an evidentiary error occurred and, (3) if it did, whether the error was harmless "because it is highly probable that the evidence did not contribute to the verdicts in light of the strength and weight of the untainted evidence." *People v Gearns*, 457 Mich 170, 173, 207; 577 NW2d 422 (1998). We start with the constitutional issues.

The Confrontation Clause guarantees defendant "the right to conduct cross-examination" whenever "substantive evidence" is "placed before the jury." *Gearns, supra*, 457 Mich at 185.

However, "a witness must put forth *some testimony* before the defendant's right of confrontation comes into play;" there is "no right to confront a witness who does not provide any evidence at trial." *Gearns, supra,* 457 Mich at 186-187 (emphasis original). On the other hand, substantive evidence may come in as the "equivalent . . . of testimony," such as when a confession or the statement of a witness is read into the record to provide a "crucial link" adding "critical weight" to the prosecutor's case. *Gearns, supra,* 457 Mich at 181-182 (quoting *Douglas v Alabama,* 380 US 415, 419-420; 85 S Ct 1074; 13 L Ed 2d 934 (1965)). Defendant's right of confrontation is violated when such evidence is introduced in "a form 'not subject to cross-examination.'" *Gearns, supra,* 457 Mich at 182, 187 (quoting *Douglas, supra*). However, when there is some "separation" between the problematic evidence and "the witness' refusal to testify on the stand," and "the proposed testimony was not critical," and the trial court gives a "general limiting instruction," there is no violation of defendant's right of confrontation. *Gearns, supra,* 457 Mich at 182-185 (discussing and following the holding of *Frazier v Cupp,* 394 US 731, 733; 89 S Ct 1420; 22 L Ed 2d 684 (1969)).

In the present case, the prosecutor summarized the witness' expected testimony during his opening statement, which statement the jury was immediately told not to consider as evidence. Two days later, when the witness was called to testify, he admitted to being involved in the robbery and pleading guilty, but then asserted his right to remain silent. No further questions were asked. There is no indication that anyone, other than the witness' private attorney, knew that the witness planned to refuse to testify.[2] Additionally, there was substantial circumstantial evidence tying defendant to the robbery. Thus, this case is similar to *Gearns* and *Frazier*, and we find no violation of defendant's right of confrontation.

Regarding due process, a constitutional violation is established when the prosecution makes a "conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege," and thereby denies defendant a fair trial. *Gearns, supra,* 457 Mich at 187-188. The prosecutor's conduct must "amount to a deliberate attempt to 'make capital' out of the refusals to testify," but the most important factor is the fairness of the trial, not the culpability of the prosecutor's conduct. *Gearns, supra,* 457 Mich at 188 (quoting *Namet v United States,* 373 US 179, 189; 83 S Ct 1151; 10 L Ed 2d 278 (1963)). Thus, merely "calling a witness to the stand and procuring his invocation of the [Fifth Amendment] privilege is not a [due process] violation" unless the prosecutor continues questioning the witness about the crime. *Gearns, supra,* 457 Mich at 190. Here, however, the prosecutor stopped questioning the witness when he invoked his right to remain silent, and did not allude to his refusal to testify at any time. Therefore, we find no violation of due process.

As to the evidentiary issue, it is error and "an ethical violation for an attorney to put a witness on the stand knowing that the witness will validly assert the Fifth Amendment." *Gearns, supra,* 457 Mich at 196. The possibility of prejudice to the defendant escalates "when the witness is an accomplice or codefendant," or is otherwise "intimately connected" or "substantially related" to the crime. *Gearns, supra,* 457 Mich at 196. The validity of the witness' assertion of privilege is important but not controlling, "the error lies in the prosecutor *knowingly* putting a witness on the stand who is going to assert a privilege . . ." *Gearns, supra,* 457 Mich at 197-199 (emphasis original).

Here, contrary to defendant's argument, there is no indication that the prosecutor knew that the witness was going to refuse to testify. The witness had entered into a plea bargain that required him to testify. He had testified at another co-defendant's trial, but, when defendant first attempted to impanel a jury two months earlier, he had not informed the prosecution that he intended not to testify. Simultaneously, his private attorney claimed to have told the prosecutor that "we haven't made up our minds yet." Thus, only the witness' own lawyer was aware that he intended to remain silent, and he did not inform *anyone* until after the witness took the stand and admitted his participation in the crime.[3] There is, therefore, no indication of bad faith on the part of the prosecutor and no evidentiary violation.

It is true that once the witness' attorney interrupted the examination and asked to confer with his client, and a discussion was held outside of the presence of the jury, everyone was aware that the witness would likely refuse to testify any further. At that time, it would have been preferable to ask the witness whether he intended to assert his Fifth Amendment privilege before bringing the jury back into the courtroom. However, we conclude that, even if this was error, "it was highly probable that, in the light of the strength and weight of the untainted evidence," the witness' refusal to testify "did not contribute to the verdicts." *Gearns, supra*, 457 Mich at 203-205, 207.

Next, defendant argues that the prosecutor shifted the burden of proof and denied him a fair trial when, in closing, he argued that defendant's explanation for the cash found on his person was unsupported by the evidence. We disagree.

We evaluate "the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). It is well settled, however, that "where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Because that is precisely what the prosecutor did in this case, we find no error.

Defendant also asserts that the prosecutor elicited inaccurate testimony and hearsay and used it in his closing and rebuttal arguments. Because defendant did not object to either of those alleged errors, reversal is unwarranted unless the resulting prejudice was so great that it could not have been cured by a timely requested instruction, or unless a failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After carefully reviewing the record, we find neither.

Lastly, defendant argues that because his role in the crime was small, it was his first adult felony, and he was only eighteen years old at the time of the offense, his sentence is disproportionately severe. We disagree.

Although severe, defendant's sentence is at the highest end of the minimum range recommended by the sentencing guidelines, and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); see also *People v Milbourn*, 435 Mich 630, 656; 461 NW2d 1 (1990). Defendant has a serious juvenile record including petty larceny, carrying a concealed

weapon, attempted robbery, larceny in a building, retail fraud, and unarmed robbery. We have found no evidence of unusual circumstances showing that a downward departure from the recommended range would have been appropriate. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). The sentence imposed is proportionate to the crime and the offender.

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Jane E. Markey

[1] Defendant was acquitted of kidnapping, MCL 750.349; MSA 28.581, and of possession of a firearm during the commission of a felony, MCL 750.227(b); MSA 28.424(2).

[2] The witness was apparently required to testify as part of his plea bargain.

[3] Because the prosecutor did not attempt to have the witness held in contempt or to persuade him to change his mind about testifying, there was no need to hold an immediate hearing (out of the presence of the jury) to ascertain the validity of the witness' claim of privilege. See *Gearns, supra*, 457 Mich at 194-196, 197-200. At least arguably, the assertion of privilege in this case was invalid.