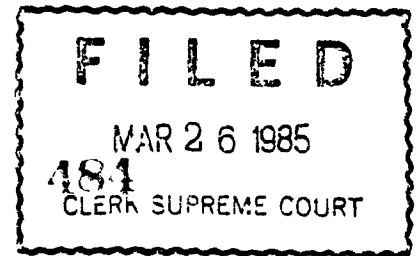


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA, )

Plaintiff-Appellee, )

vs. )

DWAINE ALLEN TORAN, )

Defendant-Appellant. )

Filed March 26, 1985

5-80  
84-261

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Appeal from the Iowa District Court for Scott County - Linda K. Neuman,  
Judge.

Defendant appeals from trial court's refusal to grant a mistrial. AFFIRMED

Charles L. Harrington, Appellate Defender for defendant-appellant.

Thomas J. Miller, Attorney General and Mickey W. Greene, Assistant  
Attorney General for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

**SACKETT, J.**

Defendant, Dwaine Toran, appeals from his conviction of first degree theft as a habitual offender in violation of Iowa Code §§714.1(1), 714.2(1), 902.8 and 902.9 (1983). Defendant contends the trial court abused its discretion in overruling his motion for mistrial based on the State's violation of the court's order in limine.

The facts show a Pontiac automobile was taken from an Oldsmobile dealer in Davenport. The day after the theft a Davenport police officer observed the Pontiac. Although the officer had not received a stolen vehicle report on the auto, he considered the driver's actions unusual. As soon as the driver spotted the police car, he drove the Pontiac at a high rate of speed up a small street that was rocky and full of ruts. The officer attempted to intersect the vehicle at an intersection but was unable to do so. When the officer next saw the Pontiac, it was parked and the driver was no longer inside. The officer observed the defendant within twenty feet of the parked car. Defendant was not questioned or taken into custody at this time. Later, defendant was observed as a passenger in another vehicle in the area.

The officer subsequently determined the Pontiac was stolen and fingerprints on the license plate matched those of the defendant. Defendant was brought to the Davenport police department where he was advised of his constitutional rights and questioned about the stolen vehicle. The defendant denied being in the car.

Prior to trial defendant filed a motion in limine which alleged, in relevant part:

On September 20, 1983, the defendant was taken to the Davenport Police Department detective bureau to be interviewed by detective James Hammes. After some conversation, the defendant made statements to the effect: "saying anything more can only hurt my case, I would just as soon talk to an attorney." Any reference to such statements would violate the defendant's Fifth and Sixth Amendment rights against self-incrimination and to the advice of counsel.

The trial court granted the motion.

At trial, the following transpired during the State's direct examination of Officer Hammes:

Q. Did you talk with [Toran] after he was brought to the police department? A. Yes, I did.

Q. What did you say to him then? A. Well, I informed him that his fingerprints were positively identified on the back of the license plate, the stolen plates that had been put on the car.

Q. What was his response to that? A. He stated — well, it's — there was no need in talking with him any further.

MR. SIMMONS: Object, Your Honor. May we approach the bench?

THE COURT: Yes.

(WHEREUPON, a discussion was had at the bench out of the hearing of the Jury and the court reporter.)

MR. SILVER: I will withdraw that question. I have no further questions. Thank you.

Following cross-examination of Hammes, defense counsel moved for a mistrial based on the violation of the order in limine and the defendant's Fifth and Sixth Amendment rights. The motion was overruled. The trial court determined the context in which the question was asked and the brief answer given did not seriously prejudice defendant and refused to grant a mistrial.

The defendant contends the trial court abused its discretion in overruling his motion for mistrial. He argues the mistrial was warranted because the State violated the order in limine and thus violated defendant's rights under the Fifth and Sixth Amendments.

The State contends the brief answer of the witness was not prejudicial. In addition, the answer was ambiguous and did not point to defendant's right to remain silent nor indicate the defendant was admitting guilt through silence. The State also contends that error was not preserved on this issue. The fact defendant drove the car off the dealer's lot was not in dispute.

The primary issue at trial was whether defendant committed the offense charged. The charged offense is a felony requiring proof of defendant's intent to permanently deprive the owner of the property. The lesser included offense of operating a motor vehicle without the owner's consent is an aggravated misdemeanor. The two offenses are distinguished in part by the absence in the

lesser included offense of an element of intent to permanently deprive the owner of the property. The defendant contends that the admission of the defendant's decision to terminate the interrogation could be viewed by the jury as a tacit admission of his guilt of the more serious theft charge.

The defendant's right to remain silent is grounded in the Fifth and Sixth Amendments which apply to the states through the Fourteenth Amendment of the United States Constitution. The right of an accused to remain silent without fear of being chided at trial for doing so is clearly a fundamental right. Because a fundamental right is involved the error can be harmless only if it is shown to be harmless beyond a reasonable doubt.

State v. Porter, 283 N.W.2d 351, 352-53 (Iowa 1979).

In State v. Kelsey, 201 N.W.2d 921, 927 (Iowa 1972), the Iowa Supreme Court said: ". . . we now hold, evidential use of 'tacit admissions' by an accused offends the proscription included in the Fifth Amendment of the United States Constitution against self-incrimination and is therefore no longer permissible in criminal trials within this jurisdiction." The Iowa court has continued to be firm in this position.

In State v. Kyseth, 240 N.W.2d 671, 674 (Iowa 1976), the court determined testimony which showed that defendant was unwilling to say where he had been, where he was going, and what he had been doing should have been suppressed because it showed that defendant exercised his Fifth Amendment right. Statements that defendant desired to talk to his attorney showed defendant exercised his Sixth Amendment rights and also should have been suppressed. Id. The court in Kyseth also pointed out that because the prosecutor knew in advance what the testimony would be, he should not have asked questions in the jury's presence which elicited testimony showing defendant's assertion of his constitutional rights. Id.

Porter, 283 N.W.2d at 352-53, found admission of testimony concerning defendant's silence potentially harmful. The trial court permitted an officer to

testify that defendant was silent after being advised of his rights, that defendant did not answer quite a few questions and that defendant would not tell the officer where he had gone. Id. at 353. The conviction was reversed because the court could not say the error was harmless beyond a reasonable doubt. Id.

The question before us is difficult. The State should have used more care in interrogating their witness, particularly in lieu of the judge's order in limine. The statement did not point to defendant's right to remain silent nor did it indicate the defendant was admitting guilt through silence. After careful consideration we determine the State did not use the testimony in any way to draw an unfavorable inference concerning defendant's guilt or innocence. Where the court determines the State has not used the statements of police officers to draw an unfavorable inference of guilt or innocence, then the error is harmless. See State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978)(State questioned police officers whether defendant made any statements other than admitting throwing the gun in the river and the officers answered in the negative); and State v. Canada, 212 N.W.2d 430, 434 (Iowa 1973)(court determined a fair reading of the record indicated the questions and answers of a police officer were designed only to relate to the actions of the defendant at the time of his arrest). A single reference by a testifying officer to defendant's silence or an inference that defendant was silent which results in no further comments by counsel or the court is not reversible error. See Id. at 434-35.

Because of our disposition, we need not address the State's contention that the defendant failed to preserve this issue for review. We conclude the trial court did not err in overruling defendant's motion for a mistrial. We find no error and affirm the trial court.

AFFIRMED.