

Considered en banc.

Defendant James E. Thompson appeals from his conviction of second-degree burglary, a violation of Iowa Code §§ 713.1 and 713.3, and from the revocation, as a result of this conviction, of his probation on an earlier conviction. We affirm.

Subsequent to his arraignment and plea of not guilty to the charge of second-degree burglary of a Standard Service Station in Cedar Rapids, defendant filed a motion to suppress, asserting the arrest was illegal because it was procured with excessive force. In addition to his allegations of statutory violations, defendant contends that this use of excessive force violated the fourth amendment of the United States Constitution and Section 8 of the Iowa Constitution. Defendant also asserts, as grounds for reversal, that the trial court erred in denying his motion to amend or enlarge its findings or conclusions; in permitting the co-defendant to invoke the fifth amendment when he had already pleaded guilty and entered into a plea bargain with the State; and in revoking defendant's probation and sentencing him.

Our scope of review in this case is on assigned error, except with regard to allegations of constitutional violations, which we review de novo, making an independent evaluation of the totality of circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (1975).

We first address defendant's contention that his arrest was effected with excessive force. We agree with defendant that a de novo review of the record is appropriate on this issue because the use of excessive force may properly be challenged under the fourth amendment to the United States Constitution. See Rochin v. California, 342 US 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952). Even upon our de novo review, however, we cannot conclude that defendant's arrest was procured with excessive force. The record indicates that when the arresting officers appeared at the scene of the burglary, defendant and co-defendant Dan Crow initially attempted to hide from them. At trial arresting officers testified that it

was necessary to pull defendant out from his hiding place and to hold him down in order to effect his arrest and prevent his struggling. Defendant claimed that he was injured from the arrest, yet no corroborative evidence of injury was admitted. Under these circumstances, we must conclude that defendant's claim of excessive force is not sufficiently supported by the evidence presented at trial. We further conclude that even if the arrest had been procured through the use of excessive force, there were no "fruits" of the allegedly illegal arrest which would require suppression.

Defendant next contends that the trial court erred in refusing to amend or enlarge its findings or conclusions. See Iowa R. Civ. P. 179(b). Specifically, defendant requested, in its motion to amend, that the court make a finding of fact that excessive force was used in defendant's arrest, hence requiring the suppression of any evidence obtained thereby. Defendant also asked the court to find that the State's failure to call the arresting officer at the time of the motion to suppress constituted a withholding of exculpatory evidence. Our examination of the record and application of the law lead us to the conclusion that the trial court properly denied defendant's motion. First, as previously discussed, the record does not support the "excessive force" claim. Second, because defendant did not make a specific request for exculpatory evidence and the prosecutor's failure to disclose in this instance did not "result in the denial of a defendant's right to a fair trial," the failure to disclose was not a constitutional violation. State v. Love, 302 N.W.2d 115, 123 (Iowa 1981), quoting United States v. Agurs, 427 U.S. 97, 104, 96 S. Ct. 2392, 2399, 49 L. Ed. 2d 342, 352 (1976); State v. Sheets, 291 N.W.2d 35, 38 (Iowa 1980).

Although defendant claims that the trial court erred in permitting his accomplice to invoke the fifth amendment privilege against self-incrimination, he

failed to preserve error on this issue by objecting at trial. Consequently, the issue is not available to him on appeal. See State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979). Furthermore, at trial defendant specifically stated that he wanted to ask the accomplice only two questions, and requested that he be given "protection" from any further questioning. Defendant cannot voluntarily use evidence which he thinks will benefit him at trial and later claim that its use violated his constitutional rights. See State v. Morrison, 183 N.W.2d 696, 699 (Iowa 1971).

Defendant's other main contention on appeal is that the trial court erred in imposing the statutory jail term for the burglary offense rather than selecting a probationary sentence. The general rule is that if a sentence falls within the statutory limits, it will be set aside only for an abuse of discretion, which can be found only if there is no support in the record for the decision. State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981); State v. Nelson, 279 N.W.2d 1, 3 (Iowa 1979). In this case we find ample support in the record for the sentence imposed. First, at the time of his arrest, defendant was already serving probation for a separate offense. Second, testimony at trial indicates that defendant resisted arrest. Finally, incarceration was recommended by the presentence investigator. Under these circumstances, we cannot conclude that the trial court abused its discretion in denying probation.

Defendant also claims that the trial court erred in terminating his existing probation for a prior conviction, yet defendant failed to file a notice of appeal regarding the revocation decision, despite the trial court's instruction that it would be necessary to do so. For this reason we refuse to address the issue. See Jensen v. State, 312 N.W.2d 581, 582 (Iowa 1981). Neither will we address defendant's claim that the co-defendant should not have been permitted to invoke the privilege against self-incrimination, because defendant failed to preserve error by making a timely objection at trial. See State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979).

The decision of the trial court is accordingly affirmed.

AFFIRMED.