

**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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**COMPLETE TITLE OF CASE**

STATE OF MISSOURI,

Respondent,

v.

KIRK FINCHER,

Appellant.

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**DOCKET NUMBER WD73262**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** February 28, 2012

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**APPEAL FROM**

The Circuit Court of Jackson County, Missouri  
The Honorable Charles E. Atwell, Judge

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**JUDGES**

Division Two: Witt, P.J., and Ellis and Pfeiffer, JJ.

CONCURRING.

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**ATTORNEYS**

Chris Koster, Attorney General  
Shaun J. Mackelprang, Assistant Attorney General  
Jefferson City, MO

Attorneys for Respondent,

Frederick J. Ernst, Assistant Appellate Defender  
Kansas City, MO

Attorney for Appellant.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**  
**MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

STATE OF MISSOURI, )  
)  
) Respondent, )  
)  
v. ) **OPINION FILED:**  
) **February 28, 2012**  
)  
KIRK FINCHER, )  
)  
)  
) Appellant. )

**WD73262**

**Jackson County**

**Before Division Two Judges:** Gary D. Witt, Presiding Judge, and Joseph M. Ellis and Mark D. Pfeiffer, Judges

Kirk Fincher appeals the judgment of the Circuit Court of Jackson County, Missouri, entered upon a jury verdict finding him guilty of murder in the first degree and armed criminal action. Fincher raises two issues on appeal, asserting that the trial court: (i) plainly erred in failing to declare a mistrial *sua sponte* after he claimed a reference was made during the detective's testimony to Fincher's post-*Miranda* silence, which violated the holding of *Doyle v. Ohio*, 426 U.S. 610 (1976); and (ii) abused its discretion in overruling Fincher's objection to the State's closing argument, in which he claims the prosecutor improperly vouched for the truthfulness of a witness's testimony and commented on facts not in evidence.

**AFFIRMED.**

**Division Two holds:**

(i) *Doyle* held that reference to a defendant's silence after the defendant has been arrested and given his *Miranda* warnings is error. In this case, however, there is no evidence in the record that Fincher had been arrested or that he had been Mirandized at the time he voluntarily participated in an interview with the detective; thus, there was no *Doyle* violation in this case, and the trial court did not err in failing to declare a mistrial *sua sponte*.

(ii) A prosecutor has the right to comment on the evidence and the credibility of witnesses from the State's standpoint during closing argument. In her trial testimony, the witness

confirmed that she told the truth when she was interviewed by the police about the shooting. Although Fincher's counsel attempted to point out inconsistencies between the witness's deposition and trial testimony on cross-examination, the State's redirect examination allowed the witness to clarify the consistencies in her sworn statements. Based on testimonial evidence at trial, the prosecutor did not refer to facts not in evidence when he argued in the State's closing argument that the witness's testimony was truthful. The trial court did not abuse its discretion in permitting the prosecutor's closing argument as his comments fell within the permitted boundaries of closing argument.

**Opinion by: Mark D. Pfeiffer, Judge**

February 28, 2012

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