IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	**WD87726**
v.	)	
	)	**OPINION FILED:**
	)	**January 27, 2026**
JOHNATHAN MOSLEY,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Boone County, Missouri
The Honorable Joshua C. Devine, Judge

Before Division Three: Alok Ahuja, Presiding Judge, Mark D. Pfeiffer, Judge, and Thomas N. Chapman, Judge

Mr. Johnathan Mosley ("Mosley") appeals the judgment of the Circuit Court of Boone County, Missouri ("trial court"), entered on his convictions for fourth-degree domestic assault, fourth-degree assault, first-degree property damage, first-degree stalking, unlawful use of a weapon, and armed criminal action. In Point I, Mosley argues that the trial court committed plain error by improperly adjudicating him to be a persistent offender for sentence-enhancement purposes because Missouri's sentence-enhancement statutory scheme is unconstitutional and because the procedure used by the

trial court failed to adequately address its unconstitutional flaw. In Points II and III, Mosley argues the trial court committed plain error by failing to, *sua sponte*, declare a mistrial following the State's comments during cross-examination and closing argument that purportedly improperly commented on Mosley's post-arrest silence. We affirm.

Facts and Procedural History[1]

On August 21, 2022, police responded to a call reporting gunfire at Victim's[2] trailer home in Columbia, Missouri. Upon arriving at the scene, police saw bullet holes on Victim's vehicle. Further inspection showed that a bullet traveled through the walls of the trailer home. Police spoke to Victim and a man who was living at Victim's home at the time.

Victim and Mosley had been in an "on again, off again" relationship that had ended prior to the shooting. About sixty days prior to the shooting, Victim met with Mosley, who became intoxicated and violent, prompting Victim to leave. Victim did not hear from Mosley again until the day of the shooting.

On the day of the shooting, Mosley contacted Victim via phone during the daytime hours and repeatedly asked Victim to move in with him, but Victim refused. In the evening, Mosley sent Victim text messages stating he was going to come to Victim's

[1] "On appeal from a jury-tried case, we view the facts in the light most favorable to the jury's verdict." *State v. Williams*, 718 S.W.3d 464, 467 n.1 (Mo. App. W.D. 2025) (quoting *State v. Powell*, 707 S.W.3d 822, 824 n.1 (Mo. App. W.D. 2025)).

[2] Pursuant to the directive of section 509.520.1(4) (Supp. IV 2025), we do not use the names of any victims in this opinion. All statutory references are to THE REVISED STATUTES OF MISSOURI (2016), as supplemented through October 22, 2024, unless otherwise indicated. And, pursuant to Missouri Supreme Court Operating Rule 2.02(c)(3), we do not identify the names of non-party witnesses in our ruling today.

home and it was going to be a "shoot out" if the man Victim was living with at that time was at Victim's home when Mosley arrived. Shortly thereafter, Victim and the man living with her heard gun shots from inside Victim's trailer home and dropped to the floor. Victim reported Mosley's threats and the subsequent shooting to law enforcement.

Law enforcement detained Mosley and interviewed him at the police station. During the interview, Mosley spoke openly about his relationship with Victim and, when requested, provided an explanation of his whereabouts on the night of the shooting. Mosley stated that he was drinking with his neighbor on the night of the shooting and that he never left Jefferson City, Missouri, that evening. He further told the interviewing police officer that the last time he had been at Victim's house was about one-and-a-half or two months before the date of the statement he provided to the police officer.

Mosley was charged with first-degree domestic assault, first-degree assault, first-degree property damage, first-degree stalking, unlawful use of a weapon, and three counts of armed criminal action. Because of his prior criminal history, the State also charged Mosley as a persistent offender as defined by section 558.016.3: "A '**persistent offender**' is one who has been found guilty of two or more felonies committed at different times . . . ." Under Missouri law, the finding that a defendant is a persistent offender authorizes the sentencing court to impose a higher prison sentence for certain offenses: "The court shall sentence a person, who has been found to be a persistent offender or a dangerous offender, and is found guilty of a class B, C, D, or E felony to the

authorized term of imprisonment for the offense that is one class higher than the offense for which the person is found guilty.[3]" § 558.016.7.

Missouri's sentence-enhancing statutes direct the trial court to make findings on the facts supporting a defendant's status as a persistent offender: "In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury *outside of its hearing* . . . but prior to sentencing, and *may be established by judicial notice* of prior testimony before the jury." § 558.021.2 (emphasis added).

During pretrial proceedings, Mosley's trial counsel and the State's attorney jointly raised their concern that permitting the trial court, not a jury, to determine the facts necessary to sentence Mosley as a persistent offender may violate Mosley's constitutional right to have those sentence-enhancing facts found by a jury. To avoid any such constitutional due-process dilemma, the State proposed—*and Mosley agreed*—that, in addition to pretrial findings by the trial court, a jury should find that Mosley committed his prior offenses and that the offenses occurred at different times:

> [THE STATE]: I agree, Your Honor. I think that there should be a finding by the jury. It will not be an issue. I think the correct way to go about things is to actually prior to the trial to do—to comport with [section 558.021.2] as a standing which is the—you take notice of it outside the presence of the jury. And then post a guilty finding, if any, we would then have a second phase of the trial in which we tell the jury the defendant has prior convictions. They would need to find that to be the fact.
>
> . . . .

[3] Mosley was charged with three class B felonies (first-degree assault, first-degree domestic assault, and unlawful use of a weapon) and two class E felonies (first-degree stalking and first-degree property damage).

> THE COURT: All right. So the second phase, then, would be only as to whether the acts occurred at different times?
>
> [THE STATE]: . . . I believe whether Mr. Mosley committed those acts, and whether they occurred at different times.
>
> THE COURT: All right. And that would be for the purposes of an enhancement?
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: And [Mosley's counsel], are you in agreement with all of that?
>
> [MOSLEY'S COUNSEL]: I am . . . .

In accordance with this *joint* agreement submitted by the parties to the criminal proceeding, the trial court held a pretrial hearing and found that Mosley met the statutory definition of a persistent offender.

Mosley's jury trial began on October 22, 2024. The State presented testimony from six witnesses, including Victim and the police officer who conducted the initial police interview of Mosley. Mosley chose to testify in his own defense. On direct examination, Mosley represented—for the first time and in contradiction to the voluntary statement he had given law enforcement during his detention interview—that he had actually been in Ashland, Missouri, facilitating a drug sale on the night of the shooting (and not in Jefferson City, Missouri, as he had previously stated to law enforcement). Mosley admitted that he never told the interviewing police officer that he was selling drugs in Ashland at the time of the shooting.

On recross-examination, the following exchanged occurred:

> [THE STATE]: I want to point out August 21, 2022, is over two years ago; right?

MOSLEY: Uh-huh.

[THE STATE]: And this is the first you're ever telling anybody from the State about this?

MOSLEY: You say telling the State about what?

[THE STATE]: That's what you were doing, was a drug deal?

MOSLEY: Yes.

[THE STATE]: *You never told anybody else this this whole time?*

MOSLEY: Why would I tell somebody I was selling drugs? That don't make sense. You selling drugs, would you—

[THE STATE]: Why are you telling us that now you're selling drugs?

MOSLEY: Because I have no choice but to tell you. I got to tell what happened.

[THE STATE]: *Well, why wouldn't you tell us what happened earlier?*

MOSLEY: Did you ask me what happened earlier?

[THE STATE]: *They asked you. You have an attorney. Your attorney never contacted me and said he was selling drugs the whole time. You ever tell your attorney to tell us?*

[MOSLEY'S COUNSEL]: Your Honor—

THE COURT: Approach, Counsel.

[THE STATE]: I'll withdraw that question, Your Honor.

THE COURT: Question has been withdrawn.

[THE STATE]: *So you never told anybody?*

MOSLEY: I was locked up, but, yeah, other than that, no.

[THE STATE]: You waited until you got here today to say this is actually what happened?

MOSLEY: I didn't want even—who wants to tell somebody yeah, I was selling drugs? I didn't want to say it today, but I got to tell what was going on.

[THE STATE]: *I'll tell you: Somebody who has eight charges against them would be somebody that would probably say it. Don't you think?*

THE COURT: Counsel, approach.

(Counsel approached the bench, and the following proceedings were had:)

THE COURT: Mr. [Prosecutor], I want you to move on. We're getting into Defendant's right to remain silent. And there hasn't been an objection made, but I want you to move on. Okay?

[THE STATE]: Yes, sir.

(The proceedings returned to open court.)

[THE STATE]: I have no further questions, Your Honor.

(Emphasis added.)

Then, during closing argument, the State commented:

He was texting [Victim] and calling her and saying he was going to shoot her while he was driving down the road in the middle of nowhere, somewhere north of Ashland, and he didn't have a gun. He was going to sell crack to somebody he didn't know—could only give a first name—on the side of the road on U.S. 63 somewhere north of Ashland. That's a pretty daring drug dealer. *And then, upon finding out he was investigated, he didn't want to give his alibi information until just now.*

(Emphasis added.)

The jury found Mosley guilty of fourth-degree domestic assault, fourth-degree assault, first-degree property damage, first-degree stalking, unlawful use of a weapon, and armed criminal action. In accordance with the parties' pretrial agreement, the trial court brought the jury back after a short break to decide the issue of whether Mosley was a persistent offender, and the jury did, in fact, find Mosley to be a persistent offender.

Mosley filed two post-trial motions. On November 17, 2024, Mosley filed a motion for judgment notwithstanding the verdict or for new trial. That motion was denied, and Mosley does not pursue any claim of error raised in that motion on this appeal.

On December 20, 2024, the day of Mosley's sentencing hearing, Mosley's counsel filed a motion to strike the finding that he was a persistent offender. Mosley's counsel argued—for the first time in the case—that Missouri's relevant sentence-enhancing statutes were unconstitutional because the statutes directed the trial court to find sentence-enhancing facts without a jury and, thus, that the statutes could not be enforced under any circumstance. The sentencing court denied Mosley's motion, in part, because the trial court—*pursuant to Mosley's own request*—had actually placed the persistent offender determination before a jury *in addition to* the procedure directed by the relevant statutory section.

Mosley timely appealed, raising three points. For ease of analysis, we group some points together.

Standard of Review

Mosley concedes in his brief that none of his points were properly preserved and, therefore, that his points may only be reviewed for plain error, if at all.

Generally, this Court may exercise its discretion to review any plain error of the trial court, regardless of whether the error was properly preserved for review. *See* Rule

30.20[4] ("Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom."); *State v. Jackson-Bey*, 690 S.W.3d 181, 186 (Mo. banc 2024) ("Generally, this Court does not review unpreserved claims of error. This Court, however, has discretion to review plain errors." (citation modified)). "Plain error review is discretionary, and this Court will not review a claim for plain error unless the claimed error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted." *State v. Brandolese*, 601 S.W.3d 519, 526 (Mo. banc 2020) (citation modified) (quoting *State v. Clay*, 533 S.W.3d 710, 714 (Mo. banc 2017)).

"The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." *Id.* (quoting *State v. Jones*, 427 S.W.3d 191, 195 (Mo. banc 2014)). "Unless manifest injustice or a miscarriage of justice is shown, an appellate court should 'decline to review for plain error under Rule 30.20.'" *Id.* (quoting *Jones*, 427 S.W.3d at 196).

This Court conducts a two-step process when reviewing a trial court's decision for plain error:

> The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. All prejudicial error, however, is not plain error, and plain errors are those which are evident, obvious, and clear. If plain error is found, the court then must proceed to the second step and

[4] All rule references are to I MISSOURI COURT RULES – STATE 2025.

> determine whether the claimed error resulted in manifest injustice or a miscarriage of justice.

State v. Johnson, 720 S.W.3d 638, 645 (Mo. App. W.D. 2025) (quoting *State v. Mills*, 687 S.W.3d 668, 675 (Mo. banc 2024)).

"As the party seeking plain error review, [Mosley] 'bears the burden of showing that plain error occurred and that it resulted in a manifest injustice or miscarriage of justice.'" *State v. Pendergraft*, 688 S.W.3d 762, 766 (Mo. App. W.D. 2024). "[The Missouri Supreme Court] has clearly stated the burden rests with the appellant." *State v. Jones*, No. SC101104, 2025 WL 3758789, at *4 (Mo. banc Dec. 29, 2025) (citing to *Brandolese*, 601 S.W.3d at 526; *Jones*, 427 S.W.3d at 195-96).

> In summary, an appellate court confronted with a request to grant relief applying plain error review may resolve the claim in one of five ways under the Rule 30.20 framework:
>
> 1. Declining plain error review when an appellant fails to facially establish substantial grounds that the circuit court committed plain error, *i.e.*, evident, obvious, and clear error;
> 2. Declining plain error review when an appellant fails to facially establish substantial grounds that the circuit court committed an error affecting substantial rights;
> 3. Declining plain error review when an appellant fails to facially establish substantial grounds that any alleged error the circuit court committed resulted in manifest injustice or miscarriage of justice;
> 4. Declining to exercise its discretionary authority to review for plain error; or
> 5. Determining an appellant facially established substantial grounds that the circuit court committed plain error affecting substantial rights resulting in manifest injustice or miscarriage of justice, warranting exercise of the appellate court's discretion to review and grant relief.
>
> There is no requirement that an appellate court consider these alternatives in any given order, but an appellate court should not review and cannot grant

> relief pursuant to Rule 30.20 unless the court finds plain error affecting substantial rights and manifest injustice or miscarriage of justice resulted.

Id. at *5.

This is the framework by which this Court reviews Mosley's request for plain error review.

Point I

In Point I, Mosley requests plain error review of the procedure used by the trial court to adjudicate his status as a persistent offender for the purpose of authorizing a higher maximum sentence per statutory authority. Mosley argues that the trial court's finding violated his constitutional right to have the facts supporting that sentence-enhancing determination found by a jury. Mosley further argues that, even though a jury also found the facts necessary to support the persistent offender determination, the jury's finding failed to remedy the constitutional violation because Missouri's relevant sentence-enhancing statutes direct the trial court, not a jury, to make such an adjudication; thus, Mosley claims that he was sentenced under an unconstitutional statutory scheme—which the trial court's additional procedure could not remedy.

"To preserve a constitutional claim of error, the claim must be raised at the first opportunity with citation to specific constitutional sections." *State v. Driskill*, 459 S.W.3d 412, 426 (Mo. banc 2015) (citing *State v. Tisius*, 362 S.W.3d 398, 405 (Mo. banc 2012)). "For an allegation of error to be considered preserved and to receive more than plain error review, it must be objected to during the trial and presented to the [circuit]

court in a motion for new trial." *State v. Minor*, 648 S.W.3d 721, 729 (Mo. banc 2022) (alteration in original) (quoting *State v. Loper*, 609 S.W.3d 725, 732 (Mo. banc 2020)).

Mosley failed to preserve any constitutional objection to the procedure used in his persistent offender determination because he waited until his sentencing hearing to raise any such objection instead of raising it at the first opportunity.

Prior to his sentencing hearing, Mosley had at least three opportunities to raise any constitutional objection to the persistent offender procedure: (1) when the parties initially agreed on the procedure to use for Mosley's persistent offender determination and presented their joint agreement to the trial court; (2) when the trial court made its determination that Mosley was a persistent offender; or (3) when the jury made its determination that Mosley was a persistent offender. For purposes of this opinion, we need not and do not decide which of these opportunities constituted the first opportunity to raise a constitutional objection; we need only decide—which we do—that Mosley had the opportunity to do so well before his sentencing hearing.

Although Mosley failed to properly preserve his constitutional claim for our review, "discretion to review for plain error remains with the appellate court even when an appellant's actions or inactions may have caused or contributed to the error." *Jones*, 2025 WL 3758789, at *4. And, "all errors—whether statutory, constitutional, structural, or based in some other source—are subject to the same treatment under this Court's plain error framework." *Id.* at *5 (quoting *Brandolese*, 601 S.W.3d at 529).

Under the circumstances of this case, however, we refuse to grant plain error review.

Here, the parties recognized the possibility that Missouri's relevant sentence-enhancing statutes might violate Mosley's constitutional rights.[5] To avert any such constitutional dilemma, the State proposed to have both the trial court and a jury make the necessary factual findings. In the discussion surrounding this proposal, Mosley's counsel affirmatively waived any objection to this proposed procedure twice:

> THE COURT: The State's argument as it relates to enhancement is that our statutory scheme is different than that of the scheme that the United States Supreme Court was dealing with such that the judge should still be permitted to make a finding of prior and persistent felony offender status for the purpose of enhancement, and that's what you're asking me to do. However, you're also asking the Court to take a belt-and-suspenders approach and to give that issue to the jury specifically whether the offenses-occurred-at-different-times issue to the jury to resolve just out of an abundance of caution. Is all of that correct?
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> [THE STATE]: Yes, Your Honor.
>
> THE COURT: Okay. And [Mosley's counsel], any problem with the Court proceeding in that way?

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[5] In declining to grant plain error review of Point I, we also necessarily decline Mosley's request for our Court to decide whether section 558.021.2, which directs a trial court to decide whether a defendant is a persistent offender, is unconstitutional in light of the U.S. Supreme Court's decision in *Erlinger v. United States*, 602 U.S. 821 (2024). We do note, however, that this Court does have jurisdiction to decide Point I of Mosley's appeal and that this appeal does not fall within the exclusive jurisdiction of the Missouri Supreme Court:

> For a case to involve the validity of a statute of this state (and, therefore, come within the [Supreme] Court's exclusive appellate jurisdiction under article V, section 3 of the Missouri Constitution), someone must have properly raised a claim that a statute is unconstitutional, properly preserved that claim in the circuit court, and properly presented that claim on appeal.

Comprehensive Health of Planned Parenthood Great Plains v. State, SC101176, 2025 WL 2346611, at *2 (Mo. banc Aug. 12, 2025) (quoting *Goodman v. Saline Cnty. Comm'n*, 699 S.W.3d 437, 440 (Mo. banc 2024)).

[MOSLEY'S COUNSEL]: *No, Your Honor.*

THE COURT: Okay. So that's how we'll plan to proceed. And then we'll take up everything in the morning at our last pretrial conference on the day of trial. I'll ask at that point for the State to provide me with copies of the certified priors so I can take those up for, one, purposes of making sure that it is, in fact, going to be a judge-tried—excuse me, a judge-sentencing case if, in fact, there's a finding of guilty, rather than a jury-sentencing case. And then also to weigh in on the enhancement issue.

[THE STATE]: Yes, Your Honor.

THE COURT: With the understanding that we're still going to have a jury make that determination on the enhancement issue as well.

[THE STATE]: Yes, Your Honor.

THE COURT: All right. That's okay by the defense?

[MOSLEY'S COUNSEL]: *Yes, Your Honor*.

(Emphasis added.)

Simply put, the trial court did exactly as Mosley requested, and Mosley now complains that he should receive plain error relief from this Court. Though our Supreme Court has recently concluded that a defendant's conduct in causing—or contributing to cause—the error he attributes to the circuit court does not constitute a waiver of his right to seek plain error review, *see State v. Burkett*, No. SC101071, 2025 WL 3758773 at *5 (Mo. banc Dec. 29, 2025), such conduct is the sort of fact that "weigh[s] heavily in favor of declining plain error review, " *id.* at *4. In *Burkett*, the Supreme Court declined to exercise plain error review where a defendant affirmatively indicated to the circuit court that he had no objection to the State's proposed jury instructions and did not affirmatively request a self-defense instruction. *Id.* at *5.

And, though our Supreme Court in *Burkett* was critical of appellate courts in Missouri for use of the term "waiver" in the context of plain error review, *see State v. Thompson*, 711 S.W.3d 339, 348 (Mo. banc 2025) ("Although plain error review is discretionary, this Court will not use plain error to impose a *sua sponte* duty on the trial court to correct Defendant's invited errors."); *Jackson-Bey*, 690 S.W.3d at 187 ("Plain 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."); *State v. Bolden*, 371 S.W.3d 802, 806 (Mo. banc 2012) ("[T]he proffering of an incorrect instruction to the trial court is an invited error by the party who proffered the instruction."); *State v. Mayes*, 63 S.W.3d 615, 632 n.6 (Mo. banc 2001) (stating a defendant may not take advantage of a self-invited error after agreeing to a procedure at trial by later claiming it was error on the part of the circuit court); *State v. Whitfield*, 696 S.W.3d 492, 498 (Mo. App. W.D. 2024) ("Whitfield cannot now complain of the trial court's action when the trial court did exactly as Whitfield requested."), it was *not* critical of appellate courts refusing to exercise discretion to grant plain error review where the defendant had affirmatively participated in causing the error below that was later complained of on appeal from a criminal conviction. Instead, the *Burkett* court explained the reference to "waiver" in such precedent as follows:

> Although some of this Court's prior cases speak of waiving plain error review, these cases are merely articulating the discretion an appellate court exercises to decline review when a defendant affirmatively causes or contributes to an . . . error [during trial]. This is consistent with Rule 30.20, which leaves the determination as to whether an appellate court conducts plain error review at its discretion—"plain errors affecting substantial rights **may be considered in the discretion** of the court . . . ."

Burkett, 2025 WL 3758773, at *5 (second omission in original).

In the case at hand, Mosley affirmatively acquiesced to the procedure outlined by the trial court that was designed to provide post-*Erlinger* due process protections to Mosley. In fact, the procedure that Mosley affirmatively agreed to provided Mosley with a factual finding of his persistent offender status by *both* a jury *and* the judge presiding over his criminal case. It is entirely possible, if not probable, that this was a reasonable trial strategy by Mosley's counsel to give him two bites at the proverbial apple on the topic of his persistent offender status. And, as we have stated before about such trial strategy and *sua sponte* judicial interference with such strategy:

> Counsel appropriately resents judicial interference in their appropriate representation of a client during trial. Counsel makes many tactical decisions at trial, and the court is not privy to the mental process in determining the tactical approach employed by counsel. Thus, when counsel affirmatively represents to the court the waiver of any objection . . . , the court can assume that counsel's decision is reasoned and calculated and that counsel does not want the court to preclude . . . the proposed procedure.

State v. Yole, 136 S.W.3d 175, 180 (Mo. App. W.D. 2004).

Considering all of the above factors, we decline to exercise our discretion to review Mosley's Point I on appeal for plain error.

Point I is denied.[6]

[6] We also fail to see how Mosley could argue that he has suffered a manifest injustice when he received the constitutional due process protection discussed in *Erlinger*—that a jury make any factual finding as to his persistent offender status.

Points II and III

Points II and III argue the trial court plainly erred in failing to, *sua sponte*, declare a mistrial when the State purportedly commented on Mosley's post-arrest "silence" during cross-examination and during closing argument in violation of Mosley's right to remain silent, to due process, and to a fair trial. Mosley failed to object to the State's questions during cross-examination or to the statements made by the State during closing argument. Therefore, this Court may review Mosley's arguments on appeal only if Mosley first demonstrates the trial court made an evident, clear, and obvious error in failing to, *sua sponte*, declare a mistrial because of the State's statements.

"Appellate courts are wary of claims that a trial court erred in failing to declare a mistrial *sua sponte* in a criminal case." *State v. Sprofera*, 427 S.W.3d 828, 837 (Mo. App. W.D. 2014) (citation modified) (quoting *State v. Hitchcock*, 329 S.W.3d 741, 749 (Mo. App. S.D. 2011)). "Granting a mistrial is a drastic remedy and should be exercised only in extraordinary circumstances where the prejudice to the defendant cannot be removed any other way." *Id.* (quoting *State v. Garvey*, 328 S.W.3d 408, 416 (Mo. App. E.D. 2010)). "Trial judges are not expected to assist counsel in trying cases, and trial judges should act *sua sponte* only in exceptional circumstances." *Id.* (quoting *State v. Barker*, 410 S.W.3d 225, 235 (Mo. App. W.D. 2013)). "Uninvited interference by the trial court in trial proceedings is generally discouraged because it risks injecting the court into the role of a participant and invites error." *State v. Paine*, 631 S.W.3d 691, 694 (Mo. App. W.D. 2021).

"This precept holds particularly true in the context of closing arguments where, in the absence of an objection and request for relief, a trial court's uninvited interference with summation may itself constitute error." *State v. Creekmore*, 721 S.W.3d 917, 924 (Mo. App. S.D. 2025) (citation modified) (quoting *State v. Lloyd*, 205 S.W.3d 893, 908 (Mo. App. S.D. 2006)). "A defendant's failure to object to an improper argument is often strategic, and uninvited intervention may emphasize the matter in a way the defendant chose not to." *Id.* (quotation marks omitted) (quoting *State v. Carter*, 415 S.W.3d 685, 691 (Mo. banc 2013)). "Thus, because trial strategy looms as an important consideration in any trial, assertions of plain error concerning matters contained in closing argument are generally denied without explication." *Id.* (citation modified) (quoting *State v. Thomson*, 390 S.W.3d 171, 176 (Mo. App. E.D. 2012)). "[R]eversal is warranted only if the defendant shows the improper argument 'had a decisive effect on the jury's determination.'" *State v. Wood*, 580 S.W.3d 566, 579 (Mo. banc 2019) (quoting *State v. McFadden*, 369 S.W.3d 727, 747 (Mo. banc 2012)).

The United States Supreme Court held, in *Doyle v. Ohio*, 426 U.S. 610 (1976), that the use of a defendant's silence at the time of arrest and after receiving a *Miranda*[7] warning, for impeachment purposes, is "fundamentally unfair and violates the due process clause of the Fourteenth Amendment." *State v. Dexter*, 954 S.W.2d 332, 337 (Mo. banc 1997). "This rule rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach

[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

an explanation subsequently offered at trial.'" *Id.* (quoting *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986)). "The State may not induce a defendant's silence through a *Miranda* warning and then use that silence as evidence against the defendant at trial." *State v. O'Keefe*, 681 S.W.3d 615, 636 (Mo. App. E.D. 2023).

"Where the appellant asserts plain error resulting from *Doyle* violations, we first determine whether any of these specific references actually crossed the *Doyle* line and, therefore, were erroneous." *State v. Fincher*, 359 S.W.3d 549, 554 (Mo. App. W.D. 2012) (citation modified) (quoting *State v. Cornelious*, 258 S.W.3d 461, 465 (Mo. App. W.D. 2008)).

Here, Mosley's complaint of a *Doyle* violation is misplaced. Simply put, Mosley made a voluntary "alibi" statement to law enforcement after his original detention, and he changed his story at the time of trial. The State was not attacking Mosley's credibility because of his "silence" upon detention and interview; instead, the State was challenging Mosley's credibility for making a prior inconsistent statement to law enforcement about his alibi at the time of the crime.

The record clearly demonstrates that Mosley made an affirmative and voluntary statement to law enforcement upon his detention about his whereabouts on the night of the crime. First, the interviewing police officer testified that Mosley stated to him, during the police interview following Mosley's detention, that Mosley did not leave Jefferson City during the time of the crime. Second, Mosley conceded on cross-examination that he had told the interviewing officer that he did not leave Jefferson City that night. Third,

video evidence of Mosley's interview with law enforcement clearly confirms Mosley's Jefferson City alibi statement at the time of his original detention for questioning.

Accordingly, the State was not impeaching Mosley with his post-detention *silence* but with his *prior inconsistent statement* to law enforcement. Because the State was not impeaching Mosley with his *silence*, *Doyle* is not applicable to this case. *See Anderson v. Charles*, 447 U.S. 404, 409 (1980) ("*Doyle* does not apply to the facts of this case. Each of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of 'silence'. . . ."); *State v. Rhodes*, 988 S.W.2d 521, 527 (Mo. banc 1999) (finding that "[t]he prosecutor did not comment on appellant's silence but on his untruthful statements [to police interrogators upon detention and questioning]"); *State v. Gillespie*, 401 S.W.3d 560, 564 (Mo. App. E.D. 2013) ("Since Appellant waived his right to remain silent and chose to give a detailed statement to Detective McPherson upon interrogation, and then testified inconsistently with part of that statement at trial, the State was allowed to explore any omissions in that statement in light of Appellant's trial testimony.").

The alibi Mosley offered at trial—that he was instead in Ashland facilitating a drug deal at the time of the shooting—was inconsistent with the version of events Mosley recounted in his statement to law enforcement. "[Mosley] was under no duty to speak [to law enforcement], but having spoken, he enjoys no license to lie." *State v. Santillan*, 1 S.W.3d 572, 580 (Mo. App. E.D. 1999).

The statements Mosley made to officers were admissible to impeach Mosley's contradictory testimony at trial, and the jury was entitled to consider the inconsistencies between his testimony at trial and his prior statement to law enforcement as evidence of his guilt. *See Miller v. Engle*, 724 S.W.2d 637, 640 (Mo. App. W.D. 1986) ("[P]rior inconsistent statements may be considered as substantive evidence when offered to sustain a burden of proof if the declarant is available for cross-examination.").

The trial court has not committed error, plain or otherwise.

Points II and III are denied.

Conclusion

The judgment of the trial court is affirmed.

Mark D. Pfeiffer, Judge

Alok Ahuja, Presiding Judge, and Thomas N. Chapman, Judge, concur.