

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOHN CHRISTOPHER FIELDS,
Appellant.

No. 2 CA-CR 2015-0111
Filed June 3, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County
No. CR201300629

The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

STATE v. FIELDS
Decision of the Court

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

ESPINOSA, Judge:

¶1 After a jury trial, John Christopher Fields was convicted of possession of a dangerous drug, methamphetamine, and possession of drug paraphernalia. The trial court sentenced him as a category two repetitive offender to concurrent, presumptive prison terms, the longer of which was 4.5 years. On appeal, Fields argues the trial court abused its discretion by not granting a mistrial after the state introduced testimony regarding his invocation of his right to remain silent. For the following reasons, we affirm.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the jury’s verdicts.” *State v. Forde*, 233 Ariz. 543, n.2, 315 P.3d 1200, 1209 n.2 (2014). In March 2013, Fields was stopped by Officer Lawrence Boutte of the Sierra Vista Police Department for driving over the speed limit. After a records check revealed that his license was suspended, Fields was taken into custody and his car was impounded. During a search of the vehicle, Boutte discovered a black portfolio and a set of keys. The portfolio contained mail addressed to Fields, other items with his name on them, and a plastic bag containing over ten grams of methamphetamine.

¶3 Officer Boutte read Fields his rights pursuant to *Miranda*¹ and then began to question him about the drugs. Fields indicated he understood his rights, and answered “basic questions,” but ultimately asserted his right to remain silent when the questioning became more specific. Fields was charged with possession of a dangerous drug for sale and possession of drug

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

STATE v. FIELDS
Decision of the Court

paraphernalia. He was subsequently found guilty and sentenced as described above.² Fields appealed his conviction and sentence, and alleges he was denied a fair trial. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Right to Remain Silent

¶4 The Fifth Amendment to the United States Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The right to remain silent may be invoked when it is clear from the context that answering a question could be self-incriminating. See *State v. VanWinkle*, 229 Ariz. 233, ¶ 12, 273 P.3d 1148, 1151 (2012). Although admission of evidence of a defendant’s post-arrest, post-*Miranda* silence is improper, *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976); *State v. Mauro*, 159 Ariz. 186, 197, 766 P.2d 59, 70 (1988), testimony regarding a defendant’s conduct or demeanor may be allowed so long as the evidence of silence is not used to establish the defendant’s guilt, *Mauro*, 159 Ariz. at 197, 766 P.2d at 70.

¶5 Fields argues the trial court erred when it denied his motion for a mistrial after the state introduced testimony regarding his invocation of his right to remain silent. The relevant testimony indicated Fields had begun answering questions, but then at one point put his head down and failed to answer the questions asked. On direct examination by the state, Officer Boutte testified:

Q: And when you started asking questions did Mr. Fields respond to them?

A: Basic questions, yes. When I got more specific, he exercised his right to remain silent.

²Although Fields was charged with possession of a dangerous drug for sale, the jury found him guilty of the lesser-included offense of possession of a dangerous drug.

STATE v. FIELDS
Decision of the Court

Q: All right. But did he provide you certain information in response to your questions?

A: Yes.

Q: Did you ask him about the substance that was being processed into evidence in this case?

A: Yes, I did.

Q: What did you ask him about it?

A: Basically, I asked him if they were his and asked him if he had an issue with drugs, both of which—well, it was a specific answer, and he said he preferred not to talk about that.

Q: Okay. While you were speaking with him you were making observations, correct?

A: Yes.

Q: When you asked Mr. Fields about the substance that was discovered, he didn't provide necessarily a verbal response; did he?

A: No. In the first one his head went to the ground and shook his head no. When I say look to the ground, he looked towards the ground and shook his head no.

Q: He shook his head no?

A: He shook his head. He looked down. And I just know on the second one his response was: I would prefer not to talk about that.

STATE v. FIELDS
Decision of the Court

...

Q: Okay. Now did you ask him about the portfolio, whether the portfolio was his?

A: Yes, I did.

Q: And did he respond to that?

A: No.

...

Q: Did he respond to your question in any other way?

A: No; just looked down.

Q: He looked down?

A: Yes.

Q: In response to the question regarding the portfolio?

A: When the question was asked, he looked down.

¶6 Fields objected, arguing that the fact he had put his head down inferred he was ashamed, which was “some sort of admission.” Fields voiced concern that the state was “hammering in on the fact that [he had] asserted his right to remain silent,” moved for a mistrial, and alternatively requested that the jury be given a curative instruction. The trial court excused the jury, and Officer Boutte was further examined regarding the timing of Fields’s failure to answer certain questions. Boutte clarified that his observations of Fields had occurred before what he believed to be an invocation of the right to remain silent.

STATE v. FIELDS
Decision of the Court

¶7 On appeal, Fields argues that his “actions of looking down and not answering were part of his invocation [of the right] to remain silent,” and the trial court’s refusal to grant a mistrial deprived him of a fair trial. The state contends Officer Boutte’s description of Fields’s actions occurred before invocation and was therefore admissible evidence. Because comment on a defendant’s conduct or demeanor is permissible so long as the evidence of silence is not used to establish defendant’s guilt, *Mauro*, 159 Ariz. at 197-98, 766 P.2d at 70-71, the admissibility of Boutte’s testimony depends on when Fields invoked his right to remain silent.

¶8 A defendant must invoke the right to remain silent unambiguously and unequivocally, *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010), and the right may be waived either explicitly or impliedly through conduct, *see State v. Trostle*, 191 Ariz. 4, 14, 951 P.2d 869, 879 (1997) (“Answering questions after police properly give the *Miranda* warnings constitutes waiver by conduct.”). In *Berghuis*, the Court determined that the defendant did not invoke his right to remain silent when he was “largely silent” for nearly three hours before responding to police questioning. 560 U.S. at 375, 381-82. Similarly, “evasive answers made before invoking the right to remain silent are admissible.” *State v. Burns*, 237 Ariz. 1, ¶ 150, 344 P.3d 303, 334 (2015). In *Burns*, our supreme court considered circumstances comparable to those presented here, including testimony that the questioned defendant had become “real quiet, clos[ed] his eyes, and just sh[ook] his head.” *Id.* ¶ 151 (alteration in *Burns*). Our supreme court upheld admission of the evidence because the exchange had occurred before the defendant invoked his right to remain silent. *See id.*

¶9 Here, Officer Boutte testified that when Fields had been asked “whether he had an addiction or what he was doing with the drugs,” Fields responded, “I don’t want to talk. I don’t want to talk about that.” It is unclear from the record whether Fields intended to invoke his right to remain silent or was simply signaling his desire to not talk about that subject any longer, but we need not address whether he unambiguously and unequivocally invoked his Fifth Amendment right at that point because questioning immediately ceased. And, because Boutte’s testimony indicated Fields had

STATE v. FIELDS
Decision of the Court

looked down, shook his head, and failed to answer one or more questions after he impliedly waived his right to remain silent by answering questions, but before he arguably invoked that right, the trial court did not err in admitting that evidence.

¶10 Fields also contends the trial court erred in “allowing the [s]tate to elicit testimony and make comments regarding [his] invocation of his right to remain silent.” The state concedes that Officer Boutte’s referral to Fields’s eventual invocation of his constitutional rights was improper, but argues the trial court did not abuse its discretion by denying Fields’s motion for mistrial and providing a curative instruction to the jury. *See VanWinkle*, 229 Ariz. 233, ¶¶ 12, 15, 273 P.3d at 1151-52 (prosecution may not comment on a defendant’s exercise of right to remain silent; “[t]he right . . . would mean little if the consequence of its exercise is evidence of guilt”).

¶11 A declaration of a mistrial is the most drastic remedy for trial error, and we will not overturn a trial court’s decision to deny a mistrial absent an abuse of discretion. *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003). The trial court is in the best position to assess the impact of a witness’s statement on the jury, *id.*, and reviewing courts will not reverse a conviction based on the erroneous admission of evidence unless there is a “‘reasonable probability’ that the verdict would have been different had the evidence not been admitted,” *id.* ¶ 44, quoting *State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1012-13 (2000); see also *State v. Gilfillan*, 196 Ariz. 396, ¶ 35, 998 P.2d 1069, 1078 (App. 2000) (“In deciding whether to grant a mistrial, the trial court must determine if a statement, the substance of which was not admissible, alerted the jury to a matter it should not consider and the probability that the jury indeed was influenced by it.”).

¶12 The jury in this case heard testimony from Officer Boutte that when he had asked Fields whether he had a problem with drugs, Fields responded that he “preferred not to talk about that.” The trial court concluded that the statement was in “somewhat of a gray area,” and may have been interpreted by the jury as an invocation of the right to remain silent. The court then, in accordance with the alternative remedy suggested by Fields,

STATE v. FIELDS
Decision of the Court

determined a curative instruction was “appropriate under the circumstances,” while noting it was “not necessarily finding that something ha[d] to be cured.” The court then instructed the jury: “A person in custody has the right to remain silent and not answer any questions from a law enforcement officer. The exercise of that right is not evidence of guilt.”

¶13 The trial court viewed the allegedly improper statement in context, assessed its impact on the jury, and determined that a limiting instruction would be appropriate. Defense counsel did not object to the instruction, and, in fact, had suggested such an instruction be given. We presume it was followed by the jurors. *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006).

¶14 Additionally, there was other evidence of Fields’s guilt, including mail and other items connected to him in the portfolio containing the methamphetamine. Thus, the trial court could find that the impact of the single reference to Fields’s desire to remain silent was minimal, and we conclude the court did not abuse its broad discretion in fashioning a remedy less drastic than a mistrial. *Cf. Gilifillan*, 196 Ariz. 396, ¶ 38, 998 P.2d at 1079 (no reasonable probability that inadmissible evidence materially affected the outcome of the trial, thus no error requiring reversal).

Disposition

¶15 For the foregoing reasons, Fields’s convictions and sentences are affirmed.