

IN THE COURT OF APPEALS OF IOWA

No. 8-555 / 07-1298
Filed July 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD EDISON JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith,
Judge.

Defendant appeals his convictions of attempted murder and willful injury causing serious injury contending his Fifth Amendment privilege against self-incrimination was violated at trial. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney
General, William E. Davis, County Attorney, and Michael Walton, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

SACKETT, C.J.

Defendant Richard Johnson appeals from his convictions of attempted murder in violation of Iowa Code section 707.11 (2007), and willful injury causing serious injury, in violation of section 708.4(1). He contends the district court erred in allowing the prosecution to elicit testimony that concerned his post-arrest silence when cross-examining him. We affirm.

I. BACKGROUND.

Defendant was charged with attempted murder and willful injury following an altercation between him and a friend, Betty Alwine, at Betty's apartment at Lend-A-Hand apartments where both parties resided. Defendant claimed on March 5, 2007, Betty confronted him about money he owed her sister. Defendant told Betty he could not pay the debt until April. According to defendant, he stood up to leave, Betty grabbed his belt, and he felt something sharp on his hand. Feeling threatened, he retrieved a hammer and repeatedly hit Betty in the head with it.

Betty testified the defendant came to her apartment that day and told her he had been drinking and gambling all night. She claimed he wanted to gamble some more and asked her for money. When she refused, he stood up, walked behind her, and approached the door as if he was leaving. Betty next felt blows to the top of her head and they began struggling over the hammer.

A maintenance worker heard the commotion, entered the apartment, and called 911. Paramedics and the apartment manager arrived shortly thereafter. Defendant admitted he told the maintenance worker, a paramedic, and the apartment manager, "I did it." The apartment manager took defendant to her

office. When police arrived, defendant told them he wanted to see a lawyer. The hammer was recovered from the scene but no knife was found.

On cross-examination of the defendant, the prosecution asked him if he told anyone during the incident that Betty had cut him. He testified that the apartment manager or the police probably heard him say this when he was in the manager's office. After this response, and over defense counsel's objection, the following exchange took place:

Q. [I]s it your testimony you told the police that [Betty] cut you? A. No.

Q. You didn't tell the police that, did you? A. No.

Q. You didn't tell any officer that, did you? A. I told him, "I want to see a lawyer."

Q. And you didn't tell [the apartment manager] either, did you? A. It happened in her office, I believe.

Defendant claims on appeal that this questioning addressed his post-arrest silence and therefore violates his Fifth Amendment privilege against self-incrimination.

II. SCOPE OF REVIEW.

"Our review of a district court's refusal to suppress statements allegedly made in violation of constitutional guarantees is *de novo*." *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). We independently evaluate the totality of the circumstances as evidenced by the record. *Id.*

III. ANALYSIS.

The right to remain silent is grounded in the Fifth Amendment and is made applicable to the states through the Fourteenth Amendment. See U.S. Const. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . ."); *State v. Porter*, 283 N.W.2d 351, 352 (Iowa 1979).

The defendant relies on the rules set forth in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), regarding how a defendant's silence cannot be used against him during trial. "[T]he Fifth Amendment guaranty against self-incrimination prohibits impeachment on the basis of a criminal defendant's silence after receipt of *Miranda* warnings." *State v. Metz*, 636 N.W.2d 94, 97 (Iowa 2001) (citing *Doyle*, 426 U.S. at 618, 96 S. Ct. at 2245, 49 L. Ed. 2d at 96). Using a defendant's post-arrest silence to impeach a defendant's explanation or testimony at trial is fundamentally unfair and violates due process. *Id.* (citing *Doyle*, 426 U.S. at 618, 96 S. Ct. at 2245, 49 L. Ed. 2d at 96).

The State correctly points out that defendant's reliance is misplaced as *Doyle* does not apply to the circumstances before us. In *Doyle*, the prohibition of using defendant's silence for impeachment was limited to use of the silence defendant invokes "at the time of arrest and after receiving *Miranda* warnings." *Doyle*, 426 U.S. at 619, 96 S. Ct. at 2245, 49 L. Ed. 2d at 98. Commenting on a defendant's silence exercised before he is taken into custody and given *Miranda* warnings does not present the due process concerns found in *Doyle*. *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 2130, 65 L. Ed. 2d 86, 96 (1980); see also *U.S. v. Johnson*, 495 F.3d 951, 973 (8th Cir. 2007) (explaining the privilege against self-incrimination is inapplicable to a citizen's decision to be silent when the citizen's action is not compelled by any official conduct). Even if a defendant's silence occurs post-arrest but before any *Miranda* assurances are given, that silence may be used for impeachment if the defendant chooses to testify. *Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 1312, 71 L. Ed. 2d 490, 494 (1982). *Doyle* therefore does not protect all silence, but only that

“where the Government had induced silence by implicitly assuring the defendant that his silence would not be used against him.” *Vick v. Lockhart*, 952 F.2d 999, 1002 (8th Cir. 1991) (quoting *Fletcher*, 455 U.S. at 607, 102 S. Ct. at 1312, 71 L. Ed. 2d at 494).

The silence referred to by the prosecution during cross-examination did not occur after defendant was given *Miranda* warnings. Defendant argues that the questioning did concern post-arrest silence because the questions did not reference a specific time or place that defendant was silent. However, defendant’s own answers contradict this understanding since he explained on the stand that he made the statement in the manager’s office, the place he was immediately after the incident but before the police arrived. In addition, when a defendant chooses to testify in his own defense, his pre-arrest silence may be used to impeach his credibility. *Jenkins*, 447 U.S. at 238, 100 S. Ct. at 2129, 65 L. Ed. 2d at 94-95. Defendant chose to exercise his right to testify and he was therefore subject to cross-examination challenging his credibility just like any other witness. See *id.* at 235-36, 100 S. Ct. at 2128, 65 L. Ed. 2d at 92-93. We affirm.

AFFIRMED.