FILED
APR 21 1981
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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed April 21, 1981
vs.)
CALVIN P. GASKEY,) 1-25 / 64976
Defendant-Appellant.)

Appeal from Polk District Court - Ray A. Fenton, Judge.

Defendant appeals from his conviction for theft in the second degree in violation of sections 714.1(4) and 714.2(2), The Code 1979, contending that he should be granted a new trial because a State's witness commented on his exercise of the right to remain silent. AFFIRMED.

Wayne H. McKinney, Jr., Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Roxann Ryan, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant Calvin Gaskey appeals from his conviction for theft in the second degree in violation of sections 714.1(4) and 714.2(2), the Code 1979, contending that he should be granted a new trial because a State's witness commented on his exercise of the right to remain silent. We affirm the conviction.

Because defendant alleges violation of a basic constitutional safeguard, we will evaluate the totality of relevant circumstances shown by the entire record. Webster County Board of Supervisors v. Flattery, 268 N.W.2d 869, 872 (Iowa 1978). This is the equivalent of de novo review. See id.

I.

On March 5, 1980, defendant was found guilty by a jury of theft in the second degree in connection with an automobile stolen in November of 1979. At trial, Detective John Belieu was asked by the prosecutor if he had had any conversation with the defendant following his arrest, to which Belieu replied, "Just asked him if he wanted to talk to us at that time, and he said he didn't want to talk right then. He would talk to his lawyer first." Defendant did not object to Belieu's statement at the time; however, at the next trial session, he requested and was granted permission to reopen the case in order to object to the statement and to allow the court to consider the objection as having been made at the time of the statement. Defendant's motion to strike the testimony was overruled, as were his motions for mistrial and for new trial.

II.

On appeal, defendant contends that Belieu's statement constituted an impermissible comment on defendant's exercise of his constitutional right to remain silent and that therefore failure to grant a mistrial or a new trial was reversible error. We acknowledge, as does the State, that Belieu's reference to defendant's post-arrest silence constitutes error. State v. Porter, 283 N.W.2d 351, 352 (Iowa 1979); State v. Kyseth, 240 N.W.2d 671, 674 (Iowa 1976). However, we conclude that the error does not justify granting a new trial to the defendant.

Where violation of a fundamental constitutional right is alleged, we can hold error harmless only if we are prepared to say that the error was harmless beyond a reasonable doubt. State v. Nelson, 234 N.W.2d 368, 372 (Iowa 1975). In making this determination, we look to see whether it appears beyond a reasonable doubt that the error did not affect the accused's right to a fair trial. Porter, 283 N.W.2d at 353. In the instant

case, the reference to defendant's silence was made only once and did not form the basis for subsequent argument by the State. See Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir. 1977). In fact, our review of the record reveals no attempts on the part of the State to encourage or cultivate any adverse inference from defendant's silence. Moreover, the evidence of defendant's guilt is fairly compelling. See id. For example, the arresting officer testified that he observed an occupied car in an area of town that was usually deserted at midnight. The defendant was in the driver's seat of the car. In response to the officer's inquiry, defendant said that they had stopped the car because of radiator trouble. When asked why the car had no license plates, defendant replied that the car had just been purchased out-of-state and that they had not yet obtained the plates. The officer then called in the vehicle identification number and learned that the car was stolen. Moreover, defendant's accomplice gave a detailed account of the actual theft of two cars and refers to defendant as his accomplice in the theft. For these reasons, we conclude that it appears beyond a reasonable doubt that the reference to defendant's post-arrest silence did not affect his right to a fair trial and that therefore admission of Belieu's statement did not constitute reversible error. Defendant's conviction is hereby affirmed.

AFFIRMED.