THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

Respondent

vs.

ROBERT R. BROOKS

Appellant

No. SC 90347

Appeal from the Circuit Court of Jefferson County
The Honorable M. Edward Williams, Circuit Judge

SUBSTITUTE BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from the final judgment in a criminal case. On August 23, 2007, a jury found Robert Brooks guilty of second degree murder and armed criminal action, and recommended a sentence of life imprisonment for second degree murder and seventy-five years' imprisonment for armed criminal action. S.L.F. 17-20. On September 17, 2007, Mr. Brooks filed a motion for judgment of acquittal or, in the alternative, motion for new trial. L.F. 42. On November 1, 2007, the Circuit Court denied the motion for new trial and entered a judgment and sentence consistent with the verdict. Tr. 842; L.F. 40-41. On November 9, 2007, Mr. Brooks filed a notice of appeal. L.F. 46.

Mr. Brooks' appeal was heard by the Court of Appeals for the Eastern District. This appeal does not involve the validity of a treaty or statute of the United States, a statute or provision of the Constitution of this state, or title to any state office, nor is it a case in which the punishment of death has been ordered. As provided in Article 5, Sections 3 and 15, of the Missouri Constitution, as amended, the Missouri Court of Appeals, Eastern District, was vested with initial jurisdiction of this appeal.

The Court of Appeals affirmed the judgment of the Circuit Court on March 3, 2009. Mr. Brooks filed a motion for rehearing and application for transfer in the Court of Appeals on March 18, 2009. The Court of Appeals denied the motion and application on August 3, 2009. On August 18, 2009, Mr. Brooks filed an application for transfer in this Court. On October 6, 2009, this Court sustained Mr. Brooks' application for transfer and entered an order transferring the case.

STATEMENT OF FACTS

I. Overview

On August 29, 2006, Robert Brooks was arrested for suspicion of the homicide of Amanda Cates. Tr. 569. Mr. Brooks and Ms Cates had dated for three years and were engaged to be married. Tr. 591. They both worked as police officers. Tr. 516, 589. After serving as a police officer in the City of Jennings for sixteen years, Mr. Brooks joined the Village of Calverton Park police force in 2005. Tr. 589. Ms Cates worked for the Normandy police department and was assigned to the Normandy Middle School as the school resource officer. Tr. 516-17.

The State's theory was that Mr. Brooks arrived home early in the morning of August 29, 2006, that he and Ms Cates became embroiled in a domestic argument, and that Mr. Brooks intentionally shot Ms Cates. Tr. 724.

Mr. Brooks claimed he acted in self-defense. Tr. 631. According to Mr. Brooks, during their argument Ms Cates grabbed his gun, placed her finger on the trigger, and pointed the gun at him. Tr. 629-31. When Mr. Brooks attempted to disarm her, they wrestled over the gun. Tr. 630-32. The gun discharged, and a bullet hit Ms Cates. Tr. 632-33. Besides Mr. Brooks, there were no eyewitnesses to the shooting. Tr. 534, 637.

The case was tried to a jury. The Court instructed the jury on first degree murder, second degree murder, involuntary manslaughter, armed criminal action, and self-defense. Tr. 751-62; S.L.F. 6-14. The jury found Mr. Brooks guilty of second degree murder and armed criminal action, and recommended life imprisonment for second degree murder and seventy-five years' imprisonment for armed criminal action. S.L.F.

17-20. The court entered judgment in accordance with the verdict, and ordered the sentences to run concurrently. L.F. 40-41.

II. Evidence Presented at Trial

On the evening of August 28, 2006, Mr. Brooks attended a Calverton Park council meeting. Tr. 442. One of the topics on the council's agenda was whether to extend full-time employment to reserve officer Trudy Moore. Tr. 441. Mr. Brooks was Ms Moore's field training officer, and he discussed the hiring decision with the police chief prior to the meeting. Tr. 441-42. The council decided not to hire Ms Moore. Tr. 442. Ms Moore recalled that Mr. Brook was upset with the decision and that he talked to the police chief after the meeting. Tr. 442. According to Ms Moore, Mr. Brooks felt that the police chief had not "stepped up" on her behalf. Tr. 443.

Mr. Brooks and Ms Moore left the council meeting and drove to Jennings Sports Bar, arriving at approximately 9:30 p.m. Tr. 443. Mr. Brooks received several calls on his cell phone from Amanda Cates while at the bar. Ex. 53, 58; Tr. 435-36, 443-44, 470-71, 596-97. Ms Cates called because she was upset that Mr. Brooks was not home. Tr. 597. Ms Moore testified that at 10:45 p.m., Mr. Brooks received a call and, in a raised voice, told the caller he would "be home when he got home." Tr. 444.

At 11 p.m., Mr. Brooks drove Ms Moore home. Tr. 445-46. Mr. Brooks told her "he didn't want to deal with the problems at home." Tr. 447. Ms Moore testified that Mr. Brooks said they should get a hotel room. Tr. 446. Mr. Brooks denied making such a proposition. Tr. 600. According to Mr. Brooks, he said he, not they, should get a hotel room. Tr. 600. They arrived at Ms Moore's house at 11:30 p.m. Tr. 452. Mr. Brooks

kissed her on the cheek. Tr. 450. When he tried to kiss her again, Ms Moore pulled away and exited the vehicle. Tr. 450. Mr. Brooks had flirted with Ms Moore in the past, although nothing came of it. Tr. 455, 460. He had invited her to a baseball game and had offered to take her on a boat ride. Tr. 455. According to Ms Moore, Mr. Brooks told her she was better company than Ms Cates and said Ms Cates "wasn't any fun." Tr. 455-56. Ms Moore had no idea whether Ms Cates knew Mr. Brooks had been flirting with her. Tr. 457.

- *Mr. Brooks and Ms Cates Argue*

After dropping off Ms Moore, Mr. Brooks drove home. Tr. 601. Mr. Brooks lived in Crystal City with Ms Cates and his daughter, Chelsea. Tr. 591. On the way home, Mr. Brooks and Ms Cates had a heated argument which escalated over the course of several phone calls. Ex. 53, 58; Tr. 602, 669. Ms Cates hung up on Mr. Brooks two or three times. Tr. 603. Mr. Brooks testified that Ms Cates "wasn't happy I wasn't home, and she said I should have been home earlier." Tr. 602. Mr. Brooks advised Ms Cates he was on his way home and told her to "just go to sleep, don't get up." Tr. 607. Ms Cates replied, "don't come home." Tr. 612.

Mr. Brooks arrived home after midnight. Tr. 665. All of the lights were out and it was "completely black." Tr. 610. He walked to the bedroom. Tr. 610. Ms Cates was in bed. Tr. 611-12, 675. He tossed his gun on the bed and began to undress. Tr. 610, 612, 673. After he removed his pants and socks, Ms Cates jumped out of bed. Tr. 612. She began hitting him and yelled: "What the hell are you doing?" Tr. 612-13. Mr. Brooks

said he wanted to go to sleep. Tr. 612. She reminded Mr. Brooks that she had told him not to come home. Tr. 612. Mr. Brooks asked her to "quit fighting." Tr. 614.

The fighting continued. Ms Cates said "let's go see who you were talking to" and ran outside to get Mr. Brooks' cell phone out of his truck. Tr. 617-18. Ms Cates viewed the phone's call log. Tr. 618. It showed a call had been placed to a "Michelle" at 11:07 p.m. followed by a call to "314-280-0742," the telephone number of Mr. Brooks' friend Chuck Ervin. Tr. 488-493, 619-20; Ex. 58. When Ms Cates saw that Mr. Brooks had called someone named Michelle at 11:07 p.m., Ms. Cates became upset and said "you are talking to fucking Michelle." Tr. 622-23. Ms Cates scrolled to the "314-280-0742" number and pressed the redial button.[1] Tr. 622. Ms Cates then threw the phone down in the grass and went inside. Tr. 622-23. Mr. Brooks put the phone back in his truck and followed Ms Cates into the house. Tr. 623-24. Mr. Brooks' cell phone records indicated a four second phone call was placed to Mr. Ervin at 12:27 a.m. Tr. 494-95. Mr. Ervin did not hear his phone ring and was unaware of the call. Tr. 524.

When Mr. Brooks re-entered the house, Chelsea was still in her bedroom and did not appear to be awake. Tr. 624, 627, 713. Ms Cates and Mr. Brooks continued arguing

[1] The phone's call log displayed "314-280-0742" next to "Michelle." Tr. 489-92; Ex. 56. Mr. Brooks' cell phone displayed "Michelle" instead of Michelle's number because she, unlike Mr. Ervin, was stored in the phone's contact list. Tr. 485, 621; Ex. 56. Mr. Brooks presented evidence that Ms Cates believed the telephone number "314-280-0742" belonged to Michelle. Tr. 491-92, 621-22.

in "semi-raised" voices. Tr. 624, 627. When Mr. Brooks tried to get into bed, Ms Cates asked him what he was doing. Tr. 624. Mr. Brooks replied that he "just want[ed] to go to sleep" and requested that they quit fighting. Tr. 624. When Ms Cates continued to yell at him, Mr. Brooks announced he was leaving. Tr. 625-27. He told Ms Cates: "[T]hat's it, I am leaving, I am out of here. . . . I am not fighting with you, I am tired of fighting, this is all we do, we fight almost every day, I am sick of it." Tr. 626-27.

Ms Cates told Mr. Brooks he "ain't going nowhere." Tr. 629. She grabbed Mr. Brooks' gun off the bed and pointed it at him. Tr. 629.

Mr. Brooks testified that several weeks earlier he had a similar confrontation with Ms Cates when he came home late. Tr. 615. At that time, Ms Cates picked up her gun, pointed it at him, and said: "I am tired of this bullshit, I am just tired of it." Tr. 615. She declared: "[I]f I can't have you, nobody . . . can have you. I should have killed you a long time ago, you son of a bitch." Tr. 628. Mr. Brooks told her to put the gun down. Tr. 615. When she did not comply, Mr. Brooks grabbed the gun out of her hand and took it away from her. Tr. 615.

Mr. Brooks remembered this incident when Ms Cates aimed the gun at him on August 29, 2006. Tr. 628-29. Mr. Brooks told Ms Cates "we are not going through this again" and asked her to "put the gun down." Tr. 629. Ms Cates held the gun with both hands and continued pointing it at him. Tr. 629-30. Mr. Brooks attempted to disarm her. Tr. 630. He grabbed her hands and they began struggling over the gun. Tr. 630. The gun was in Ms Cates' hands and Mr. Brooks' hands were around her hands. Tr. 631. The struggle lasted several seconds. Tr. 631-32. The gun twisted around, went off, and a

bullet struck Ms Cates in the face. Tr. 281-82, 631-32, 711. Mr. Brooks held Ms Cates as she fell to the floor. Tr. 633.

Mr. Brooks ran to the phone and dialed 9-1-1. Tr. 635. The call originated between 12:28 and 12:31 a.m. Tr. 416. Mr. Brooks reported that he shot his fiancée because he believed she was an intruder, and requested an ambulance. Tr. 635; Ex. 48. Mr. Brooks did not contend at trial that he thought he had shot an intruder. In his opening statement and in his testimony, Mr. Brooks acknowledged he made up the story about an intruder because he was embarrassed and ashamed that two police officers would be involved in an accidental shooting.[2] Tr. 175, 635-36. He testified: "I was ashamed and embarrassed. Everything happened so fast. I lost somebody that meant the world to me." Tr. 722. Mr. Brooks did not repeat this claim after placing the 9-1-1 call. Tr. 640.

- *The Police Respond*

Sergeant Jed Guidicy and Patrolman Jeff Wynn responded to the emergency call. Tr. 184, 196. Chelsea Brooks unlocked the door, and the police officers entered the

[2] During *voir dire* defense counsel asked prospective jurors whether it would be possible for them to believe a person was telling the truth even if that person first told a lie. Tr. 112-14. Specifically, defense counsel asked: "Is there anybody who feels that that's not possible? That if something happens you always tell the truth right way or otherwise forever you are a liar?" Tr. 113. None of the prospective jurors responded affirmatively. Tr. 113-14.

house. Tr. 185. Mr. Brooks was frantic, crying, and hysterical. Tr. 194, 213. In the master bedroom, Sergeant Guidicy observed Ms Cates' leg protruding from the adjoining bathroom. Tr. 187. He checked to see if she was alive, and he could not detect a pulse. Tr. 188. Patrolman Wynn located the gun on the bed. Tr. 189.

Patrolman Wynn activated a microphone on his uniform and recorded the activities taking place in his vicinity. Tr. 200. An hour and twenty minutes of conversations picked up by the microphone were played to the jury, including several phone calls made by Mr. Brooks.[3] Tr. 204. On one call, Mr. Brooks is heard telling his mother he "shot her by accident." Tr. III 4. Patrolman Wynn testified he overheard Mr. Brooks say to his mother, "I told her don't get up, I said let's go to bed, and a fucking half an hour later she gets up. . . . No, she is dead mom, mom this is bullshit, mom. I was asleep, mom. I told her don't get up, and we were arguing at first, and then I was like we should be fucking sleeping, and then about a half an hour, and then boom." Tr. 201-02. Patrolman Wynn also testified that he heard Mr. Brooks tell his friend Michael Tetrall: "We were arguing at first, Michael, about forty minutes, forty-five minutes." Tr. 207-08.

Captain Jeff McCreary, who coordinated the investigation at the scene, asked Mr. Brooks to go to the Crystal City police station for an interview. Tr. 398-99. A detective transported Mr. Brooks to the police station. Tr. 424.

[3] Volume III of the transcript filed in this appeal is a transcript of this recording.

Lieutenant Terry Thomas met Mr. Brooks at the station. Tr. 529. He informed Mr. Brooks that he wanted to perform a gunshot residue test on his hands. Tr. 529. According to Lieutenant Thomas, Mr. Brooks said "he shot the weapon" and "had no problem" with the test. Tr. 529. Mr. Brooks denied telling Lieutenant Thomas he had fired the gun. Tr. 647. During the administration of the test, Mr. Brooks told Lieutenant Thomas he had washed his hands after performing CPR on Ms Cates. Tr. 532. The results of the test were inconclusive for the presence of gunpowder residue.[4] Tr. 530-31; Ex. 62.

- *Mr. Brooks is Mirandized and Interviewed by the Police*

Lieutenant Thomas's "main assignment" was to talk to Mr. Brooks and "try to get his side of the story." Tr. 529. Detective Mike Pruneau assisted Lieutenant Thomas in that task. Tr. 536, 570. The interview was video recorded, and the State played twenty-six minutes of the recording at trial. Tr. 548-49; Ex. 64.

The interview was conducted in a small room with a desk and three chairs. Ex. 64. At approximately 2:28 a.m., Lieutenant Thomas advised Mr. Brooks of his *Miranda* rights, and handed him a form listing those rights. Tr. 534, 552-53; Ex. 63; Ex. 64. Mr. Brooks initialed blanks on the form indicating he understood his rights, but he refused to

[4] According to William Randall, a criminologist in the Missouri State Highway Patrol Crime Laboratory, an inconclusive test means the examiner cannot "conclude one way or the other whether something is there or not there." Tr. 378.

sign the "waiver of rights" provision.[5] Ex. 63. At trial Lieutenant Thomas explained the rationale for informing Mr. Brooks of his constitutional rights: "It was part of the investigation, [Mr. Brooks] was the only person that was involved in the shooting, and he was at the station, so we chose to read him his rights." Tr. 534.

After Mirandizing Mr. Brooks, Lieutenant Thomas and Detective Pruneau repeatedly asked Mr. Brooks to tell them how the shooting occurred. Ex. 64; Tr. 555-67. The following exchanges occurred during the portion of the interview played to the jury:

> THOMAS: ***Right now it wasn't not [sic] so much to ask you questions, as to your version what occurred.*** I wasn't there, so I don't know.
>
> BROOKS: I don't know.
>
> Tr. 555 (emphasis added)

* * *

[5] The waiver of rights provision Mr. Brooks refused to sign said this:

> I have read, or have had read to me, this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer present at this time. I understand and know what I'm doing. No promises or threats have been made to me and no coercion of any kind has been used against me.

Ex. 63.

PRUNEAU: If you have to walk out that door, but ***I would sure like to hear your side of the story, you know.***

BROOKS: I asked you if I am free to go; yes or no?

Tr. 556 (emphasis added).

* * *

PRUNEAU: We don't—***we are not hearing your side, man.*** Then I mean ***if you are not hearing your side, put yourself in my situation okay?***

BROOKS: I have been there.

Tr. 557 (emphasis added)

* * *

PRUNEAU: ***So what happened?***

BROOKS: Terry, Terry, it's not—there is nothing—I just—

THOMAS: You can make a phone call. We are not telling you can't make a phone call.

BROOKS: I can't call, I don't have no number. I don't know where it is. You got some water?

Tr. 559 (emphasis added)

* * *

THOMAS: ***Robert, I don't know what happened. All I want to do is find out what happened.*** And you know as well as I do that when officers are first on the scene, they are coming in, they

are getting their statements, you are giving a statement, we weren't there, you are upset, things were going on, so you have been doing this for years.

BROOKS: I don't know why you are doing this.

THOMAS: You have been doing this as a Detective. All we are trying to do is—

BROOKS: I was going—the rest of my life with this. This is bullshit. Where is my daughter? Terry, where is [sic] my family members?

Tr. 560 (emphasis added)

* * *

PRUNEAU: . . . We need our time line, and ***we need your story on what happened, okay? You've done this, you have done it for seventeen years. If you don't do anything, you know good and well that you can tell us what happened.***[6]

[6] The transcript is inconsistent with the recording of the interview. From listening to the recording played for the jury, it is apparent that Detective Pruneau said: "We need ***your*** time line, and we need your story on what happened okay? You've done this, you have done it for seventeen years. If you ***didn't*** do anything, you know good and well that you can tell us what happened." Ex. 64 (beginning at 21 minutes and 32 seconds into the recording or 2:44:02 a.m. according to the video timer).

BROOKS: I don't know, man. I just—I am lost right now, brother.

PRUNEAU: Well, I understand.

BROOKS: I've lost everything.

Tr. 564 (emphasis added)

* * *

PRUNEAU: . . . . But here's the thing, Bob, and I keep saying this, I need, because I am—I am one of the investigators on here, okay? And you know this. You have been there. You have [done] it. ***You know how it goes. And you know—you know, whenever we talk to somebody and we hey listen, what is your side. And when we don't get cooperation—***[7]

BROOKS: I am not—I am just lost, man. I am just lost.

PRUNEAU: I understand you being lost, man, but I mean that's you being lost is not doing your daughter any good. Not doing you any good. Not doing us any good. ***I at least have to have somewhere to go and say hey, you know what, this is what he is saying happened***. . . . [W]hen I get woke up at quarter

[7] The transcript omits the word "say" that is audible on the recording. Detective Pruneau said: "[Y]ou know, whenever we talk to somebody and we ***say*** hey listen, what is your side. And when we don't get cooperation—" Ex. 64 (beginning at 23 minutes and 34 seconds into the recording or 2:46:04 a.m. according to the video timer).

to 1:00, there was an accidental shooting, up at Harbor Pointe, a guy accidentally shot his wife, thought it was an intruder, that's all I know. . . . ***So I mean it's going to be hard for me to defend you, being a police officer and saying hey, you know what he didn't cooperate, and he didn't tell me this. You know that. So I need to hear from you what happened.*** Did you work tonight?

BROOKS: (Nodding)

PRUNEAU: What time did you get off?

BROOKS: I don't know. Where is mind—I don't know where my mind is at. Oh, God. I am tired. I don't know.

Tr. 566-69 (emphasis added).

The interview was terminated when Mr. Brooks' invoked his Miranda rights. Tr. 163; Ex. 64. Mr. Brooks did not volunteer an exculpatory statement during the interview. Ex. 64. He did not tell the investigators the factual basis of the defense he would present at trial. Tr. 570-71; Ex. 64. Lieutenant Thomas acknowledged that Mr. Brooks "basically said nothing." Tr. 575-76. At the conclusion of the interview, Mr. Brooks was arrested for suspicion of homicide. Tr. 569.

- *Chelsea Brooks' Statement*

Chelsea Brooks was transported to the Crystal City police station after the shooting. Tr. 391. At 2:49 a.m. Chelsea gave a written statement to Detective Chad

Helms.[8] Ex. 38; Tr. 391. Chelsea stated she fell asleep around 11 p.m. and that he father arrived home at midnight. Ex. 38. Mr. Brooks was yelling and went into the bedroom. Ex. 38. He began hitting Ms Cates. Ex. 38. Ms Cates went to the bathroom and tried to close the door. Ex. 38. When she heard a "boom," Chelsea ran into the bedroom. Ex. 38. Chelsea saw Ms Cates covered in blood and lying unresponsive on the bathroom floor, and noticed blood on her father's underwear. Ex. 38. Chelsea stated that her father was running around the room screaming and talking to 9-1-1. Ex. 38.

- *Robert Brooks speaks with Dawn Baxter*

On September 1, 2006, Mr. Brooks had a telephone conversation with Dawn Baxter, one of Ms Cates' friends. Tr. 510. According to Ms Baxter, Mr. Brooks said the shooting was "an accident, we were arguing, it was an accident." Tr. 510. She told him to "tell them the truth," to which Mr. Brooks replied, "I already did." Tr. 510-11. Mr. Brooks testified that he was referring to the fact that he had already told his attorney the truth about the shooting. Tr. 643. Ms Baxter also testified that Mr. Brooks said, "I am in jail, where else would I be," when she asked him where he was. Tr. 511. Court records indicated that Mr. Brooks had bonded out the day before. Tr. 511.

- *Forensic Evidence and Medical Examiner's Testimony*

William Randall is a criminologist assigned to the trace evidence section of the Missouri State Highway Patrol Crime Laboratory. Tr. 361. Testing he performed on Ms

[8] The parties stipulated to the admission of Chelsea's written statement in lieu of her live testimony, and her statement was read to the jury. Ex. 37; Tr. 392.

Cates' hands confirmed the presence of gunpowder residue. Tr. 363-65. In his report, Mr. Randall offered three explanations to account for the positive result. Tr. 373. Ms Cates could have: (1) fired the gun, (2) held the gun without firing it, or (3) been in close proximity to the gun when it was fired. Tr. 373. Mr. Randall testified that if two people had their hands on a gun and were fighting over it when it is fired, he would expect to find gunpowder residue on the hands of both individuals. Tr. 370. But he testified that this is not always true, and that gunpowder residue typically is removed by washing one's hands. Tr. 366-67, 370.

The medical examiner for Jefferson County performed an autopsy on Ms Cates. Tr. 278, 280. Dr. Mary Case determined the entrance wound was in the right lateral cheek area. Tr. 280-81. She concluded the wound was "distant" because she found no soot or stippling around the wound. Tr. 284-85. Dr. Case testified that if the muzzle is "loosely in contact" with the body, "there could be soot," which is "kind of burned carbonationus [sic] material . . . smeared around the wound." Tr. 283. Dr. Case further testified: "If the muzzle is back a little bit farther, you begin to lose the soot, and then we being seeing what we call powder tattooing, which is stippling made by pieces of actually burned and unburned gun powder" that strike the body. Tr. 283. Had the gun been fired in close proximity to Ms Cates, Dr. Case expected that she would have found soot or stippling around the wound. Tr. 284.

Detective Michael Gray, Jefferson County's chief evidence technician, testified that the bullet entered Ms Cates' cheek at a forty degree downward angle. Tr. 263, 264. Dr. Case and Detective Gray testified that the area around the wound was wet with blood.

Tr. 273, 296. Dr. Case testified that blood could wash off soot, but not stippling, and that she would "not necessarily" expect to find stippling if she sees soot. Tr. 296.

On direct examination Dr. Case testified that the wound was consistent with the shooter being in front of Ms Cates and firing at a downward angle with Ms Cates' head somewhat turned. Tr. 289. On cross-examination Dr. Case agreed that the shooting "could have happened another way," and acknowledged that her findings were not inconsistent with the gun going off during a struggle. Tr. 300, 317. The following colloquy occurred between Dr. Case and defense counsel:

> Q. . . . . I want you to assume, hypothetically, two people struggling over the gun. One person means to shoot the other person, or scare them. The other person, in an attempt to keep from being shot, wrestles with them, and the person in whose hand the gun is originally, pulls the trigger, either as an involuntary act, or as part of the struggle. And they end up shooting themselves. Is that inconsistent with your findings?
>
> A. Um, in this hypothetical, no, it is not.

Tr. 317.

No witness was able to identify the positions Mr. Brooks and Ms Cates were in at the time of the shooting. Tr. 265, 301-02, 632. Nor could any witness say who fired the gun or rule out that there had been a struggle over the gun. Tr. 265, 330, 375. There was no evidence Ms Cates fired her service weapon or any other firearm prior to the shooting. Tr. 517.

- *The Prosecutor Comments on Mr. Brooks' Silence and Failure to Offer an Exculpatory Statement to the Police*

At trial the State attacked Mr. Brooks' credibility by establishing that Mr. Brooks did not tell the police he acted in self-defense and did not raise self-defense until trial. In opening statement, the prosecutor emphasized Mr. Brooks' failure to cooperate by not answering Lieutenant Thomas and Detective Pruneau's questions regarding the shooting:

> And basically ***all they did was ask him what happened, what happened, Bob. He never would tell them. Not a word. Not a word.*** I need to talk to somebody is what he said, or I need a phone book. They gave him a phone book. Then he needs a phone number. They gave him a phone number. ***Then they say we want your side of the story, you are not under arrest, you are free to go, open the door and you are free to walk out of here. Over and over and over. You will see them ask him him [sic] and he just tells—they didn't interrogate him like they do most people, they said just tell us what happened. Not a word.*** Never told them that he thought she was an intruder and accidentally shot her. ***He never told them anything.*** That's going to last close to an hour or so. And then finally, you know, finally he says I am done. At that point he is pretty well a suspect at that point, so they place him under arrest. And I will have to cut it [the tape] off at that point because he invokes his rights, so at that point I got to turn it off.

Tr. 162-63 (emphasis added).

Defense counsel objected. Tr. 163-65. He contended that the prosecutor's comments violated Mr. Brooks' right to remain silent under the Fifth Amendment: "[I]t seems to be a direct comment [on Mr. Brooks' right to remain silent] whether he is under arrest or not, once he has been Mirandized, if he exercises that right, then it leaves the jury with the negative inference that the invocation of his is tactically [sic] an admission of guilt." Tr. 164. The Court ruled the prosecutor's statement that Mr. Brooks said "not a word" was "clearly a direct comment on his right to remain silent" and cautioned the prosecutor to "not to refer to it further." Tr. 165. Defense counsel moved for a mistrial, arguing the harm caused by the State's actions could not be undone by issuing a curative instruction to the jury: "I don't want this to happen again in the trial, and I don't think there is any way to clear it by instructing the jury to disregard it, and I don't know that there is any way that we can have the bell unrung." Tr. 166. The Court sustained the objection and denied the motion for mistrial. Tr. 166, 168. It instructed the jury to "disregard the prosecuting attorney's comments regarding the defendant's exercise of his right to remain silent." Tr. 168.

The prosecutor resumed his opening statement and immediately commented on Mr. Brooks' failure to answer the interviewers' questions. The prosecutor stated: "The evidence will show that for a good part of an hour, after repeatedly asking what happened, and he would not tell them." Tr. 168. No objection was made to this statement.

During the State's case-in-chief, the prosecutor asked Sergeant Guidicy, Patrolman Wynn, and Captain McCreary whether Mr. Brooks had ever told them how the shooting occurred even though none of them had asked Mr. Brooks for this information:

Sergeant Guidicy

Q. All right. At any time did you ever hear [Mr. Brooks] indicate to you or anyone else that he thought there was an intruder in the home and accidently [sic] shot Amanda?

A. No.

Q. Did you at any time hear him state to anyone, yourself or others, that it was some sort of an accident?

A. No.

Q. At any time did he say they were fighting over the gun?

A. No.

Tr. 192.

Patrolman Wynn

Q. At any time did the defendant ever tell you that he thought that Amanda Cates was an intruder and shot her?

A. No, sir.

Q. At any time did he ever tell you that it was some kind of an accident?

A. No, sir.

Q. At any time did he ever tell you they were fighting over the gun?

A. No, sir.

Tr. 211-12.

Captain McCreary

Q. At any time did [Mr. Brooks] tell you or did you hear him tell anyone, any other officer, anyone, that he thought Amanda was an intruder and accidentally shot her?

A. No.

Q. And did you hear him give any explanation at all?

A. No.

Tr. 398-99.

On cross-examination Captain McCreary, Sergeant Guidicy, and Patrolman Wynn acknowledged they never asked Mr. Brooks to explain how the shooting occurred. Tr. 194, 212-13, 418-419.

The prosecutor also referred to Mr. Brooks' post-*Miranda* silence while examining Lieutenant Terry Thomas. The prosecutor asked Lieutenant Thomas whether Mr. Brooks made a statement regarding the shooting:

A. We basically, I knew Mr. Brooks, and I say all we want is just a statement of what happened, we want to clarify everything, we want to give you the benefit of the doubt what exactly occurred.

Q. Did he, during the interview time period, ever tell you what happened?

A. No, he did not.

Q. Did he ever give you an answer?

A. No.

* * *

Q. Do you know of any law enforcement officers who ever, while being questioned or not being questioned, he ever told what happened?

A. No.

Tr. 536-37.

Defense counsel objected to this line of questioning on the ground that the prosecutor was eliciting responses that violated Mr. Brooks' Fifth Amendment right to remain silent. Tr. 537-38. Defense counsel moved for a mistrial, contending the cumulative effect of the State's commenting on Mr. Brooks' failure to offer an exculpatory statement "can't be cured any longer by simply instructing the jury to disregard." Tr. 538. The Court sustained the objection and denied the motion for mistrial. Tr. 538-39.

After the court sustained Mr. Brooks' objection the prosecutor continued questioning Lieutenant Thomas about Mr. Brooks' failure to make a statement to the police:

Q. At any time during the interview did he tell you that he thought she was an intruder and shot her?

A. No.

Q. At any time during the interview did he say it was an accident?

A. No.

Q. At any time during the interview did he say they are fighting over the gun?

A. No.

Q. Did he ever give you any explanation during the interview as to what had actually taken place?

Tr. 539-40.

Mr. Brooks' attorney interposed an objection and renewed his request for a mistrial based on the State's repeated efforts to equate Mr. Brooks' guilt with his refusal to make a statement to the police. Tr. 540-41, 546-47. Defense counsel further stated:

> Every time that he says it, this jury has no idea that there is a pre-Miranda portion, a post-Miranda—pre-arrest and a post-arrest portion, and I think the case law is clear that any direct comment on someone's right to remain silent—you got to remember, Judge, this jury has been told already that he was Mirandized, that he already was told it's an adverse inference. They are using silence as evidence of guilt, and just to, I mean, Judge, you know, I guess I am in a position now where I would have to ask Thomas if the reason you all arrested him was because he didn't make a statement, because it's what he—they say in here.

Tr. 543. The Court sustained the objection and denied the motion for mistrial. Tr. 546-47.

The prosecutor then asked Lieutenant Thomas, "Prior to any arrest, did he ever tell you what happened?" Tr. 548. Lieutenant Thomas answered, "No." Tr. 548. No objection was made to this question and answer.

The State played twenty-six minutes of the video recording of the interview for the jury. Tr. 549-69; Ex. 64.[9] Defense counsel stated he had no objection to the playing of the tape. Tr. 548. As discussed above, the recording contained several instances where Lieutenant Thomas and Detective Pruneau asked Mr. Brooks for his side of the story, and he never told them what happened. *See supra* 16-20.

After playing the recording of the interview, the prosecutor returned to the issue of Mr. Brooks' failure to make a statement to police. The following colloquy occurred between the prosecutor and Lieutenant Thomas:

Q. Now, prior to his arrest did [Mr. Brooks] ever mention that they had been arguing for twenty to forty-five minutes?

A. No.

Q. Prior to his arrest, did he ever say that he told her to quit?

A. No.

Q. Prior to his arrest, did he ever say he told her not to get up?

A. No.

[9] The video was started when the video timer indicated it was 2:24 a.m. Tr. 544. The video was stopped at 2:50:14 a.m. Ex. 64; Tr. 569. A copy of the transcript of the interview is included in the Appendix. *See* App. at A-5.

Q. Prior to his arrest did he ever say she turned the lights on?

A. No.

Q. Prior to his arrest, did he ever say where he got the gun from?

A. No.

Q. Prior to his arrest, did he ever say that Amanda did anything to make or cause him to shoot her?

A. No.

Q. Prior to his arrest, did he ever give you any type of explanation whatsoever as to what happened?

A. No.

Tr. 570-71.

After Mr. Brooks testified regarding the shooting and told the jury how he had acted in self-defense, the prosecutor questioned Mr. Brooks about his failure to make a statement to police. This exchange began as follows:

Q. And neither Terry Thomas or [sic] Detective Mike Pruneau, basically what they asked you was, we just want to know what happened, give us your side of the story. Is that a fair rendition of what they were asking you?

A. I believe so.

Q. All right. And you never told them, did you?

A. Didn't say anything.

Tr. 719.

The prosecutor questioned Mr. Brooks about his motives for not talking to the police. He asked Mr. Brooks if the reason he did not tell the officers what happened was not due to embarrassment as he had told the jury on direct examination but because he could not invent a story fast enough and because he was afraid the State could use his statement against him:

Q. And you know as a police officer if you make a statement, you are stuck with it, right? You know that from experience?

A. I guess so, sir.

Q. And you know that whatever statement you make can be used against you, right?

A. Yes, sir.

Q. All right. And at that point, the reason you didn't make a statement was not because you were embarrassed, it's because you couldn't think up a story; isn't that true?

A. Can you repeat the question, please?

Q. You weren't embarrassed. The reason you didn't give them an answer is because you couldn't think up a story fast enough for them?

A. No, sir. That's not true.

Tr. 719-20.

The prosecutor reiterated that Mr. Brooks had not told Lieutenant Thomas and Detective Pruneau he had acted in self-defense as he was asserting at trial:

Q. Terry Thomas and Officer Pruneau, prior to your arrest, asked you what happened, you didn't tell them what you told the jury in your Direct Examination, did you?

A. That's correct.

Tr. 721.

The State also commented on Mr. Brooks' failure to cooperate with the police during closing argument. The prosecutor argued to the jury:

> His story doesn't make sense. It's a lie. I am too embarrassed to tell 9-1-1 what happened. I am too embarrassed to tell my mother what happened. I am too embarrassed to tell Michael what happened. ***I am too embarrassed to tell the police prior to my arrest, Crystal City Police Department, what happened.*** I am so embarrassed I am going to take a murder wrap [sic]. That's ridiculous. That's not common sense.

Tr. 771-72 (emphasis added).

And in rebuttal, the prosecutor argued:

> ***[Q]uite frankly, no matter how embarrassed a person is, if it really happened like he said, he would have been screaming it to the walls.*** He wouldn't have started out for the intruder lie. He wouldn't have kept the intruder lie going. He would have changed it when asked.

Tr. 799 (emphasis added).

III. Jury Verdict and Post-Trial Matters

The jury convicted Mr. Brooks of second degree murder and armed criminal action. S.L.F. 17-18. It recommended a sentence of life imprisonment for murder and seventy-five years' imprisonment for armed criminal action. S.L.F. 19-20.

In his motion for new trial, Mr. Brooks argued that the Court erred in failing to grant a mistrial due to the State's repeated references to his silence in violation of his right to remain silent. L.F. 42-45. The Circuit Court denied the motion and entered a judgment and sentence in accordance with the verdict. Tr. 842; L.F. 40-41. Mr. Brooks appeals from that judgment. L.F. 46.

POINT RELIED ON

I.

The Circuit Court erred in allowing the State to comment on and adduce testimony regarding Mr. Brooks' failure to provide an exculpatory statement to police after being advised of his *Miranda* rights and in not declaring a mistrial on that account because the references to post-*Miranda* silence violated Mr. Brooks' right to due process and his right to remain silent and not have his silence used against him as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Missouri Constitution, in that: (1) the State repeatedly emphasized Mr. Brooks' failure to make an exculpatory statement to the police after he had been Mirandized; (2) the State commented on Mr. Brooks' silence in opening statement and closing argument and presented evidence highlighting Mr. Brooks' failure to make an exculpatory statement after he had been advised of his *Miranda* rights; (3) a major theme of the State's case was that Mr. Brooks' claim of self-defense was unbelievable because he did not tell the police that Ms Cates was shot when he was attempting to disarm her and acting in self-defense; (4) the Circuit Court's curative instructions were inadequate to remove the prejudicial effect of the references to Mr. Brooks' post-*Miranda* silence; (5) Mr. Brooks' defense was undermined by the State's misconduct because it depended entirely on the jury finding him credible and believing his version of the incident; (6) Mr. Brooks' defense was not transparently frivolous; and (7) there was not overwhelming evidence of guilt.

Doyle v. Ohio, 426 U.S. 610 (1976)

State v. Dexter, 954 S.W.2d 332 (Mo. 1997)

ARGUMENT

I.

The Circuit Court erred in allowing the State to comment on and adduce testimony regarding Mr. Brooks' failure to provide an exculpatory statement to police after being advised of his *Miranda* rights and in not declaring a mistrial on that account because the references to post-*Miranda* silence violated Mr. Brooks' right to due process and his right to remain silent and not have his silence used against him as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Missouri Constitution, in that: (1) the State repeatedly emphasized Mr. Brooks' failure to make an exculpatory statement to the police after he had been Mirandized; (2) the State commented on Mr. Brooks' silence in opening statement and closing argument and presented evidence highlighting Mr. Brooks' failure to make an exculpatory statement after he had been advised of his *Miranda* rights; (3) a major theme of the State's case was that Mr. Brooks' claim of self-defense was unbelievable because he did not tell the police that Ms Cates was shot when he was attempting to disarm her and acting in self-defense; (4) the Circuit Court's curative instructions were inadequate to remove the prejudicial effect of the references to Mr. Brooks' post-*Miranda* silence; (5) Mr. Brooks' defense was undermined by the State's misconduct because it depended entirely on the jury finding him credible and believing his version of the incident; (6) Mr. Brooks' defense was not transparently frivolous; and (7) there was not overwhelming evidence of guilt.

Standard of Review: The question of whether a defendant's constitutional rights were violated by the erroneous admission of evidence

is a question of law that is reviewed *de novo*. *State v. Davidson*, 242 S.W.3d 409, 416 (Mo.App. E.D.2007). The State bears the burden of proving constitutional errors were harmless beyond a reasonable doubt. *State v. Dexter*, 954 S.W.2d 332, 340 n.1 (Mo. 1997). To find an error harmless beyond a reasonable doubt, the court of appeals "must find that no reasonable doubt exists that the admitted evidence failed to contribute to the jury's verdict." *Davidson*, 242 S.W.3d at 417. In the event the Court determines that the error is unpreserved, Mr. Brooks requests that the Court review for plain error. *Dexter*, 954 S.W.2d at 340.

Throughout the trial the prosecutor repeatedly referred to Mr. Brooks' failure to tell the detectives that the shooting happened accidentally during a struggle over a gun as Mr. Brooks claimed at trial. Since the detectives questioned Mr. Brooks after he had been read his rights, the prosecutor clearly intended to target Mr. Brooks' post-*Miranda* silence. By highlighting his failure to cooperate with the detectives and refusal to provide an exculpatory statement explaining how the shooting occurred, the State violated Mr. Brooks right to due process and deprived him of a fair trial. Mr. Brooks is entitled to a new trial so his guilt or innocence can be determined by an untainted jury.

In *Doyle v. Ohio*, the United States Supreme Court held it is "fundamentally unfair and a deprivation of due process" to allow the prosecution to impeach the defendant by commenting on post-*Miranda* silence. 426 U.S. 610, 618 (1976). The Court concluded that "while the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Id*. at 618.

The Court reasoned that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Id.* at 617. In other words, post-*Miranda* silence may constitute a reliance on those rights rather than a tacit admission that the defendant has no exculpatory explanation. A defendant's right to due process under the Fourteenth Amendment, therefore, is violated "when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right." *Id.* at 619 & 619 n.10. According to the Court, "it does not comport with due process" to allow the prosecution "to call attention to [the defendant's] silence at the time of arrest and insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony." *Id.* at 619.

Missouri jurisprudence recognizes that the State is prohibited from referring to post-*Miranda* silence either as affirmative proof of guilt or to impeach the defendant's testimony. *State v. Dexter*, 954 S.W.2d 332, 338 (Mo. 1997); *Steger*, 209 S.W.3d at 17. "If a defendant exercises his or her right to remain silent . . ., it is a fundamental violation of his or her constitutional rights for the State to use that silence against him or her." *Steger*, 209 S.W.3d at 17. Introducing evidence of the defendant's post-*Miranda* silence violates rights guaranteed by Fifth Amendment to the U.S. Constitution and Article I, Section 19 of the Missouri Constitution and also results in the denial of due process. *State v. Richardson*, 724 S.W.2d 311, 315 (Mo.App. S.D.1987).

A. Threshold Issues

Before addressing whether the State violated *Doyle*, two threshold issues warrant consideration: (1) Did Mr. Brooks waive his right to remain silent and not have his silence used against him? and (2) Did Mr. Brooks waive plain error review of the admissibility of the video recording of his police interview when his trial attorney stated he had no objection to its admission? "Waiver principles should be construed liberally in favor of the defendant." *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005). *See also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Whether there has been an intelligent waiver depends "upon the particular facts and circumstances surrounding [the] case." *Zerbst*, 304 U.S. at 464; *State v. Bucklew*, 973 S.W.2d 83, 90 (Mo.1998).

1. Mr. Brooks did not waive his right to remain silent

In its Court of Appeals' brief, the State argued Mr. Brooks waived his right to remain silent by talking with the detectives after he had been Mirandized.[10] Specifically,

[10] Although police generally issue *Miranda* warnings at the time of arrest, Mr. Brooks was not arrested until after he had been taken to the Crystal City police station, Mirandized, and interviewed by the police. Tr. 424, 534, 569. Mr. Brooks' right to remain silence is protected once he has been Mirandized. *See, e.g., Kappos v. Hanks*, 54 F.3d 365, 368-69 (7th Cir. 1995) (stating that "the fact that an arrest had not yet occurred does not render *Doyle* inapplicable" because "it is the promise contained in the statement of *Miranda* rights [that] precludes the prosecutor from commenting on the defendant's silence"); *Kubsch v. State*, 784 N.E.2d 905, 914 (Ind. 2003) ("[A] defendant's prearrest,

the State pointed to Mr. Brooks' statements that he had "nothing to hide" and "didn't do nothing at all," and his description of his relationship with Ms. Cates. Tr. 558-59, 562. The State's waiver argument should be rejected because none of these statements concerned the circumstances of the shooting or contradicted his trial testimony that he acted in self-defense.

The United States Supreme Court has never found a waiver occurs when a defendant makes post-*Miranda* statements to law enforcement officers. *Bass v. Nix*, 909 F.2d 297, 304 (8th Cir. 1990) (noting that the Supreme Court "has never applied the waiver doctrine to a *Doyle* violation"). In *Doyle*, one of the defendants made several post-*Miranda* statements to the police denying involvement in the alleged crime. Upon being informed that he was under arrest for the sale of marijuana, he asked "What's this all about?" and told the police officer he "didn't know what he [the police officer] was talking about." *Id*. at 622 n. 4 (Stevens, J., dissenting). The defendant did not tell the police officer that he had been framed as he would later claim at trial. *Id*. at 613. Despite his post-*Miranda* statements, the Supreme Court treated the defendant as though he had remained completely silent. The Court held that the State violated the defendant's right

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post-*Miranda* silence enjoys the same protection as a defendant's postarrest, post-*Miranda* silence"). *Cf. State v. Hill*, 823 S.W.2d 98, 101 (Mo.App. E.D.1991) (stating that where the defendant's "silence has not been implicitly occasioned by a *Miranda* warning" the State may cross-examine the defendant "as to postarrest silence without violating due process").

to remain silent by impeaching "defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings." *Id*. at 611, 619-20.

A post-*Miranda* statement is admissible to impeach the defendant's inconsistent trial testimony, but the government is not permitted to focus on omissions from that statement: "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements" as long as the "[q]uestions were not designed to draw meaning from silence but to elicit an explanation for a prior inconsistent statement." *Anderson v. Charles*, 447 U.S. 404, 408 (1980). The Constitution does not prohibit impeachment with inconsistent post-*Miranda* statements, the Court concluded, because "[a]s to the subject matter of those statements, the defendant has not remained silent at all." *Id*.

In describing the constitutional limitations on the government's use of a defendant's post-*Miranda* silence, the *Bass* court stated:

> The key to the inquiry has always been whether the impeachment was based on post-arrest statements contradicting later trial testimony or whether the impeachment was based on silence contradicting later trial testimony. *Doyle* applies when, as in the instant case, the impeachment was based on silence.

909 F.2d at 304. *See also United States v. Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993) (stating that the prosecution violates *Doyle* where the "focus of the examination" is "not on inconsistent stories as in *Charles [v. Anderson]*, but on [the defendant's] failure to present his exculpatory story at the time of arrest"); *United States v. May*, 52 F.3d 885,

890 (10th Cir. 1995) (finding no Doyle violation because "the focus of the prosecutor's comments was not on May's failure to present his exculpatory story at the time of arrest, but on prior inconsistent stories"); *Turner v. State*, 719 S.W.2d 190, 193 (Tex.Cr.App. 1986) (holding that because "the State never proved that the appellant made a statement [after his arrest] which was actually inconsistent with the alibi he offered as a defense at trial" it was improper for the prosecutor to "cross-examine the appellate regarding his post-arrest silence").

United States v. Laury, 985 F.2d 1293 (5th Cir. 1993), provides a good example of how these principles operate. Laury was charged with robbing a bank on December 19, 1988. After being Mirandized, he denied robbing the bank and claimed he was out of town a few days before Christmas. *Id*. at 1299. At trial, Laury raised an alibi defense and testified that he was attending his cousin's birthday party on the date of the robbery. *Id*. at 1301. He did not tell authorities about his alibi prior to trial. *Id*. The prosecutor cross-examined Laury regarding his failure to tell the police about his alibi and challenged the alibi defense in closing argument by stating that "[h]e doesn't tell the FBI he has an alibi." *Id*. The court of appeals held the prosecutor violated *Doyle*:

> Although Laury made post-arrest statements to FBI agents, he did not discuss his whereabouts during the robbery. Therefore, nothing Laury told the FBI agents was inconsistent with his trial testimony that he was at a party on the date of the bank robbery. ***The prosecutor did not comment on what Laury told FBI agents, but on what he did not tell them***. . . . Only "[w]hen a defendant chooses to contradict his post-arrest statements to the

> police . . . [does] it become[ ] proper for the prosecutor to challenge him with those [post-arrest] statements and with the fact that he withheld his alibi from them." ***Because Laury's post-arrest and trial statements were not inconsistent, we view the prosecutor's comments as comments on Laury's post-arrest silence, and therefore in violation of Doyle.***

Id. at 1303 (quoting *Lofton v. Wainwright*, 620 F.2d 74, 78 (5th Cir.1980)) (emphasis added) (internal footnotes omitted).

Where, as in this case, the defendant offers a general denial of guilt after being advised of his Miranda rights, courts have found no waiver when the defendant does not fully disclose exculpatory information until trial. *See, e.g.*, *Doyle*, 426 U.S. at 613, 617-619, 622 n. 4; *United States v. Caruto*, 532 F.3d 822, 824 (9th Cir. 2008) (finding no waiver where defendant charged with importation and possession of cocaine made post-*Miranda* statement denying knowledge of cocaine in her truck's gas tank); *Bass*, 909 F.2d at 304 & 304 n.11 (holding that the defendant did not waive his Fifth Amendment rights by denying guilt); *Laury*, 985 F.2d at 1299, 1303-04 & n.8 (holding that defendant's post-*Miranda* statement denying involvement in bank robbery did not authorize the prosecution to comment on his failure to tell the police that he was out of town when the robbery occurred as he testified to at trial in support of alibi defense). Although in such cases the defendant has not strictly maintained his or her silence, the defendant's conduct was equated with silence. *Laury*, 985 F.2d at 1302 n.7. *See also United States v. Casamento*, 887 F.2d 1141, 1179 (2nd Cir. 1989) (stating that "even if a defendant has made statements to the police after receiving *Miranda* warnings, he is

deemed to have maintained his silence, unless the post-arrest statements are inconsistent with the defendant's testimony at trial").

Missouri jurisprudence is generally in harmony with these principles. A defendant waives his right to remain silent when he makes a "statement obviously related to something" and then only with respect to the subject matter of that statement. *State v. Crow*, 728 S.W.2d 229, 230, 232 (Mo.App. E.D.1987); *State v. Richardson*, 724 S.W.2d 311, 315 (Mo.App. S.D.1987). Where the defendant makes post-*Miranda* statements in response to police questioning but does not refer "to any specifics of the alleged criminal act," the defendant has not waived his right to remain silent and the State may not comment on the defendant's refusal to answer questions. *State v. Weicht*, 835 S.W.2d 485, 487-88 (Mo.App. S.D.1992). The prosecution may cross-examine the defendant regarding inconsistencies between the defendant's post-*Miranda* statements and trial testimony. *State v. Antwine*, 743 S.W.2d 50, 70-71 (Mo. 1988) (holding that such impeachment was not improper because the prosecutor "did not make inquiry regarding appellant's 'silence' but focused on the accuracy of appellant's statement"). In the absence of such an inconsistency, however, the prosecution may not elicit evidence of a defendant's post-*Miranda* silence. *See State v. Richardson*, 724 S.W.2d 311, 316 (Mo.App. S.D.1987) (holding that the State violated the defendant's right to remain silent when prosecutor asked a police officer on direct examination whether the defendant ever denied owning marijuana because "[t]he question did not seek to elicit a prior inconsistent statement"); *State v. Roth*, 549 S.W.2d 652, 656 (Mo.App. W.D.1977) (holding that prosecutor's remarks in closing argument regarding the defendant's failure

to mention self-defense after he was arrested violated *Doyle* because there is no "contradiction between a claim of self-defense made for the first time at trial and silence on that claim at the time of arrest").

Several Missouri cases, however, conflict with these principles. In *State v. Bowler*, 892 S.W.2d 717 (Mo.App. E.D.1994), the court held that a defendant who denied committing the crime after being Mirandized may be impeached with his failure to tell the police of his alibi. Following his arrest for sexually assaulting his girlfriend's daughter, the defendant declared: "I did not do anything like that and I want a lawyer." *Id*. at 719. At trial, he claimed that he, his girlfriend, and the victim were not at home on the night of the assault as the victim had claimed. *Id*. at 719. On cross-examination the prosecutor asked the defendant about his failure to tell the police that he was not at home at the time the assault was said to have taken place. *Id.* The trial court granted the defendant's objection to this remark and instructed the jury to disregard the State's comment but refused to declare a mistrial. *Id.*

The court of appeals found no error in not declaring a mistrial. The court noted that the defendant "made an oral statement that he did not do the alleged acts" and "did not volunteer the alibi he proffered at trial." *Id.* Finding that the defendant's post-*Miranda* statement and trial testimony were inconsistent, the court stated: "Because defendant gave one exculpatory statement to police at the time of his arrest and another explanation at trial, it was proper for the State to question him regarding his failure to offer identical stories on both occasions." *Id*.

Mr. Brooks submits that *Bowler* was wrongly decided because the defendant's post-*Miranda* statement was not inconsistent with his alibi defense. Indeed, nothing the defendant said upon arrest was at odds with his defense that he could not have assaulted the victim in his home if he was not home when the assault allegedly took place. *Doyle* treated the petitioner defendant's statements "what's this all about?" and "I don't know what you're talking about"—the equivalent of a denial of guilt—as silence instead of a prior inconsistent story. 426 U.S. at 622 n.4 (Stevens, J., dissenting). Accordingly, Bowler's post-*Miranda* statement was not a proper basis for impeachment and thus did not permit the adverse inference argued by the prosecution. In concluding that a basic denial of guilt authorizes the State to impeach a defendant who does not also disclose the substance of his trial defense, *Bowler* is contrary to *Doyle* and should be overruled.

In *State v. Hutchison*, 957 S.W.2d 757 (Mo. 1997), the court found the impeachment exception to *Doyle* authorized the prosecution to introduce evidence of the defendant's "selective" post-*Miranda* silence in response to follow-up questions posed by a law enforcement officer. Hutchison, Salazar, and the Yates brothers were at a New Years' Eve party held in Lopez's garage. While Lopez was inside his house, Hutchison and Salazar called for him to come out. Salazar, who was holding a revolver, told Lopez that he had shot someone and that one of the Yates brothers had tried to stab him. Lopez found the Yates brothers lying on the garage floor with gunshot wounds. Hutchison suggested that they removed the Yates brothers from the garage. They lifted the Yates brothers into the trunk of Lopez's car, and the three men drove to a nearby creek bed. Hutchison and Salazar exited the vehicle and walked to the back of the vehicle.

Hutchison, who was carrying a .22 caliber handgun, said "we got to kill them, we got to kill them." Lopez then heard several gunshots. Several hours later the bodies of the Yates brothers were found on the side of the road. They died from execution-style gunshot wounds to the head from .22 caliber bullets.

In Hutchison's murder trial, the investigator who interviewed Hutchison testified that after reading Hutchison his Miranda rights, Hutchison indicated "he wanted to talk to us." *Id*. at 762. The investigator asked him "what he did the evening hours of December 31st and the early morning hours of January 1st." Hutchison told the investigator that he and Salazar had attended the party at Lopez's house where they met two girls from Branson. Hutchison claimed they left the party and went to Springfield. The investigator asked for details regarding the girls, the type of vehicle they drove to Springfield, the time they left the party, the time they arrived in Springfield, and where they stayed in Springfield. Instead of responding to these questions, Hutchison requested details about the homicides, specifically asking how the victims had been shot. *Id*. at 763. When the investigator told him how the victims had been killed, Hutchison's "attitude changed" and he "shouted some obscenities," at which point the investigator terminated the interview. *Id*.

On appeal, Hutchison argued the investigator's testimony that he stopped answering questions violated his right to remain silent. Finding no error, this Court held that Hutchison waived his right to silence when he began answering the investigator's questions. *Id*. Specifically, the court concluded: "A defendant who voluntarily speaks

after receiving Miranda warnings may be impeached not only with his own statements but with his 'selective silence.'" *Id.*

Hutchison appears incompatible with decisions prohibiting the prosecution from adducing evidence of omissions from a defendant's post-*Miranda* statements. *Hutchison* relied on *State v. Antwine*, 743 S.W.2d 51, 70 (Mo. 1987), for the principle that the prosecution may impeach a defendant with his "selective silence." 957 S.W.2d at 763. *Antwine* in turn relied on *State v. Trice*, 575 S.W.2d 739, 742 (Mo.App. E.D.1978). *Trice* states:

> [W]here a defendant has exercised his right to remain silent introduction of evidence of his failure to make an exculpatory statement serves to penalize defendant for exercising that right. [This rationale] has no application where defendant does not exercise his right to remain silent, but rather elects to make statements.

575 S.W.2d at 742. This proposition, however, is squarely at odds with *Doyle* (which was not mentioned in *Trice*) where the Court held that the defendant's failure to offer an exculpatory statement may not be commented upon even though the defendant had not remained silent after being advised of his Miranda rights. *See United States v. May*, 52 F.3d 885, 890 (10th Cir. 1995) (stating that "when a defendant is 'partially silent' by answering some questions and refusing to answer others, this partial silence does not preclude him from claiming a violation of his rights under *Doyle*"); *United States v. Scott*, 47 F.3d 904, 907 (7th Cir. 1995) (stating that "a suspect may speak to [government] agents, reassert his right to remain silent or refuse to answer certain questions, and still be

confident that *Doyle* will prevent the prosecution from using his silence against him"). Because *Hutchison* relies on *Trice* to justify the admission of a defendant's "selective silence," it does not correctly state the law.[11]

Even if the Court determines that introducing evidence of a defendant's "selective silence" was not improper, *Hutchison* is distinguishable on its facts and, therefore, not controlling. Hutchison expressly waived and never invoked his Miranda rights. His interview was ended when he began shouting expletives. Mr. Brooks, on the other hand, refused to sign a waiver of rights and terminated the interviewed by invoking his *Miranda* rights. Thus, Mr. Brooks' refusal to answer the detectives' questions was "insolubly ambiguous" as his silence may have constituted a reliance on those rights. *Doyle*, 426 U.S. at 617. To the extent there is any inconsistency between Mr. Brooks' post-*Miranda* statement denying guilt and his testimony regarding self-defense (and Mr.

[11] As a preliminary matter, the impeachment exception to *Doyle* noted was inapplicable in *Hutchison* because the evidence of the defendant's post-Miranda silence was introduced through the investigator's testimony, and not by impeaching the defendant on cross-examination. Indeed, it is unclear from the opinion whether Hutchison testified and, if he did, whether his testimony contradicted his statements to the detective. If he did not testify, there was no cause for admitting the detective's testimony for impeachment purposes. And if he did testify and there was no inconsistency between his trial testimony and post-*Miranda* statements, there would be no basis for impeachment under *Anderson*.

Brooks maintains there is no inconsistency), *Doyle* prohibited the prosecution from emphasizing exculpatory details omitted from his post-*Miranda* statement. *See Caruto*, 532 F.3d at 831 (holding that where "it is defendant's invocation of her Miranda rights that results in the omitted facts that create the difference between the two descriptions, cross-examination based on those omissions draws meaning from the defendant's protected silence in a manner not permitted by *Doyle*").

Hutchison is further distinguishable because Mr. Brooks never answered the detectives' questions asking for his version of the incident. Hutchison, in contrast, began to provide an exculpatory account before becoming nonresponsive. Mr. Brooks did not waive his right to remain silent. He never exhibited a willingness to discuss the circumstances of the alleged criminal offense with law enforcement officers.

Finally, in referring to Hutchison's refusal to answer follow-up questions, the prosecutor did not attempt to draw meaning from his post-*Miranda* silence. The prosecutor asked the investigator what he asked the defendant and what the defendant said in response, and the investigator testified that the defendant did not answer the questions. The opposite is true here. The prosecutor repeatedly emphasized Mr. Brooks' refusal to tell the detectives the same exculpatory story he told the jury. Asking Mr. Brooks to confirm that he "didn't tell [the detectives] what you told the jury in your Direct Examination" (Tr. 721) was clearly designed to draw meaning from post-*Miranda* silence and undermine Mr. Brooks' credibility with the jury. *See, e.g., State v. Mabie*, 770 S.W.2d 331, 335 (Mo.App. W.D.1989).

Mr. Brooks did not relinquish his right to remain silent and to be protected against the prosecution's use of his silence against him by talking with Lieutenant Thomas and Detective Pruneau. The statements upon which the State bases its waiver claim did not relate an account of the shooting and were not inconsistent with Mr. Brooks' testimony that he acted in self-defense.[12] The bottom line is Mr. Brooks never began to offer an explanation of how the shooting occurred. That's why the detectives kept pressing him for his side of the story until he invoked his Miranda rights.

At most, Mr. Brooks offered a generalized denial of guilt which was entirely consistent with his defense and trial testimony that he was not guilty because he acted in self-defense. This is an insufficient basis upon which to find a waiver. Holding that a defendant who denies culpability thereby waives the right to not have the prosecution use his silence as substantive evidence of guilt would deprive all but the most legally astute of the protections afforded by *Miranda*. That result is clearly repugnant to *Doyle*. *See South Dakota v. Neville*, 459 U.S. 553, 565 (1983) (stating that the right to silence recognized in *Miranda* is "of constitutional dimension" and "cannot be unduly burdened").

[12] At trial the State maintained that Mr. Brooks said nothing to the detectives about the shooting. Tr. 162-63, 575-76. Ironically, the State now takes the opposite position when it contends that Mr. Brooks waived his constitutional rights by, in fact, making a post-*Miranda* statement about the shooting.

2. Mr. Brooks did not waive plain error review of the admissibility of the recording of his police interview

The State argued in the Court of Appeals that Mr. Brooks affirmatively waived plain error review of the propriety of playing the recording because his trial attorney announced "no objection" when the video was offered into evidence.

In *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. 2009), the defense attorney stated he had no objection when the prosecutor offered a videotape recording of the defendant's police interview into evidence. This Court concluded that "[p]lain error review is waived when 'counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence.'" *Id*. (quoting *State v. Mead*, 105 S.W.3d 552, 556 (Mo.App. W.D.2003)). In finding a waiver, the court determined that the defendant made a "strategic decision not to object to the admission of the statement." *Id*. That conclusion, however, contradicts *State v. Wurtzberger*, 40 S.W.3d 893 (Mo. 2001), where the court expressly held plain error review was not subject to waiver. In *Wurtzberger*, defense counsel "told the court expressly he had no objection" to a proposed jury instruction. *Id*. at 897. This Court held that despite the waiver provision contained in Rule 28.03, the defendant still was entitled to plain error review "under Rule 30.20 if manifest injustice would otherwise occur." *Id*. Because *Johnson* does not overrule *Wurtzberger*, the Court should resolve the conflict between these decisions.

The court should reconsider its ruling in *Johnson*. An attorney's announcement of "no objection" under the singular pressure of trial is more likely the product of a failure to recall or know the appropriate objection than a strategic decision to join the opposing

party's request to admit evidence. It is unreasonable to deny plain error review automatically in cases where a trial attorney states "no objection" but extend plain error review in cases where the attorney stands mute or says "I can't think of an appropriate objection." Such a rule will encourage attorneys to assert general (and, therefore, ineffective) objections in order to preserve plain error review. The rule is also easily circumvented. An attorney who wishes for evidence to be admitted for strategic purposes can preserve plain error review by simply making an incorrect or vague objection that is certain to be overruled.

Other courts have declined to adopt a per se waiver rule when an attorney announces "no objection." Instead, courts review the record to determine whether the attorney's action was due to negligence or strategy. *See United States v. Jaimes-Jaimes*, 406 F.3d 845, 847-48 (7th Cir. 2005) (holding that defendant whose attorney stated he had no objection to probation officer's calculation of the guideline range did not waive plain error review where there was no strategic reason for the decision). In deciding whether these actions amount to a waiver, courts must examine "the facts and circumstances surrounding [the] case." *Zerbst*, 304 U.S. at 464; *Bucklew*, 973 S.W.2d at 90. The absolute waiver rule adopted in *Johnson* precludes the inquiry required to determine if there has been a knowing and intelligent waiver.

This Court should not apply find a waiver of plain error review in this case because the record does not "preclude a finding of inadvertence or negligence" or establish that defense counsel's action was a matter of trial strategy. *Johnson*, 284 S.W.3d at 582. The record indicates that Mr. Brooks' counsel stated "no objection" due

to a misunderstanding of the law and not for strategic reasons. Counsel apparently believed the prosecutor could comment on Mr. Brooks' silence after he had been advised of, but prior to invoking, his Miranda rights. At a sidebar conference defense counsel stated:

> I thought that [the prosecutor] saying that [Mr. Brooks] didn't say anything [to the detectives], is probably okay . . ., and I believe there is a case on this, you can say I am not talking to you anymore, and that's not the same as invoking your right. I think there is case law that says, I don't want to talk to you any more, I don't have anything else to say, you can comment on that, but once the right is invoked, you can't comment on the fact that he invoked the right.

Tr. 167.

In later sidebar conference, defense counsel stated his belief that the prosecution could refer to Mr. Brooks' refusal to answer the detectives' questions until he was placed under arrest, even though he had been previously advised of his Miranda rights:

> Judge, I feel like we are revisiting this, but that question: "Do you know any officers he ever told", that doesn't say prior to arrest. That could mean any time. . . . Now, I let it go the first time, because according to Officer Thomas, at that time he wasn't under arrest. He had been Mirandized out of an abundance of caution, which is okay.

* * *

These questions need to have been phrased prior to being placed under arrest did he ever tell you that there was an accident . . . .

Tr. 537, 540.

A waiver is "an intentional relinquishment or abandonment of a known right or privilege. *Zerbst*, 304 U.S. at 464. *See also United States v. Yu-Leung*, 51 F.3d 1116, 1122 (1995), *quoted in Mead*, 105 S.W.3d at 556 (stating that a waiver occurs when a party "consciously refrains from objecting as a tactical matter"). Because that did not happen here, the Court should not find that Mr. Brooks waived plain error review of the admissibility of the video.

B. The State violated Mr. Brooks' constitutional rights by commenting on his failure to provide an exculpatory statement after he had been Mirandized

Over the course of the trial the State repeatedly commented on Mr. Brooks' failure to explain his actions on the morning of the shooting. These statements improperly drew attention to Mr. Brooks' silence after he had been Mirandized and, therefore, clearly violated his constitutional rights.

In opening statement the prosecutor informed the jury that Mr. Brooks did not cooperate with detectives who were trying to elicit his story, insinuating that Mr. Brooks was guilty because he refused to talk to the police. Here is what the prosecutor said:

> ***And basically all they did was ask him what happened, what happened, Bob. He never would tell them. Not a word. Not a word. . . . [T]hey said just tell us what happened. Not a word.*** Never told them that he thought

she was an intruder and accidentally shot her. ***He never told them anything.*** That's going to last close to an hour or so. And then finally, you know, finally he says I am done. At that point he is pretty well a suspect at that point, so they place him under arrest. And I will have to cut it [the tape] off at that point because he invokes his rights . . . .

* * *

The evidence will show that for a good part of an hour, after repeatedly asking what happened, and he would not tell them.

Tr. 162-63, 168 (emphasis added).

In the State's case-in-chief, the prosecutor asked four of the State's witnesses whether Mr. Brooks ***ever*** told them how the shooting occurred. Tr. 192, 211-12, 398-99, 536-37; *see supra* at 26-28. These questions were not restricted to the time period before Mr. Brooks was Mirandized. Patrolman Wynn, Sergeant Guidicy, Lieutenant Thomas, and Captain McCreary responded that Mr. Brooks did not offer any explanation. *Id*.

While questioning Lieutenant Thomas, the prosecutor highlighted Mr. Brooks' failure to offer an exculpatory statement during his interview at the Crystal City police station. After Lieutenant Thomas testified that he and Detective Pruneau asked Mr. Brooks to describe what happened, the prosecutor asked three questions regarding whether Mr. Brooks answered their questions and explained how the shooting occurred. Tr. 536-37; *see supra* at 27-28. To each question Lieutenant Thomas responded that Mr. Brooks had not done so. *Id*. Lieutenant Thomas also testified that Mr. Brooks never

volunteered that the shooting was accidental or resulted from a struggle over the gun. Tr. 539-40; *see supra* at 28-29.

The prosecutor played a portion of the video recording of Mr. Brooks' interview for the jury. Tr. 548-49; Ex. 64. The recording shows Lieutenant Thomas and Detective Pruneau asking Mr. Brooks for his version of events, and Mr. Brooks not answering their questions. Ex. 64. The jurors watched Detective Pruneau implore Mr. Brooks to tell them what happened because if he "didn't do anything," he "know[s] good and well you can tell us what happened." Tr. 564; Ex. 64. And the jurors saw Detective Pruneau warn Mr. Brooks of the consequences of his failure to talk:

> [I]t's going to be hard for me to defend you, being a police officer and saying hey, you know what he didn't cooperate, and he didn't tell me this. You know that. So I need to hear from you what happened.

Tr. 567; Ex. 64.

When the recording ended, the prosecutor asked Lieutenant Thomas a series of questions reiterating that Mr. Brooks had not told him or Detective Pruneau what happened and did not claim he acted in self-defense. These questions were:

- Prior to his arrest, did he ever mention that they had been arguing for twenty to forty-five minutes?
- Prior to his arrest, did he ever say he told her not to get up?
- Prior to his arrest, did he ever say where he got the gun from?
- Prior to his arrest, did he ever say that Amanda did anything to make or cause him to shoot her?

- Prior to his arrest, did he ever give you any type of explanation whatsoever as to what happened?

Tr. 570-71; *see supra* at 30-31. Lieutenant Thomas answered "no" to each question. *Id.*

Testifying in his own defense, Mr. Brooks explained that the shooting occurred during a struggle over the gun. Tr. 629-33. On cross-examination the prosecutor asked Mr. Brooks about his refusal to talk about the shooting with Detective Pruneau and Lieutenant Thomas, and Mr. Brooks acknowledged that he did not offer his side of the story during the interview. Tr. 719. To impeach Mr. Brooks, the prosecutor emphasized the fact that Mr. Brooks did not tell the police he acted in self-defense: "[Y]ou didn't tell [Lieutenant Thomas and Detective Pruneau] what you told the jury in your Direct Examination, did you?" Tr. 721. Mr. Brooks agreed that he had not told those officers what he told the jury. Tr. 721. The prosecutor accused Mr. Brooks of refusing to talk, not because he was embarrassed as he claimed, but due to his inability to "think up a story fast enough" and his fear of being "stuck" with a statement that could be used against him. Tr. 719-20. Mr. Brooks denied these allegations. Tr. 720.

Finally, during closing argument the prosecutor referred to Mr. Brooks' post-*Miranda* silence to undermine his credibility. The prosecutor told the jury:

> His story doesn't make sense. It's a lie. I am too embarrassed to tell 9-1-1 what happened. I am too embarrassed to tell my mother what happened. I am too embarrassed to tell Michael what happened. ***I am too embarrassed to tell the police prior to my arrest, Crystal City Police Department, what***

happened. I am so embarrassed I am going to take a murder wrap [sic].

That's ridiculous. That's not common sense.

Tr. 771-72 (emphasis added).

In rebuttal the prosecutor added: "[Q]uite frankly, no matter how embarrassed a person is, ***if it really happened like he said, he would have been screaming it to the walls.***" Tr. 799 (emphasis added).

The implication of these statements is clear: If the shooting occurred as Mr. Brooks claimed at trial, he would have told the police he acted in self-defense during the interview and would not have remained silent.

Courts have found that similar statements and evidence concerning a defendant's post-*Miranda* silence violate *Doyle* and operate to deny the defendant due process.

In *State v. Mabie*, 770 S.W.2d 331 (Mo.App. W.D.1989), the defendant was convicted of forcible rape. The day after he was arrested and Mirandized, the defendant provided an oral and written statement to the police in which he claimed the victim had consented. *Id.* at 333. At trial the defendant testified that his encounter with the victim had been consensual. *Id*. During cross-examination, the prosecutor asked the defendant why he had not denied the rape at the time of his arrest:

> Q. Now, when you're in Winchell's and the police arrest you and they put you—the cuffs on you and they tell you, Mr. Mabie, you're under arrest for rape, well, you must have just laughed and told them rape, what are you talking about?
>
> * * *

Q. Did you say that? Rape, what are you talking about, man, that's—you know, we just had consensual sex out here in the woods. You didn't tell the police that, did you?

A. I mentioned to them, I said I don't understand.

Q. You didn't tell them?

A. I didn't understand.

Q. You didn't tell any of those arresting officers anything, not one word about consensual sex, did you?

* * *

Q. You never told them not one single word that that gal and I were out there—

A. I was advised of my rights to remain silent, and I remained silent until I was asked to make a statement.

Q. You waived those rights, didn't you?

A. Yes, sir, after I was asked.

Q. And later on you talked to Detective Kempster about noon the next day, didn't you?

A. Yes, sir.

Q. So you had a lot of time to think about what you had to tell him, right?

Id. at 333-34.

In closing argument, the prosecutor claimed that the defendant committed the rape because he did not contend the victim consented when he was arrested:

> [T]he defendant is arrested, and they put the cuffs on him and say, hey, you're arrested for rape. And the defendant doesn't say rape, what are you talking about? . . . [W]ouldn't that be the reasonable thing to do if you're a guy who just went out in the woods and had sex with somebody that was consensual and some police officer slaps cuffs on you? You better believe you're going to be telling him this is crazy, I didn't rape anybody. But he didn't say that, he didn't say consent until 12 p.m. the next day. . . .

Id. at 334.

The court of appeals held the State violated the defendant's right to remain silent. *Id*. at 335, 338. The court concluded that the prosecutor's conduct was intentional and constituted an improper attack on the defendant's credibility: "[T]he prosecutor did purposefully elicit testimony as to appellant's post-arrest silence, and that he then proceeded to forcefully draw attention to appellant's post-arrest silence during his closing argument." *Id*. at 335.

In *State v. Flynn*, 875 S.W.2d 931 (Mo.App. S.D.1994), the defendant was convicted of possession of cocaine. As he was being placed under arrest, the defendant removed a white object from his pocket and threw it. *Id.* at 932. One of the arresting officers retrieved a vial containing what appeared to be cocaine. *Id.* The defendant was advised of his *Miranda* rights and arrested. *Id.* At trial the defendant testified that he was an undercover agent for the Drug Enforcement Agency, and that the night before his

arrest he took the vial of cocaine from his girlfriend. *Id.* at 933. He testified that he was considering whether to report the matter to law enforcement officials and planned to give the cocaine to a law enforcement official he knew in Arkansas, the state in which he resided. *Id.* The defendant and his son testified that the defendant placed the vial in his car but forgot about it until it rolled from under his seat some time before the arrest. *Id.*

The prosecutor asked the arresting officer whether the defendant explained where he obtained the cocaine or said he was an undercover agent. *Id.* at 933. The officer responded that the defendant did not offer such an explanation. *Id.* During closing argument the prosecutor argued that the defendant's exculpatory evidence was a fabrication because he did not explain the presence of the cocaine in his vehicle at the time of his arrest. The prosecutor said:

> When [the police officers] went to arrest Mr. Flynn, he dove into his pocket. He didn't say, "Officer, I've got a story I want to tell you of a substance that I have in my pocket." He didn't do that. He reached in there and he thought that he could throw it away and they couldn't find it. So I think his story is a little incredible. He doesn't deny that he had it. He was caught dead right in his tracks. So, he had to come up with a different story.
>
> * * *
>
> If, in fact, Mr. Flynn, if the story was the way he said, even if he didn't tell the officers out there where he was arrested, once he was in the police station and knew he was being arrested for possession of cocaine, I would

have said, "Hey, I took this from my girlfriend. I'm tryin' to go her a favor. . . . Go talk to her."

Id. at 933-34.

The court of appeals held that the prosecutor's comment on the defendant's silence warranted a new trial. *Id.* at 936. The court concluded that the prosecutor improperly used the defendant's silence "to draw an 'inference of guilt of the crime.'" *Id.* at 936 (quoting *State v. Howell*, 838 S.W.2d 158, 163 (Mo.App. S.D.1992)).

In *State v. Weicht*, 835 S.W.2d 485 (Mo.App. S.D.1992), the defendant was charged with sodomizing his daughter. After he had been Mirandized, a detective asked him whether he had performed any sexual acts with his daughter. *Id.* at 487-88. The defendant replied, "I have herpes." *Id.* at 488. The detective asked if he had unzipped his pants while he was laying on the bed. *Id.* The defendant again responded, "I have herpes." *Id.* In response to the next several questions, the defendant said, "I should not have stayed in Springfield, I should be gone." *Id.* In response to another question, the defendant stated, "If the little girl was asked this question and her mother was not present, she will answer truthfully." *Id.* The court of appeals held that the defendant did not waive his right to remain silent. It ordered a new trial because the State elicited testimony from the detective that the defendant did not deny having sexual contact with his daughter and commented on the defendant's failure to provide an exculpatory statement to police. *Id*. at 486, 488.

In *State v. Crow*, 728 S.W.2d 229 (Mo.App. E.D.1987), the defendant was convicted of first degree robbery and armed criminal action. The defendant was

hitchhiking on I-70 east of Kansas City when a motorist stopped and offered him a ride. *Id.* at 230. After dropping the defendant off near Warrenton, the motorist reported that the defendant had robbed him at knifepoint. *Id.* The police located the defendant at a truck stop. *Id.* The motorist identified the defendant as his assailant. *Id.* The police arrested the defendant and advised him of his *Miranda* rights. *Id.*

At trial the defendant disputed the motorist's account of the incident. He testified that the motorist paid him $20 for sexual favors and that, he, the defendant, was so revolted at what had taken place that he threatened to call the police and demanded to be let out of the car. *Id.* The prosecutor emphasized that this was the first time the defendant had related his version of the events preceding his arrest. *Id.* The prosecutor asked the defendant if he told the arresting officers his story either prior to or after arrest; he asked the arresting officers if the defendant had offered this explanation to them; and the prosecutor commented during closing argument about the defendant's failure to mention his story prior to trial. *Id.* Concluding that the case "fits squarely into the mold established by *Doyle*," the court of appeals reversed and remanded for a new trial. *Id.* at 231. In *State v. Roth*, 549 S.W.2d 652 (Mo.App. W.D.1977), the defendant was convicted of second degree murder. The defendant testified that he shot Carlos Savage in self-defense. *Id.* at 653. The defendant and Savage lived together in a hotel. *Id.* According to the defendant, Savage pulled the defendant's .22 caliber pistol from a drawer and pointed the weapon at him. *Id.* The defendant claimed the pistol went off while he was attempting to disarm Savage. *Id.* Another hotel guest heard a loud argument and a gunshot as she waited for the elevator. *Id.* She saw Savage stagger from

the room into the hallway and collapse. *Id.* The defendant emerged from the room holding a gun. *Id.* The defendant was arrested in the parking lot. *Id.* After the police advised him of his *Miranda* rights and informed him of the charge, the defendant said: "Oh, did somebody die? He must have had a heart attack." *Id.* At the police station, the defendant told two police officers: "You can kill a man with a .22 if you know what you're doing." *Id.*

At trial the defendant testified that he shot Savage in self-defense. *Id.* During closing argument, the prosecutor argued:

> All right. Let's assume that [the defendant is] afraid because he's a convict he wouldn't get a fair shake. But now he already knows somebody has seen him out in the hall, so he's taking the gun and himself away. But he's arrested. Once he's arrested, gentlemen, that logic, if it does exist, of his fear of being a convict vanishes. Nowhere did he tell the policemen then, after he was arrested, when it would work to his benefit.
>
> * * *
>
> So, at the time after he's arrested and that logic vanishes, he did not say a word about self-defense, about Carlos Savage with the gun, about anything, when it would do him some good.

Id. at 653-54.

The court of appeals found it "clear beyond doubt" that the State's argument was a comment on the defendant's failure to provide an exculpatory statement when he was arrested. *Id.* The court ordered a new trial because the prosecutor's argument "was a

comment on the silence of the defendant at the time of arrest and, as such, allowed the inference that the claim of self-defense was a fabrication." *Id.* at 656.

The State violated *Doyle* because it focused on Mr. Brooks' failure to answer questions posed by the police rather than on what he actually said. The prosecution did not attempt to impeach Mr. Brooks with his post-*Miranda* statements and, in fact, never even mentioned them. Instead, the prosecution's ongoing theme was that Mr. Brooks' defense was unworthy of belief because he did not respond when the detectives asked for his story, clearly implying that an innocent person would have spoken up. This is a clear violation of *Doyle*.

C. The State's repeated references to Mr. Brooks' post-*Miranda* silence had a decisive effect on the jury.

Reversal is necessary if evidence admitted in violation of *Doyle* had a decisive effect on the jury. *State v. Dexter*, 954 S.W.2d 332, 340 (Mo. 1997); *State v. Steger*, 209 S.W.3d 11, 17-18 (Mo.App. E.D.2006). In determining the impact the evidence had on the jury, courts consider whether: (1) the government made repeated *Doyle* violations; (2) the trial court issued any curative remedies; (3) the defendant's exculpatory evidence is transparently frivolous; and (4) there is overwhelming evidence of guilt. *Id*. at 18. The burden is on the State to prove the error was harmless beyond a reasonable doubt.[13]

[13] While Mr. Brooks believes that the issue of whether his right to remain silent was violated has been preserved for appeal, he requests plain error review of the trial court's failure to declare a mistrial or take other adequate remedial action—*e.g.*, striking the

Dexter, 954 S.W.2d at 340 n.1. Even though the State bears the burden of proof, Mr. Brooks will discuss these factors and demonstrate why the judgment should be reversed.

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offending remarks and testimony, admonishing the prosecutor, and providing the jury with curative instructions—in the event that the Court determines the issue has not been preserved. When the court of appeals concludes a *Doyle* violation has occurred, it "has the discretion to review the violation or violations in the context of the entire record for plain error that affects substantial rights and constitutes a manifest injustice." *Dexter*, 954 S.W.2d at 340. Appellate courts consider the same factors regardless of whether the defendant has preserved the error. *Id.* at 340 n.1. Where the error has not been preserved, instead of deciding whether the State has satisfied its burden of proving the error harmless beyond a reasonable doubt, the appellate court determines whether the error affects substantial rights and constitutes manifest injustice. *Id*. Appellate courts may consider unpreserved *Doyle* violations in evaluating whether the prosecutor intended to make improper use of a defendant's post-Miranda silence. *See State v. Rogers*, 973 S.W.2d 495, 499-500 (Mo.App. S.D.1998). Several of the cases cited by Mr. Brooks have held that the prosecutor's comments on the defendant's post-*Miranda* silence constituted plain error. *See, e.g., Dexter*, 954 S.W.2d at 340; *State v. Flynn*, 875 S.W.2d 931 (Mo.App. S.D.1994); *State v. Mabie*, 770 S.W.2d 331 (Mo.App. W.D.1989); *State v. Nolan*, 595 S.W.2d 54 (Mo.App. S.D.1980).

1. The State made repeated and intentional *Doyle* violations

Throughout the trial the State referred to Mr. Brooks' silence and his failure to offer an exculpatory statement after he had been Mirandized. The references to Mr. Brooks' silence were intentional. They persisted even after the Circuit Court concluded that the prosecutor's remark in opening statement that Mr. Brooks said "not a word" to the police interviewing him was a direct comment on Mr. Brooks' silence and warned the prosecutor to refrain from referring to the subject again. Tr. 165. The prosecutor, undeterred by the court's warning, returned to the subject of Mr. Brooks' silence. When he resumed his opening statement, the prosecutor assured the jury that "[t]he evidence will show that for a good part of an hour, after repeatedly asking what happened, and he would not tell them." Tr. 168. As discussed in Section B above, *supra* at 55-61, the State continued to refer to Mr. Brooks' post-*Miranda* silence during the rest of the trial.

This is not a case where circumstances mitigated against ordering a new trial such as where the State's witness spontaneously volunteered a response that alluded to the defendant's silence, *see, e.g.*, *State v. Harper*, 637 S.W.2d 342, 345 (Mo.App. W.D.1982). Here, the prosecutor directly solicited testimony regarding Mr. Brooks' refusal to discuss the shooting with police after he had been Mirandized, Tr. 536-37, 539-40, 570-71, and cross-examined Mr. Brooks regarding his failure to tell Lieutenant Thomas and Detective Pruneau "what you told the jury in your Direct Examination." Tr. 721. The prosecutor used this illicit evidence to convince the jury that Mr. Brooks' defense was unworthy of belief by arguing that if Mr. Brooks' story was true, he would have told police how the shooting occurred. Tr. 799. Courts have held that similar

prosecutorial misconduct required a new trial. *See, e.g., Flynn*, 875 S.W.2d at 936; *Mabie*, 770 S.W.2d at 335; *United States v. Caruto*, 532 F.3d 822, 830-31 (9th Cir. 2008); *United States v. Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993); *United States v. Laury*, 985 F.2d 1293, 1303-04 (5th Cir. 1993).

2. The Circuit Court's curative remedies were not adequate

The Circuit Court's response to the prosecutor's references to Mr. Brooks' post-*Miranda* silence was lacking. Although the court sustained several objections to the State's reference to Mr. Brooks' post-*Miranda* silence, the curative remedies were wholly inadequate to remove the prejudice. In sustaining Mr. Brooks' objection to the prosecutor's remarks in opening statement, the court instructed the jury as follows:

> Ladies and gentlemen, the objection of defense counsel has been sustained. The jury will be instructed to disregard the prosecuting attorney's comments regarding the defendant's exercise of his right to remain silent. Those comments will be stricken from the record and should play no part in your consideration of the case.

Tr. 168.

While the court instructed the jury not to consider the defendant's invocation of his right to remain silent, it did not order the jury to disregard the entirety of the prosecutor's statement, in particular that Mr. Brooks said "not a word" when the detectives asked him "over and over and over" again what happened. Tr. 163, 168. And whatever curative effect the court's instruction may have had was eliminated when the prosecutor reminded the jurors of Mr. Brooks' failure to provide an exculpatory

statement immediately upon resuming his opening statement. Tr. 168. The court's inaction in response to this improper reference to Mr. Brooks' silence allowed the prosecutor to redirect the jury's attention to Mr. Brooks' failure to offer an explanation for the shooting after he had been Mirandized and reinforce the implication that an innocent man would have talked to the police.

Mr. Brooks objected when the prosecutor asked Lieutenant Thomas if he knew whether Mr. Brooks had told any other police officer what happened. Tr. 536-37. Defense counsel argued the statement was a direct comment on Mr. Brooks' silence. Tr. 537-38. The court sustained the objection, ordered the question stricken from the record, and instructed the prosecutor to rephrase the question. Tr. 539. The court, however, did not instruct the jury to disregard the question and Lieutenant Thomas's answer. The jury, therefore, was left with the impression that it could consider this improper evidence in reaching a verdict.

Mr. Brooks objected to the next series of questions directed to Lieutenant Thomas. These questions and answers were as follows:

Q. At any time during the interview did he tell you that he thought she was an intruder and shot her?

A. No.

Q. At any time during the interview did he say it was an accident?

A. No.

Q. At any time during the interview did he say they are fighting over the gun?

A. No.

Q. Did he ever give you any explanation during the interview as to what had actually taken place?

Tr. 539-40. Defense counsel contended that these questions constituted a "direct comment as to his right not to make any statements." Tr. 541. The court sustained the objection and instructed the jury "to disregard the last question." Tr. 547. But the court did not instruct the jury to disregard the entire line of questioning. Consequently, the court erroneously allowed the jurors to consider the responses to the first four questions in their deliberations.

The Circuit Court did not intervene when the prosecutor impeached Mr. Brooks with his refusal to provide his side of the story to Lieutenant Thomas and Detective Pruneau, Tr. 719, and his failure to tell the detectives he acted in self-defense as he had just told the jury. Tr. 721. Nor did the trial court intervene when the prosecutor stated in closing argument that the jurors should reject Mr. Brooks' claim that he acted in self-defense. The prosecutor argued that if the shooting "really happened" like Mr. Brooks testified, he "would have been screaming it to the walls." Tr. 799.

The trial court's curative efforts were sporadic and did not effectively ameliorate the prejudice caused by the State's improper references to Mr. Brooks' post-*Miranda* silence. Where the State has repeatedly commented on a defendant's post-*Miranda* silence, appellate courts have concluded that curative instructions are inadequate and a mistrial is the proper remedy. In *Dexter*, the circuit court instructed the jury to disregard improper questions posed to the defendant that would have required the defendant to

refer to his post-*Miranda* silence. 954 S.W.2d at 341. This Court held that admonishing the jury to disregard was insufficient because the prosecutor's "mere asking of the questions . . . had already created an inference of guilt by directing the jury to be suspicious" of the defendant's failure to respond. *Id.* Similarly, in *State v. Benfield*, 522 S.W.2d 830 (Mo.App. S.D.1975), the court concluded that curative instructions were inadequate to offset the prejudice resulting from the prosecutor's reference to the defendant's silence. "The trial court's instruction to the jury, 'to disregard the last question asked of this witness and the last answer given,' was not a sufficient antidote for the damaging evidence improperly injected." *Id.* at 835.

As in *Dexter* and *Benfield*, the circuit court's curative instructions were not adequate to counteract the massive prejudice created by the State's improper references to Mr. Brooks' silence. Due to the frequency with which the State commented on Mr. Brooks' silence, a more drastic remedy was necessary. The circuit court should have declared a mistrial as Mr. Brooks requested on several occasions. *Dexter*, 954 S.W.2d at 341; *Steger*, 209 S.W.3d at 18.

3. Mr. Brooks' defense was not transparently frivolous

Mr. Brooks' defense was not transparently frivolous; it was plausible and not refuted by the evidence. Mr. Brooks claimed that Ms Cates pointed a gun at him and that she was shot accidentally during the struggle that ensued when he attempted to disarm her. Tr. 630-32. No one witnessed the incident besides Mr. Brooks, and the State did not present evidence conclusively disproving self-defense. Dr. Case testified that Ms Cates

could have been shot from a distance, as the State maintained, or during a struggle over the gun, as the defense claimed. Tr. 289, 317.

The court of appeals recently examined whether a claim of self-defense was transparently frivolous. In *State v. Steger*, the defendant was convicted of first degree assault, armed criminal action, and unlawful use of a weapon. 209 S.W.3d at 13. Mr. Barrett testified that when he walked out of a shop located on his property, he was blinded by a spotlight shining on him from a vehicle parked on the county road. *Id.* at 14. Mr. Barrett was unable to see who was in the vehicle, and called out, "Who are you? What do you want?" *Id.* According to Mr. Barrett, two shots were fired at him, and he retreated into the shop. *Id.* He claimed he was able to identify the defendant as his assailant when the headlights of a passing vehicle illuminated him. *Id.* Mr. Barrett contacted the county sheriff and reported that the defendant had fired shots at him. *Id.* After calling his friend, Mr. Towell, for assistance, Mr. Barrett stepped out of the shop holding a loaded shotgun. *Id.* at 14-15. He aimed the shotgun at the defendant and yelled at him to leave. *Id.* at 15. The defendant drove away in the direction of Mr. Towell's residence. *Id.* Mr. Towell observed the defendant sitting in his vehicle at the end of the driveway with the dome light on. *Id.* Mr. Towell testified that the defendant pointed his gun out of the passenger side window and fired several shots at him. *Id.* Mr. Towell returned fire with his shotgun. *Id.*

The court concluded that the defendant's claim of self-defense was not transparently frivolous. *Id.* at 18. The defendant disputed Mr. Barrett and Mr. Towell's testimony and claimed he came under gunfire while driving past Mr. Barrett's property.

Id. at 14. He grabbed his gun, held it out of the driver's window, and fired the gun into the air. *Id.* He then drove away. *Id.* He denied having the passenger side window open, turning on the spotlight, driving to another location, or firing shots at Mr. Towell, and he denied seeing Mr. Towell. *Id*. Because the witnesses' conflicting accounts of the shooting made their credibility "a critical issue," the court could not say "Steger's defense was 'transparently frivolous.'" *Id*. at 18.

Mr. Brooks' defense is even stronger than the one presented in *Steger*. In *Steger*, the State presented testimony of eyewitnesses who refuted Mr. Steger's claim that he acted in self-defense by testifying that they saw Mr. Steger fire shots at them without provocation. Here, the State did not introduce direct evidence contradicting Mr. Brooks' claim that he acted in self-defense and did not shoot Ms Cates intentionally. Moreover, Mr. Brooks' testimony that he acted in self-defense to disarm Ms Cates was consistent with the evidence. Accordingly, his defense was not transparently frivolous.

4. The State did not present overwhelming evidence of guilt

Courts have expressed difficulty articulating a test for determining whether the State has presented "overwhelming evidence of guilt." *See, e.g., Dexter*, 954 S.W.2d at 342. According to the most often cited formulation of the test, overwhelming evidence of guilt exists "if [the defendant] were tried one hundred times on this evidence, with or without [the inadmissible evidence], she would be convicted one hundred times." *State v. Martin*, 797 S.W.2d 758, 765 (Mo.App. E.D.1990) (quoting *State v. Smart*, 756 S.W.2d 578, 582 (Mo.App. W.D.1988) (Nugent, J., concurring)), *cited in Dexter*, 954 S.W.2d at

342. The State did not present overwhelming evidence of Mr. Brooks' guilt based on this standard.

The State's theory was that Mr. Brooks could not have acted in self-defense because the shot was fired from too great a distance. There was no dispute that Mr. Brooks and Ms Cates were involved in an argument and that Ms Cates was shot. The contested issue was whether Mr. Brooks intentionally shot Ms Cates or whether Ms Cates was shot in self-defense during a struggle over the gun. The evidence presented by the State did not overwhelmingly prove the former or conclusively refute the latter.

There were no independent eyewitnesses to the shooting. Forensic evidence did not rule out self-defense. Results of gunpowder residue tests were consistent with either side's theory of the case. While the State presented evidence that Ms Cates' hands could have tested positive for gunpowder residue because she was in close proximity to the gun and her hands may have been raised in a defensive position, Tr. 369, 373, 376, the test results also supported Mr. Brooks' claim that Ms Cates was holding the gun with both of her hands when it went off. Tr. 369, 373, 631-32. The lack of soot or stippling associated with the wound did not establish that Mr. Brooks fired the gun from a distance as the State claimed. Dr. Case believed the gun was fired from a distance based on the absence of soot or stippling near the wound. Tr. 284. But her testimony did not conclusively prove the gun was not fired at close range as Mr. Brooks maintained. She testified that soot would be deposited on the skin if the muzzle of the gun was "loosely in contact" with the body. Tr. 283. If the muzzle was farther back, burned or unburned gunpowder could cause stippling. Tr. 283. Dr. Case testified that if she found soot around the

wound, she would "not necessarily" expect to find stippling. Tr. 296. Dr. Case's testimony, therefore, established that a wound caused by a gun fired at close range could produce soot and no stippling. Dr. Case's testimony that blood could wash off soot and her and Detective Gray's testimony that the wound was wet with blood, provided a plausible explanation for how Ms Cates could have been shot at close range without there being any soot associated with the wound. Tr. 273, 296. Furthermore, Dr. Case acknowledged that the shooting could have occurred during a struggle over the gun as Mr. Brooks contended. Tr. 317.

Statements Mr. Brooks made during phone calls before and after the shooting do not supply conclusive evidence of guilt. On the 9-1-1 call Mr. Brooks claimed he shot Ms Cates because he thought she was an intruder. Tr. 635. While this was untrue and a fair basis for impeachment, it was not overwhelming evidence that Mr. Brooks murdered Ms Cates. Mr. Brooks explained to the jury why he said what he said, and maintained he did not intentionally harm Ms Cates. The jury was free to believe or disbelieve his testimony. *State v. Rose*, 86 S.W.3d 90, 105 (Mo.App. W.D.2002). The jury's evaluation of Mr. Brooks' credibility, however, was contaminated by the State's repeated comments that Mr. Brooks refused to cooperate with the police. The improper references to Mr. Brooks' silence may have inflamed the jury and influenced it not to consider the lesser included offense of involuntary manslaughter or acquitting Mr. Brooks.

In a call to his mother shortly after the shooting, Mr. Brooks said: "I shot her by accident," "I told her don't get up," "let's go to bed," "half an hour later she gets up," "we were arguing at first," "I was asleep," and "we should be fucking sleeping, and then

about a half an hour, and then boom." Tr. 201-02. Mr. Brooks also called his friend, Michael Tetrall, on the morning of the shooting. In that call Mr. Brooks said: "We were arguing at first, Michael, about forty minutes, forty-five minutes." Tr. 207-08. A few days after the shooting, Mr. Brooks spoke with Dawn Baxter, one of Ms Cates' friends. According to Ms Baxter, Mr. Brooks said the shooting was "an accident, we were arguing, it was an accident." Tr. 510. As a preliminary matter, with evidence of only one side of the conversation it is difficult to discern the meaning and significance of what Mr. Brooks said on the phone without speculation. Some of Mr. Brooks' statements may have been in response to questions. The State made no effort to place the statements in context by calling Mr. Brooks' mother or Mr. Tetrall as witnesses or by cross-examining Mr. Brooks. Regardless, none of these statements establishes that Mr. Brooks murdered Ms Cates or that he did not act in self-defense.

Mr. Brooks' statements were not inconsistent with his defense. He testified that he and Ms Cates were arguing when he was driving home from Jennings at around 11 p.m., and that Mr. Brooks told her to go to sleep. Tr. 599, 607. He testified that when he arrived home around midnight, Ms Cates got up and they continued arguing even though he asked if they could just go to sleep. Tr. 612-14. Mr. Brooks' statement that he shot her by accident is consistent with his claim that Ms Cates was shot when they fought over the gun, and it was not at odds with his claim of self-defense. Someone unfamiliar with complex legal principles may not understand and appreciate the distinction between an accidental shooting and self-defense. Again, the weight and significance of these statements are matters for the jury to decide. *Rose*, 86 S.W.3d at 105.

Even if the State presented a submissible case, this not the same as proving guilt by overwhelming evidence. *Dexter*, 954 S.W.2d at 342. Courts have found overwhelming evidence of guilt where there are witnesses linking the defendant to the crime or a confession.[14] *Id*. Although such evidence is not required to find overwhelming evidence of guilt, this Court made plain that in addition to there being "no reasonable doubt" the defendant committed the crime, "the degree of prejudice that occurred by use of the inadmissible references to [defendant's] post-*Miranda* warnings silence must be insubstantial." *Id*.

The State's use Mr. Brooks' silence was anything but insubstantial. The State mounted a continual assault on his credibility by commenting on his failure to talk after

[14] In *Dexter*, this Court cited *State v. Sims*, 764 S.W.2d 692, 694 (Mo.App. E.D.1988), where "the defendant signed a written confession"; *State v. Huckleberry*, 823 S.W.2d 82, 86 (Mo.App. W.D.1991), where "five police officers and defendant's wife testified about the threatening manner in which defendant exhibited a shotgun" in a prosecution for unlawful use of a weapon; *State v. Babbitt*, 639 S.W.2d 196, 197 (Mo.App. E.D.1982), where the "victim identified defendant and defendant signed a written confession"; *State v. Hamell*, 561 S.W.2d 357, 364-65 (Mo.App. E.D.1977), where "there was a positive identification, and defendant's palmprint was found at the scene"; and *State v. Smith*, 609 S.W.2d 478, 480 (Mo.App. W.D.1980), where "defendant had sworn during testimony that he committed the offense." 954 S.W.2d at 342.

the police advised him that he had the right to remain silent. The number of references to Mr. Brooks' silence coupled with the prosecutor's argument that Mr. Brooks would have told the police he had acted in self-defense preclude a finding that the inadmissible evidence had no effect on the verdict.

The success of Mr. Brooks' defense depended on whether the jury found his testimony believable. The State attempted to influence the jury by improperly attacking Mr. Brooks' credibility with his post-*Miranda* silence. *See Laury*, 985 F.2d at 1303 (stating that "[j]urors would naturally and necessarily view the prosecutor's line of questioning on cross examination [regarding omissions from the defendant's post-*Miranda* statement], as well as his statement in closing argument, as an attack on Laury's credibility"). The prosecutor urged the jury to reject Mr. Brooks' testimony regarding self-defense by arguing that his silence was indicative of guilt. The jury may have deemed Mr. Brooks' testimony unbelievable based on this improper argument. In a case that turns on the jury's assessment of the defendant's credibility, the court of appeals has noted that "[a]ny evidence which has a tendency to show that defendant's version was a fabrication might have influenced the verdict." *State v. Nolan*, 595 S.W.2d 54, 56 (Mo.App. S.D.1980) (reversing for plain error due to prosecutor's commenting on the defendant's silence). Due process demands that Mr. Brooks is entitled to have his claim of self-defense evaluated by a jury untainted by evidence of his post-*Miranda* silence. *See Flynn*, 875 S.W.2d at 936 (noting that guilty verdict reflected jury's rejection of the defendant's exculpatory evidence and ordering new trial because even though

defendant's explanation "may tax credulity," the State had "no right to comment on [defendant's] exercise of his constitutional right to remain silent").

CONCLUSION

The prosecution's numerous and improper references to Mr. Brooks' post-*Miranda* silence violated his due process rights as established in *Doyle v. Ohio*. Because the *Doyle* violations permitted the prosecutor to undermine his credibility and trial defense, Mr. Brooks was deprived of a fair trial. Accordingly, this Court should reverse the judgment of conviction and remand the case for a new trial.