No. SC90347

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ROBERT BROOKS,

Appellant.

Appeal from the Jefferson County Circuit Court
Twenty-third Judicial Circuit
The Honorable M. Edward Williams, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a Jefferson County judgment sentencing Mr. Brooks to serve concurrent terms of life and seventy-five years for the crimes of murder in the second degree, § 565.021, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000. This Court has jurisdiction pursuant to Article V, section 10, of the Missouri Constitution.

STATEMENT OF FACTS

The appellant, Robert Brooks, was charged with murder in the first degree, § 565.020, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000 (L.F. 8-9). After a jury trial, Mr. Brooks was found guilty of murder in the second degree and armed criminal action (Tr. 815). Viewed in the light most favorable to the verdict, the facts were as follows:

In August, 2006, Mr. Brooks was engaged to, and living with, Amanda Cates, the victim (Tr. 381, 591). They lived in Crystal City, in Jefferson County (Tr. 184, 381, 591). Mr. Brooks and the victim were both police officers – Mr. Brooks in Calverton Park, and the victim in Normandy (Tr. 437, 516, 589).

On the evening of August 28, 2006, Mr. Brooks attended a meeting of the Calverton Park City Council (Tr. 442). One of the agenda items at the meeting was whether Gertrude ("Trudy") Moore, a part-time police officer that Mr. Brooks was training, would be hired on a full-time basis (Tr. 441). Mr. Brooks spoke to the Calverton Park Chief of Police on Ms. Moore's behalf, urging that she be hired (Tr. 442). Ms. Moore was not hired, and Mr. Brooks was upset (Tr. 442).

After the meeting, Mr. Brooks confronted the chief of police (Tr. 442). Mr. Brooks raised his voice at the chief, and he told the chief that he felt the chief had failed to adequately advocate for Ms. Moore (Tr. 442-443). Although Mr. Brooks was engaged to the victim, Mr. Brooks had a romantic or intimate inclination for Ms.

Moore, and he was upset when she did not get the job (*see* Tr. 442, 446-447, 450).

After Mr. Brooks confronted the chief of police, Mr. Brooks and Ms. Moore went to a bar, arriving at about 9:30 p.m. (Tr. 443). While he was with Ms. Moore at the bar, Mr. Brooks received several telephone calls on his cellular telephone (*see* Tr. 443-444). Mr. Brooks told Ms. Moore that one call was from a Calverton Park police officer, and that the other calls were from his daughter (Tr. 444).

A subsequent review of Mr. Brooks's cellular telephone and telephone records revealed that Mr. Brooks received six calls from 9:48 p.m. until about 10:33 p.m. (Tr. 470-471, 475-478). The call at 9:48 came from Charles Ervin, a Calverton Park police officer (Tr. 475, 522). The other five calls came from the victim's cellular telephone and Mr. Brooks's home telephone (Tr. 470, 475-477).

One call, at 9:50 p.m. came from the victim's cellular telephone (Tr. 470, 475). The next four calls all came from Mr. Brooks's home telephone over about a seven-minute period (Tr. 475-477). The first two calls came in quick succession at 10:27 p.m., and they each lasted twenty-seven seconds (Tr. 475-476). The third call came at 10:28 p.m., and it, too, lasted twenty-seven seconds (Tr. 476-477). The fourth call came at 10:33 p.m., and it lasted sixty-two seconds (Tr. 477).

At about 10:45 p.m., Mr. Brooks received yet another call from his home telephone (Tr. 471, 477-478). This call lasted one minute and thirty-six seconds, and during this call, Mr. Brooks raised his voice and told the caller "he was in the

parking lot and he would be home when he got home" (Tr. 444, 477-478). At about 11:00 p.m., Mr. Brooks and Ms. Moore left the bar; Mr. Brooks had drunk seven or eight beers, and when he left, he ordered three beers to go (Tr. 446-447). At some point while he and Ms. Moore were at the bar, Mr. Brooks had gotten upset that Ms. Moore was wearing an ankle bracelet that she had received from another man (Tr. 448).

After leaving the bar, Ms. Moore asked Mr. Brooks to drive her back to the police station so that she could pick up her purse, which she had left inside her car (Tr. 446). Ms. Moore intended to have Mr. Brooks drive her home because she did not feel capable of driving (Tr. 446). Mr. Brooks wanted to get a hotel room with Ms. Moore, stating that he "didn't want to deal with the problems at home" (Tr. 447). Mr. Brooks had made advances in the past, and he had invited Ms. Moore to an upcoming baseball game, saying that she was better company than his fiancée (Tr. 455). Mr. Brooks had also previously told Ms. Moore that his fiancée "wasn't any fun" (Tr. 456).

Ms. Moore declined to get a hotel room with Mr. Brooks, and as they drove from the bar to the police station, Mr. Brooks continued to drink (Tr. 448). Ms. Moore then received a telephone call from a friend, and Mr. Brooks got mad and said that she "didn't need to be on the phone with another man when [she] was with Big Daddy" (Tr. 449). At around that time, at 11:07 p.m., Mr. Brooks called

"Michelle" on his cellular telephone (Tr. 489).

At the police station, Ms. Moore retrieved her purse from her vehicle and returned to Mr. Brooks's vehicle so that he could drive her home (Tr. 449-450). When they reached Ms. Moore's house, Mr. Brooks kissed Ms. Moore on the cheek (Tr. 450). Then, when Ms. Moore opened the door to get out, Mr. Brooks pulled her back in and tried to kiss her again (Tr. 450). Ms. Moore pulled away from Mr. Brooks, and Mr. Brooks told Ms. Moore to dump out the liquor he had purchased for her before leaving the bar (Tr. 450-451). Ms. Moore complied, and Mr. Brooks said he would return at 5:00 to pick her up for work (Tr. 451). It was about 11:30 p.m. when Ms. Moore arrived home (Tr. 452).

At that point, at about 11:33 p.m., Mr. Brooks called Charles Ervin (Tr. 478). At 11:49 p.m., Ervin called Mr. Brooks's cellular phone (Tr. 479). Mr. Brooks told Ervin he was on his way home, and they talked about Ms. Moore (Tr. 523).

At 11:59 p.m., Mr. Brooks called home and had an eleven and a half minute conversation with the victim (Tr. 479-480). After that call ended, Mr. Brooks immediately called home again at 12:11 a.m. (Tr. 480). That call terminated after twenty-nine seconds, and Mr. Brooks called home again at 12:12 a.m. (Tr. 481). That call lasted sixty-nine seconds, and Mr. Brooks called home again at 12:13 a.m. (Tr. 491). That call lasted seventeen seconds (Tr. 481). Mr. Brooks and the victim argued during these calls, and after the first call, Mr. Brooks repeatedly called the victim

back to continue the argument (*see* Tr. 601, 670).[1] These calls spanned a period of approximately fourteen minutes (Tr. 479-481).

Shortly thereafter, Mr. Brooks arrived home (*see* Tr. 382, 393). By that time, Mr. Brooks had consumed the beers he had bought at the bar (Tr. 403). Mr. Brooks went inside and took off his clothes, ostensibly to get ready for bed (*see* Tr. 199, 393, 611). But Mr. Brooks also continued the earlier argument, yelling at the victim, and physical violence ensued (*see* Tr. 199, 220, 222-223, 252-253, 393). The victim retreated to the bathroom, and, at that point, Mr. Brooks shot the victim (Tr. 393).

The bullet – a hollow-point Black Talon – entered the victim's right cheek, went down through the victim's neck, passed through the victim's jugular vein and carotid artery, and lodged in the base of the victim's neck (Tr. 286-287, 345-346). The location of the entry wound on the victim's right cheek, the downward movement of the bullet, the lack of soot or stippling around the wound, the presence of gunshot residue on the victim's hands, and the position of the victim's hands behind her head after she fell on the floor, were consistent with the victim putting up her hands, ducking (or starting to duck), and turning her head to the left when the shot was fired from at least eighteen or thirty-six inches away (Tr. 271-272, 283, 285, 288-

[1] At trial, appellant attempted to portray the victim as the antagonist, and he claimed that he kept calling back "trying to calm her down" (Tr. 670). The jury, of course, was not required to credit this aspect of appellant's self-serving testimony.

291, 294, 328-329, 360, 365-366, 369).

After she was shot, the victim collapsed and hit the back of her head on the floor (*see* Tr. 288). The victim was not rendered unconscious immediately, and it took several minutes for the victim to bleed to death (Tr. 292-293). During that time, at about 12:27 p.m., Mr. Brooks apparently called Charles Ervin (his friend at the Calverton Park police department), but the call was terminated after only four seconds; Ervin did not know that his telephone had been called (*see* Tr. 482, 524).

Mr. Brooks then called 911 (Tr. 182-184, 398). Mr. Brooks told the 911 operator that he had just shot his fiancée, thinking that she was an intruder in the house (Tr. 407-408). Mr. Brooks said, "Oh f---ing – I though my – my fiancée was an intruder and I shot her" (Tr. 407-408).

The 911 operator transferred Mr. Brooks to the police, and after requesting an ambulance and the police, Mr. Brooks repeated his story, stating, "My fiancée, she had been – I need an ambulance, please. She – I thought she was – f---ing I woke up, and I thought she was an intruder and – please help me" (Tr. 408). Mr. Brooks then confirmed that he had shot her, and he said that he had shot her "In the head" (Tr. 408-409). Then, after identifying the victim by name, Mr. Brooks said, "Yeah, she turned the f---ing light on, and I didn't know who it was. I fell asleep" (Tr. 410). A moment later, Mr. Brooks continued his explanation, stating, "I didn't know who she was. I told her, don't wake me up" (Tr. 411).

Shortly thereafter, police arrived on the scene, and Mr. Brooks's daughter let them into the house (Tr. 184-185, 412). The officers who arrived at the scene found the victim lying in the bathroom (Tr. 187). One of the officers checked the victim for a pulse, but the victim had no pulse (Tr. 188-190). The other officer found Mr. Brooks's gun on the bed (Tr. 189, 197).

While the police were at the scene, Mr. Brooks was not under arrest, and he was allowed to use the telephone (Tr. 201). During that time, Mr. Brooks talked to his mother, and he said, "I told her don't get up, I said let's go to bed, and a f---ing half an hour later she gets up" (Tr. 201-202). Mr. Brooks also said: "no, she is dead, mom, mom this is bulls---, 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 f---ing sleeping, and then about a half an hour, and then boom" (Tr. 202). Mr. Brooks also talked on the telephone to Michael Tetrall of the Jennings Police Department (Tr. 207). Mr. Brooks said, "We were arguing at first, Michael, about forty minutes, forty-five minutes" (Tr. 208). Aside from the comments the officers overheard while Mr. Brooks was on the telephone, Mr. Brooks did not attempt to explain the shooting to the officers who arrived at the house (Tr. 192-193, 211-212, 398-399).

At about 1:58 a.m., Mr. Brooks agreed to go to the Crystal City police station for an interview (Tr. 209, 399, 421, 432). Mr. Brooks was not placed under arrest, but he was transported to the police station (Tr. 399, 424-425).

At the police station, Mr. Brooks was contacted by Officer Terry Thomas, who wanted to collect samples for a gunshot residue test (Tr. 529). Mr. Brooks said he had no problem with the test, because he had shot the gun (Tr. 529, 532). Mr. Brooks informed Officer Thomas that he had performed CPR on the victim and that he had washed his hands (Tr. 532). Mr. Brooks refused a breathalyzer test, but he admitted that he had drunk six beers (Tr. 533).

At that point, Mr. Brooks was advised of the *Miranda* warnings (Tr. 534). Mr. Brooks initialed each of the *Miranda* warnings, but he refused to sign the form (Tr. 535). Mr. Brooks was then questioned, and, while Mr. Brooks stated "I don't have nothing to hide," and "I didn't do nothing at all," he repeatedly avoided answering questions by giving non-responsive answers (Tr. 558-569). For instance, after the officers outlined the information they had received from the 911 operator and tried to confirm it, Mr. Brooks asked for "some more water," and then asked "Are you going to bring her back?" and "Is she going to come back?" (Tr. 568). In the end, during the interview, Mr. Brooks did not give an account of the shooting (Tr. 570-571). After the interview concluded, Mr. Brooks was arrested (Tr. 569).

Three days after the murder, on September 1, 2006, Mr. Brooks called Dawn Baxter, one of the victim's friends (Tr. 510). Ms. Baxter asked Mr. Brooks what had happened, and Mr. Brooks said, "it was an accident, we were arguing, it was an accident" (Tr. 510). Ms. Baxter told Mr. Brooks to "tell them the truth," and Mr.

Brooks said, "I already did" (Tr. 510-511). Mr. Brooks then told Ms. Baxter he was in jail, when, in fact, he had bonded out the day before (Tr. 511).[2]

At trial, which commenced on August 20, 2007, Mr. Brooks testified that he and the victim had argued for 40-45 minutes while he was driving home (Tr. 601). He said that he had no animosity toward the victim, and that the victim, who was upset that he had not come home sooner, had told him not to come home (Tr. 602, 612). He said that when he arrived home, the victim jumped out of bed and started to yell at him (Tr. 612). He claimed that he had tried not to fight, but that the victim had physically attacked him and, after finding evidence of his telephone call to Michelle at 11:07 p.m., started to throw things at him (Tr. 613-625). Mr. Brooks said that he then tried to leave the house, but that the victim pointed a gun at him and said, "you ain't going no f---ing place" (Tr. 626, 629). Mr. Brooks claimed that he then tried to grab the gun, that they struggled over the gun, and that the gun went off (Tr. 630). He then attempted to explain all of his previous lies and apparent inconsistent statements (Tr. 635-636, 639-643).

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[2] Ten days before the murder, on August 19, appellant had confided in Ms. Baxter – at the victim's birthday dinner – that he was concerned about his relationship with the victim (Tr. 509). Appellant had said to Ms. Baxter, "we are not going to make it. She doesn't like me" (Tr. 509). Ms. Baxter had said then that "maybe if you quit drinking and come home, then everything would work out" (Tr. 509).

The jury found Mr. Brooks guilty of murder in the second degree and armed criminal action (Tr. 815). After a penalty phase, the jury recommended sentences of life imprisonment and seventy-five years (Tr. 837).

On November 1, 2007, the trial court sentenced Mr. Brooks in accordance with the jury's recommendation (Tr. 849). The court ordered the sentences to run concurrently (Tr. 849). On November 9, 2007, Mr. Brooks filed his notice of appeal (L.F. 46).

On March 3, 2009, the Court of Appeals affirmed Mr. Brooks's convictions and sentences. On October 6, 2009, this Court granted Mr. Brooks's application for transfer.

ARGUMENT

I.

The trial court did not plainly err or abuse its discretion in allowing the state to present evidence that Mr. Brooks failed to explain the shooting prior to his arrest or when he made a statement after the *Miranda* warnings.

Relying on *Doyle v. Ohio*, 426 U.S. 610 (1976), and various cases that have applied *Doyle*, Mr. Brooks asserts that the trial court erroneously allowed the state to repeatedly comment on his post-*Miranda* silence (App.Sub.Br. 36). Mr. Brooks alleges that these improper comments occurred in opening statement, during the testimony of various witnesses, and in closing argument (App.Sub.Br. 36).

A. Preservation and the standard of review

Mr. Brooks asserts this claim as if it were properly preserved for review, and, initially, he makes no reference to whether the claim was preserved by timely objection (App.Sub.Br. 36-37). Eventually, on page 66 of his brief, in footnote 13, Mr. Brooks acknowledges the possibility that the Court could conclude that his claim was not properly preserved at trial (App.Sub.Br. 66-67). And, indeed, as will be discussed below, virtually no aspect of Mr. Brooks's claim on appeal was preserved by a proper objection. For, while objections were made to some allegedly improper comments or testimony at trial, the various instances specifically identified by Mr. Brooks on appeal occurred either without objection, or after an affirmative

statement of "no objection" by the defense.

Generally, a party on appeal is held to the specific objections presented to the trial court. *State v. Jones*, 7 S.W.3d 413, 417 (Mo.App. E.D. 1999). "In the context of *Doyle* violations that have been preserved for appeal, 'the state bears the burden of proving that a federal constitutional error was harmless beyond a reasonable doubt.'" *Id*. (citing *State v. Dexter*, 954 S.W.2d 332, 340 n. 1 (Mo.banc 1997)). "When the error is not preserved, appellant must show that plain error occurred, resulting in manifest injustice." *Id.* Under the plain error standard, while the same types of factors will be considered in determining whether reversal is required, *see id*., a defendant is not entitled to a new trial unless the defendant can demonstrate that the error was "outcome determinative." *See Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002).

B. The state did not repeatedly comment on Mr. Brooks's post-*Miranda* silence, and to the extent that there was any improper comment on Mr. Brooks's post-*Miranda* silence, the trial court either provided an adequate remedy or did not commit reversible error

In *Doyle v. Ohio*, the United States Supreme Court held that the use for impeachment purposes of a defendant's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment. 426 U.S. at 619. The Court explained:

> while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 618. A comment on a defendant's invocation of his constitutional rights can also be an impermissible comment on the defendant's post-*Miranda* silence. *See State v. Martin*, 797 S.W.2d 758, 764 (Mo.App. E.D. 1990).

1. Factual background leading up to the alleged *Doyle* violations

Shortly after the murder, police advised Mr. Brooks of the *Miranda* warnings, and Mr. Brooks made various statements. Among other things, Mr. Brooks stated that he did not know what had happened during the homicide, that he had nothing to hide, and that he had done nothing during the homicide (*see* Tr. 550-569). (The specifics of Mr. Brooks's statement will be set forth in greater detail below.) In addition, Mr. Brooks indirectly suggested that he had no motive to kill the victim, and he effectively refused to answer some specific questions by asking diversionary questions in response to the questions posed (*see* Tr. 550-569).

By the time of trial, it was anticipated that Mr. Brooks would take the stand and testify that he acted in self-defense (*see* Tr.171-174). This, of course, was different

from what he had told the police, and defense counsel anticipated the trouble that would ensue when Mr. Brooks took the stand and offered his new exculpatory account of the homicide. Specifically, during voir dire, defense counsel asked: "Now, is there anybody who, for any reason has either lied or not told the truth about something that they have felt ashamed of in their life?" (Tr. 112). Defense counsel then observed (in discussing this question with a venireperson) that "When people aren't used to saying something out loud, when people aren't used to expressing themselves, something emotion thing, it's possible that the first reactions is not to tell the truth?" (Tr. 112-113). Defense counsel then asked, "Does that mean that anything they ever say from that point forward means they are automatically lying?" (Tr. 113). Defense counsel followed this with: "If . . . somebody is ashamed of something at first, I mean it's a lie, do you believe that that forever forfeits their right to come clean, or tell somebody what happened – . . . – that shame was the reason – reason to not disclose" (Tr. 113). And, finally, defense counsel asked, "Is there anybody who feels that that's not possible? That if something happens you always tell the truth right away or otherwise forever you are a liar?" (Tr. 113).

Defense counsel then explained that Mr. Brooks would be taking the stand, and that Mr. Brooks simply wanted the jury to give him a fair opportunity to tell his story; defense counsel stated: "And what ultimately what I want is the opportunity for Mr. Brooks to get up and – today, or whenever that day maybe, to have the same

opportunity that you give to the witnesses that Mr. Jerrell [the prosecutor] calls" (Tr. 114). Defense counsel concluded by saying "He [Mr. Brooks] wants an opportunity to be listened to the same as any other witness, the same as any other person who comes in here" (Tr. 115). And, consistent with these pronouncements, defense counsel told the jury in opening statement that Mr. Brooks would testify that he acted in self-defense when he shot the victim (Tr. 171-174).

The state was prepared for this new theory, and in anticipation of the new self-defense claim that Mr. Brooks intended to present, the state sought to impeach it by introducing evidence of Mr. Brooks's post-*Miranda* statement and highlighting the differences between it and Mr. Brooks's subsequent testimony. It is in this context that Mr. Brooks asserts that the state repeatedly and improperly commented on his post-*Miranda* silence during the state's opening statement, during the presentation of evidence, and during closing argument. Respondent will address each allegation in the order that they allegedly occurred at trial.

1. The state's opening statement

In laying out the alleged *Doyle* violations, Mr. Brooks first takes issue with the state's opening statement (*see* App.Sub.Br. 55-56); there, the prosecutor made the following allegedly improper statements (as emphasized in Mr. Brooks's brief):

> They [Officer Terry Thomas and Detective Mike Pruneau] also had [Mr. Brooks] fill out – or gave him a Miranda sheet, it has all the

warnings on it, he just initialed by each one that he understood. Well, of course he understood, he's been a cop for seventeen years.

Now, I am going to attempt to play that interview on the CD. Detective Mike Pruneau was also in the room. He is a police office with the Crystal City Police Department. ***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 accidently 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 off at that point because he invokes his rights, so at that point I got to turn it off.

[Here, defense counsel objected to the prosecutor's comment that

Mr. Brooks had invoked his rights, pointing out that the prosecutor had made an improper comment on Mr. Brooks's post-*Miranda* silence (Tr. 163-164). The trial court sustained the objection and agreed to instruct the jury; opening statement continued as follows:]

THE COURT: 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 this case.

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

(Tr. 162-164, 168) (emphasis added).

Initially, it must be pointed out that there was no objection made to any of the comments Mr. Brooks now identifies on appeal as impermissible (Tr. 162-164-168). The one objection – which was sustained by the trial court – was to the prosecutor's specific reference to Mr. Brooks's invocation of his rights (Tr. 163-164). And, as the record shows, this reference, to the extent that it was a comment on Mr. Brooks's post-*Miranda* silence, was struck from the record and removed from the jury's consideration (Tr. 168). Thus, Mr. Brooks's argument about the other comments –

the prosecutor's use of the phrase "Not a word," or similar language – is wholly unpreserved for appellate review.

Where errors are not preserved for review, this Court is not required to review them. But, in any event, with regard to the prosecutor's comments along those lines, there was no error, plain or otherwise.

First, it does not appear that *Doyle* even applies to the facts of Mr. Brooks's case. At trial, the evidence showed that Mr. Brooks was not under arrest at the time he made his statements (Tr. 522-524, 557-558). In fact, the police expressly told Mr. Brooks that he could walk out of the interview and leave the station (Tr. 557-558). Thus, *Doyle* was not implicated. *See State v. Barton*, 240 S.W.3d 693, 703 (Mo. banc 2007) (quoting *State v. Mahan*, 971 S.W.2d 307, 315 (Mo. banc 1998), for the proposition that "*Doyle* is expressly limited to the use of silence '*at the time of arrest and after receiving Miranda warnings*.'"); *State v. Simmons*, 955 S.W.2d 752, 764 (Mo. banc 1997) ("evidence of a defendant's silence is only disallowed if the defendant was in custody"); *State v. Kinder*, 942 S.W.2d 313, 326 (Mo. banc 1996) ("evidence of a defendant's silence or refusal to answer questions is only disallowed if the defendant was in custody"). Accordingly, it cannot be said that the trial court plainly erred.

In any event, even if administering the *Miranda* warnings alone made *Doyle* applicable (as Mr. Brooks contends (App.Sub.Br. 39, n. 10)), the trial court did not

plainly err in failing to curtail the prosecutor's opening statement *sua sponte*. When the prosecutor stated that Mr. Brooks "never would tell them," and that Mr. Brooks said "Not a word" during his interview at the police station, the prosecutor was merely summarizing what the evidence would ultimately show, namely, that Mr. Brooks was interviewed by the police, that Mr. Brooks made statements, that he *denied* any wrongdoing during the interview (i.e., that Mr. Brooks was *not* silent during his interview), but that Mr. Brooks did not otherwise explain what had happened. (The exact nature of Mr. Brooks's statements during the interview will be discussed in greater detail below.)

In other words, the prosecutor's comment was not a comment on protected silence at all; rather, it was merely a recitation of what Mr. Brooks's videotaped statement would reveal to the jury. And when a defendant voluntarily elects to make a statement after receiving *Miranda* warnings (as did Mr. Brooks in this case), then the defendant has not been induced to remain silent. "As to the subject matter of his statements, the defendant has not remained silent at all." *Anderson v. Charles*, 447 U.S. 404, 408 (1980). Thus, for example, in *State v. Smart*, 756 S.W.2d 578, 580-581 (Mo.App. W.D. 1988), when a defendant, in the course of answering questions about some thefts, refused to answer a question about some photographs, it was proper for the state to elicit evidence of the defendant's refusal. The Court reasoned that the defendant had not invoked her right to remain silent (as she had not then indicated

that she wanted questioning to cease) and, accordingly, that the defendant "simply was faced with a question she did not choose to answer." *Id*. at 581.

Here, similarly, because the state expected to present Mr. Brooks's interview in its case in chief (and the interview was admitted through the testimony of Officer Terry Thomas (Tr. 550)), it was entirely proper for the prosecutor to summarize the most salient aspects of that evidence in opening statement, namely, that Mr. Brooks, while denying any wrongdoing (i.e., while not remaining silent), provided not a single word of explanation (i.e., self-defense) to support his claim.[3] This was entirely proper, as it was not a comment on Mr. Brooks's protected silence; rather, it was a comment on the fact that he told an incomplete and false story. *See Anderson v. Charles*, 447 U.S. at 409 ("We conclude that *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,' and we find no reason to adopt such a

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[3] Appellant attempts to argue that the prosecutor's repeated reference to appellant's failure to provide an explanation shows that the prosecutor was purposely trying to violate *Doyle*, even after the trial court had sustained his objection (App.Sub.Br. 68). But, in fact, the trial court sustained an objection to the prosecutor's reference to appellant's later invocation of his rights (Tr. 163-164). The prosecutor did not revisit that forbidden topic, and the prosecutor's other comments were wholly proper.

view in this case."); *see generally State v. Rhodes*, 988 S.W.2d 521, 527 (Mo. banc 1999) ("The prosecutor did not comment on appellant's silence but on his untruthful statements after receiving *Miranda* warnings.").

Allowing the state to present evidence that the defendant gave an incomplete and false story, or, in other words, evidence from which it can be seen that the defendant omitted certain details, is not a violation of *Doyle* and its underlying principles. As this Court has stated, "a defendant 'who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent,' [and, accordingly,] he may be impeached with prior inconsistent statements." *State v. Antwine*, 743 S.W.2d 51, 70 (Mo. banc 1987). Moreover, "having elected to make a statement to the police, a defendant who remained 'selectively silent' may be impeached by omissions in that statement." *Id*.

This conclusion makes sense, for it simply allows the state to use evidence that is produced when the defendant does *not* remain silent or is *not* induced to remain silent by the *Miranda* warnings. And this comports with *Doyle*. As the Court explained in *Doyle*, when a person receives *Miranda* warnings, "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." 426 U.S. at 617. "Thus, every post-arrest [post-*Miranda*] silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Id*.

In other words, it is only after a defendant invokes his right to remain silent

that his "silence is insolubly ambiguous." At any time before the defendant invokes his right to remain silent – and particularly where the defendant instead makes statements that purport to explain his conduct in the alleged crime – any "silence" or omitted fact is highly probative, for it legitimately shows that the defendant initially had no valid explanation for his conduct, that the defendant was conscious of his guilt, and that any subsequent (different) exculpatory story was fabricated in the interval between the first and later accounts. *See generally Brecht v. Abrahamson*, 507 U.S. 619, 628-629 (1993) ("It was entirely proper – and probative – for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone before the time he received his *Miranda* warnings at his arraignment about the shooting being an accident. Indeed, if the shooting was an accident, petitioner had every reason – including to clear his name and preserve evidence supporting his version of the events – to offer his account immediately following the shooting.");[4] *State v. Kinder*, 942 S.W.2d at 326 ("Kinder's unwillingness to swear to his innocence

[4] Although *Brecht v. Abrahamson* dealt with pre-*Miranda* silence, there is little reason to differentiate between the probative nature of pre-*Miranda* silence and post-*Miranda* "silence" where the defendant has, in fact, elected not to remain silent. In either instance, the defendant has not been induced to remain silent by *Miranda* warnings, and, accordingly, any post-*Miranda* omissions (or "silence") are just as probative as pre-*Miranda* silence.

on the Bible with his legs uncrossed was relevant to show Kinder's consciousness of his guilt"). Indeed, to hold otherwise could greatly limit the state's ability to present a defendant's post-*Miranda* statement in any given case. For example, if a defendant were to tell the police (after *Miranda* warnings) that he knowingly shot a person, the state could then be precluded from presenting the defendant's post-*Miranda* statement because the statement was "silent" about various facts showing that the defendant acted in self-defense.

And, in fact, although Mr. Brooks did not expressly state that he knowingly shot the victim, Mr. Brooks is seeking to exclude an admissible post-*Miranda* statement under similar circumstances. Mr. Brooks argues that the state should not have been allowed to impeach his defense by pointing out omissions from his initial statement because, according to Mr. Brooks, "none of [his post-*Miranda* statements to the police] concerned the circumstances of the shooting or contradicted his trial testimony that he acted in self-defense" (App.Sub.Br. 40). But a review of the record shows that Mr. Brooks is incorrect, both because he made post-*Miranda* statements about the homicide and because his post-*Miranda* statements were inconsistent with his later claim of self-defense.

In his interview with the police, after the police advised him of the *Miranda* warnings, Mr. Brooks stated his belief that he must be "a suspect" in the murder (Tr. 553-554). When the police stated that they were trying to "figure out what is going

on," Mr. Brooks avoided the inquiry by saying that he needed to "talk to somebody" (Tr. 554). An officer said that they were trying to get Mr. Brooks's "version [of] what occurred," and Mr. Brooks said, "I don't know" (Tr. 555). Mr. Brooks then asked for a phone book, and he clarified through a series of questions that he was free to leave the interview (Tr. 555-558). Then, when he was told that he could "walk right on out," Mr. Brooks said, "I don't have nothing to hide" (Tr. 558).

Mr. Brooks then said that he felt "stressed," and he asked the officers if they were married (Tr. 558). Mr. Brooks then talked about his very close relationship with his fiancée (the victim), in an apparent attempt to convince the officers that he held no animus toward her (Tr. 558). Mr. Brooks also continued to implicitly assure the officers that he had nothing to hide (Tr. 558). Mr. Brooks stated:

> Ask anybody, what we did, everything, we did everything together. Everything. Ever – every f---ing little old only thing, we did. The only thing we did separatel[y], we worked. Everything. We did everything together. She is – now she is f---ing gone. God. God. Can I call somebody? I just want – I am not – you can sit right here – you can guys can sit here.

(Tr. 558). After telling the officers that he wanted to talk to his "buddy, Michael," Mr. Brooks continued to talk about his close relationship with the victim:

> She was my f---ing life, the rest of my life. Am I going to be able to do

the things I used to do? No. Because you know why, because I am going to be thinking about her. Because we did all that. We did all that (Tr. 560). (These statements stood in stark contrast to Mr. Brooks's subsequent trial testimony describing the acrimonious and broken relationship that allegedly existed between him and the victim.)

When asked at that point what happened, Mr. Brooks said, "Terry. Terry, it's not – there is nothing – I just –" (Tr. 559). (Terry Thomas was the name of the detective who asked the immediately preceding question.) Mr. Brooks then said that he still needed the telephone number he has asked for earlier, and he asked for some water (Tr. 559). When the officer again asked "what happened" and explained that the police were simply doing what they did in any case, Mr. Brooks said, "I don't know why you are doing this" (Tr. 560). Mr. Brooks then inquired about his family, and requested a "regular phone book" for St. Louis (Tr. 560-561).

Mr. Brooks then demonstrated his consciousness of guilt by stating, "You know as well as I do, if I got up and walked out that door, you are going to lock me up" (Tr. 561). When the officer asked "For what?" Mr. Brooks said, "Who knows for what" (Tr. 561). The officer then assured Mr. Brooks again that he was "free to go," and Mr. Brooks said: "But you know what, Terry, I want to – what do you do, man? *I don't have nothing to hide. I didn't do nothing at all*" (Tr. 561-562) (emphasis added). When asked what he was worried about, Mr. Brooks reiterated the loss he felt and

stated his love for the victim: "Because she is f---ing gone. She is gone, Terry. She is gone. She is f---ing gone. I love her" (Tr. 562).

After a few more diversions (Mr. Brooks asked if they had been to his house, whether they could check for someone in the lobby, whether he could use the restroom, and whether he could have more water (these latter requests were granted)), the detectives again asked Mr. Brooks if he could "tell [them] what happened" (Tr. 562-564). At that point, Mr. Brooks said, "I don't know man. I just – I am lost right now, brother" (Tr. 564).

A detective then tried to convince Mr. Brooks to tell his side of the story (Tr. 565-567). The detective reminded Mr. Brooks that he knew how things would proceed in a normal investigation, and he started to talk about what happens when the police "don't get cooperation –" (Tr. 566). But before the detective could finish that statement Mr. Brooks said, "I am not – I am just lost, man. I am just lost" (Tr. 566). After the detective pointed out that "being lost" was not doing anyone any good, Mr. Brooks started to answer a few questions:

> DETECTIVE PRUNEAU: …. So I need to hear from you what happened. Did you work tonight?
>
> ROBERT BROOKS: (Nodding).
>
> DETECTIVE PRUNEAU: What time did you get off?
>
> ROBERT 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.

DETECTIVE PRUNEAU: From what the dispatch told me, okay, from what the dispatch told me, I guess you called 9-1-1?

ROBERT BROOKS: Yes, sir. I did.

DETECTIVE PRUNEAU: Okay. They said that – on the tape they said that you actually you accidentilly [sic] shot your wife –

ROBERT BROOKS: Can I have some more water, please?

DETECTIVE PRUNEAU: That you accidently [sic] shot your wife, and you thought she was an intruder, correct?

ROBERT BROOKS: Are you going to bring her back?

DETECTIVE PRUNEAU: Am I?

ROBERT BROOKS: Is she going to come back? Is she going to come back?

DETECTIVE PRUNEAU: You know that as much as I would like to say yes she is, I can't do that. And you know that. And I wish I could do that for you, brother.

DETECTIVE THOMAS: Let's go back and put this together. What time did you go to work today?

ROBERT BROOKS: This morning, Terry.

DETECTIVE THOMAS. Do you work days or evenings?

ROBERT BROOKS: I work secondary. I work every night. I am always gone.

DETECTIVE THOMAS: Okay. Did you work at the station today, or did you work secondary?

ROBERT BROOKS: Listen, I am not being difficult, guys. Seriously. I know how it works. I know, you know, Terry, she is gone. I don't know. I don't know. I need to talk to somebody. Can I get a phone book?

(Tr. 567-569). Shortly thereafter, Mr. Brooks invoked his right to remain silent, but that fact was not elicited for the jury (*see* Tr. 569).

Under these circumstances, Mr. Brooks was not silent about the homicide or his activities on the day of the murder. To the contrary, when asked for his version of what happened, Mr. Brooks said, "I don't know" (Tr. 555). Later, when Mr. Brooks was told that he could walk out, Mr. Brooks assured the officers that he had "nothing to hide" (Tr. 558). It is obvious from the context of these statements that Mr. Brooks was initially trying to tell the officers that he did not know anything about the murder, and that he had nothing to hide about the murder.

Additionally, Mr. Brooks showed his consciousness of guilt when he stated his belief that the police would "lock [him] up" if he walked out (Tr. 561). And after he was again told that he was free to go, Mr. Brooks again said that he had "nothing

to hide," and he expressly stated that "[he] didn't do nothing at all" (Tr. 561-562). During the interview, Mr. Brooks also repeatedly tried to assure the detectives that he had no animus for the victim (Tr. 558, 560, 562). These statements were an obvious attempt to suggest that he had no motive to murder the victim, and by stating that he "didn't do nothing at all," Mr. Brooks plainly stated that he had done nothing. This, of course, stood in stark contrast to his subsequent trial testimony that he had argued with the victim and then tried to prevent her from shooting him.

But even that was not the end of Mr. Brooks's statements. Later, when he was again asked for his account of the homicide, Mr. Brooks said, "I don't know, man. I just – I am lost right now, brother" (Tr. 564). And, finally, after answering a few questions about what he had done on the day of the murder, Mr. Brooks effectively refused to confirm whether he had accidentally shot his wife (as he told the 911 operator) (Tr. 567-569). But Mr. Brooks did not refuse to answer by actually invoking his right to remain silent. To the contrary, Mr. Brooks refused to answer by employing the diversionary tactic of asking questions in response (Tr. 568). Specifically, instead of directly answering the question, Mr. Brooks responded first by asking, "Can I have some more water, please?" (Tr. 568). When the question was repeated, he then responded by asking, "Are you going to bring her back?" (Tr. 568).

Given these various statements, it cannot be said that Mr. Brooks made no

statements concerning the circumstances of the shooting. As outlined above, Mr. Brooks made statements indicating that he did not know what had happened during the murder, that he had done "nothing" during the murder, and that he had no motive to shoot the victim. Additionally, Mr. Brooks cannot maintain that none of his statements "contradicted his trial testimony that he acted in self-defense" (App.Sub.Br. 40). Indeed, a claim that he did not know what happened is wholly inconsistent with a subsequent claim of self-defense. Likewise, doing "nothing" is also inconsistent with self-defense. Moreover, the background story Mr Brooks offered to the detectives (one involving closeness and love) was quite different from the story of discontent that Mr. Brooks outlined at trial. *See United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1287 (9th Cir. 1982) (in holding that it was proper to impeach the defendant, the court observed: "Several other portions of his trial testimony arguably are inconsistent with his post-arrest statements, but they need not be described in detail. It is sufficient if the statements, taken as a whole, reveal an inconsistency.").

As discussed above, when a defendant voluntarily elects to make a statement, after receiving *Miranda* warnings – as did Mr. Brooks – then the defendant has not been induced to remain silent. "As to the subject matter of his statements, the defendant has not remained silent at all." *Anderson v. Charles*, 447 U.S. at 408. Thus, here, inasmuch as Mr. Brooks did not invoke his right to remain silent, and

inasmuch as Mr. Brooks made exculpatory statements and refused to answer certain questions (which he did through evasion and non-responsive answers rather than invocation), it was proper to point out the omissions or differences between Mr. Brooks's post-*Miranda* statement and trial testimony. *See State v. Bowler*, 892 S.W.2d 717, 719 (Mo.App. E.D. 1994) ("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."); *State v. Smart*, 756 S.W.2d at 580-581 (it was proper to elicit evidence of a refusal to answer a question when the defendant did not otherwise invoke).

Mr. Brooks cites various cases to support his contention that his omissions were improperly used against him. But none of the cases compel reversal in Mr. Brooks's case. For instance, Mr. Brooks points out that in *Doyle*, one of the two defendants did not remain completely silent after *Miranda* warnings. He points out that that defendant asked, "What's this all about?" and that, upon being informed of the basis for the arrest, the defendant exclaimed, "you got to be crazy," or "I don't know what you are talking about." *See Doyle*, 426 U.S. at 615, n. 5, 622-623, n. 4 (Stevens, J., dissenting). Mr. Brooks thus argues that *Doyle* – which involved an implicit general denial of guilt – forecloses the use of "silence" in the form of omissions from post-*Miranda* statements.

But contrary to Mr. Brooks's argument, *Doyle* was not an instance of the

Court actually determining that such post-*Miranda* statements were the equivalent of protected "silence" under *Doyle*. To the contrary, as the Court later made plain in *Anderson v. Charles*, the Court in *Doyle* simply ignored those statements and treated the case as a case that "involved two defendants who made no postarrest statements about their involvement in the crime." 447 U.S. at 407; *see also id*. at 407 n. 2 (nothing that "Both the Court and the dissent in *Doyle* analyzed the due process question as if both defendants had remained silent."). In short, because the Court in *Doyle* simply did not analyze whether such statements (i.e., implicit general denials) would subject a defendant to subsequent impeachment, *Doyle* does not provide any support for Mr. Brook's claim that a "general" denial will not subject a defendant to impeachment. In short, the more relevant case is, as discussed above, *Anderson v. Charles*, 447 U.S. at 404.

Mr. Brooks also cites various other cases – some from other jurisdictions, and a few from Missouri. For instance, he cites *Bass v. Nix*, 909 F.2d 297, 304 (8th Cir. 1990). But in *Bass v. Nix*, the only post-*Miranda* discussion about the murder was a conversation in which the defendant asked the police a question about the murder. *Id*. at 299 n. 5. In that conversation with the police, the defendant did not offer "any exculpatory or inculpatory explanation or evidence" about the murder; thus, the court concluded that the defendant had not made a post-*Miranda* statement that could be used to impeach the exculpatory story offered by the defendant at trial. *Id*.

at 302. Here, by contrast, Mr. Brooks did make exculpatory statements about the murder, and his statements were inconsistent with his later claim of self-defense.

Mr. Brooks also relies on *United States v. Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993), a case in which the defendant made some statements before invoking his right to remain silent. In that case, upon questioning, the defendant told the police that he had no other illegal silencers, the defendant admitted that he had purchased the illegal silencer that was the basis for the charge, and the defendant told the officer that he had bought the silencer "for protection." *Id*. at 484-485. At trial, the defendant claimed that he had been "set up" to buy the silencer (he claimed entrapment), and, on cross-examination, the prosecutor asked why he had not come "clean" and simply told the police that he had been set up. *Id*. at 485. On appeal, the court concluded that the prosecutor had impermissibly elicited evidence of the defendant's "silence," concluding that the cross-examination was "not designed to point out inconsistencies between Canterbury's trial testimony and his statements at the time of arrest." *Id*. But respondent submits that *Canterbury* was wrongly decided, and, inasmuch as it is non-controlling authority that conflicts with this Court's prior opinions, it should not be followed.

Indeed, it is evident that the decision in *Canterbury* was incorrect. The court in *Canterbury* stated that "Canterbury's post-arrest statements are not inconsistent with his entrapment defense." *Id*. at 486. But this is an inexplicable statement, as it is

apparent from the opinion that the defendant in *Canterbury* made an inconsistent statement when he claimed to have bought the silencer "for protection." That statement was wholly inconsistent with his subsequent claim of entrapment, and, accordingly, the court should have held that the prosecutor properly elicited the defendant's failure to come "clean" when talking to the police after his arrest. Additionally, inasmuch as the defendant made post-*Miranda* statements, any omissions from those statements should have been subject to comment.[5]

Mr. Brooks relies on *Canterbury* and cases like *United States v. May*, 52 F.3d 885, 890 (10th Cir. 1995), for the proposition that "the appropriate inquiry in these situations [where a defendant is "partially silent"] is whether the cross-examination was designed to impeach the defendant's trial testimony by calling attention to prior inconsistent statements or, instead, was designed to suggest an inference of guilt from the defendant's post-arrest silence." *Id*. at 890. This may be an appropriate test, but it does not compel reversal in Mr. Brooks's case. To the contrary, because Mr.

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[5] In *People v. Hurd*, 62 Cal.App.4th 1084, 1092-1094 (Cal.App. 2nd Dist. 1998), the court declined to follow *Canterbury*, concluding (as have Missouri courts): "A defendant has no right to remain silent selectively. Once a defendant elects to speak after receiving a *Miranda* warning, his or her refusal to answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights." *Id*. at 1093.

Brooks gave an inconsistent account at trial and claimed self-defense, it is apparent that the prosecutor's various references to omissions (or the claimed "silence") were designed to show the inconsistency. Indeed, but for the apparent inconsistency between Mr. Brooks's trial testimony and his post-*Miranda* statements to the police, the omissions (the alleged "silence") had no meaning.

Mr. Brooks relies heavily on *United States v. Laury*, 985 F.2d 1293 (5th Cir. 1993), as "a good example" of the limits that the prosecutor must work within in using a defendant's post-*Miranda* silence. But *Laury* is inapposite. In that case, with regard to the crime, the defendant made no statements about his whereabouts on the day of the crime, and he merely told the police that he did not rob the bank. *Id*. at 1303. At trial, the defendant claimed to have been at a party on the day of the robbery. On cross-examination, the prosecutor asked the defendant why he had not divulged his alibi, either when he talked to the FBI or during the several months prior to trial. *Id*. at 1301. On appeal, the court concluded that the prosecutor had improperly commented on the defendant's silence, because "nothing [the defendant] told the FBI agents was inconsistent with his trial testimony that he was at a party on the date of the bank robbery." *Id*. at 1303. Thus, the court concluded that "The prosecutor did not comment on what [the defendant] told FBI agents, but on what he did not tell them." *Id*. By contrast, in Mr. Brooks's case, Mr. Brooks's trial testimony was inconsistent with his earlier statement. Accordingly, the prosecutor's

comments ultimately drew meaning from the inconsistency and not the mere fact of Mr. Brooks's "silence."[6]

In arguing that a "general denial of guilt" will not open up the defendant to impeachment with his selective silence, Mr. Brooks also relies on *United States v. Caruto*, 532 F.3d 822, 824 (9th Cir. 2008) (App.Sub.Br. 43). In *Caruto*, the defendant made "a limited statement and then invoke[d] her *Miranda* rights." *Id*. at 828. The defendant had answered several questions, but after she invoked, she did not answer any further questions. *Id*. At trial, the defendant gave a much more detailed account than the account she had given to the police after her arrest, and, in closing argument, the prosecutor commented extensively on the fact that certain facts had

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[6] As the Fifth Circuit later clarified, "*Laury* establishes that where a defendant's testimony at trial deals with subject matter *not addressed in his post-arrest statement*, there can be no inconsistency between the statements and, therefore, *Charles* is inapplicable." *Pitts v. Anderson*, 122 F.3d 275, 280-281 (5th Cir. 1997) (emphasis added). With that clarification and limitation, *Laury* is largely consistent with Missouri case law, and, because Mr. Brooks made statements about the homicide, there was no error in highlighting his omissions. To the extent that *Laury* can be interpreted as Mr. Brooks suggests, it conflicts somewhat with Missouri precedent, *see State v. Bowler*, 892 S.W.2d 717, and, accordingly, respondent submits that the rule in *Laury* should not be applied too broadly.

not been given to the police. *Id*. at 826-827. On appeal, the court analyzed whether the prosecutor had improperly commented on the defendant's silence where it was apparent that the "omissions from [the defendant's] post-arrest statement resulting from her decision to invoke her *Miranda* rights." *Id*. at 829. The court distinguished the case from those cases where a defendant merely decides not to answer a single question, and the court concluded that the prosecutor's argument was improper. *Id*. at 829 (Caruto did not simply fail to answer a specific question. Rather, she specifically invoked her *Miranda* rights and stopped the interview altogether. Therefore, her silence with respect to the unasked questions is clearly attributable to her exercise of those rights.").

In contrast to *Caruto*, the prosecutor in Mr. Brooks's case did not comment on "silence" that was the result of the Mr. Brooks's invocation of his right to remain silent. *Cf. id*. at 830 ("As the prosecution acknowledged at trial, the alleged inconsistencies here were omissions attributable to Caruto's invocation of her *Miranda* rights."). Mr. Brooks was repeatedly asked for his version of events, and he made incomplete and false statements about the homicide in response to those queries. As discussed above, he claimed that he did not know what had happened, he claimed to have done nothing, and he tried to suggest that he had no motive to kill the victim. Taken together, these statements were wholly inconsistent with Mr. Brooks's trial testimony and, accordingly, Mr. Brooks's failure to explain how he

acted in self-defense was a proper subject for impeachment.

Finally, Mr. Brooks discusses some Missouri cases which stand for the general proposition that a defendant cannot be impeached with "silence" or omissions from a post-*Miranda* statement unless the defendant makes a statement about the crime that is inconsistent with his subsequent trial testimony (App.Sub.Br. 44). Included in this discussion are the opinions in *State v. Crow*, 728 S.W.2d 229 (Mo.App. E.D. 1987); *State v. Richardson*, 724 S.W.2d 311 (Mo.App. S.D. 1987), *State v. Weicht*, 835 S.W.2d 485 (Mo.App. S.D. 1992), and *State v. Roth*, 549 S.W.2d 652, 656 (Mo.App. W.D. 1977) (App.Sub.Br. 44-45). But these cases, too, do not compel reversal in Mr. Brooks's case. Indeed, because Mr. Brooks did make inconsistent statements about the homicide, Mr. Brooks's reliance on these cases is misplaced.[7]

As outlined above, Mr. Brooks said that he did not know what had happened during the murder, that he had nothing to hide about the shooting, and that he had

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[7] Mr. Brooks's reliance on *Roth* is particularly misplaced, as it was decided in 1977, prior to the decision in *Anderson v. Charles*, and this Court's decision in *Antwine*, where the Court held that a defendant can be impeached with inconsistent post-*Miranda* statements and "selective silence." *See Antwine*, 743 S.W.2d at 70. *See also State v. Wallace*, 952 S.W.2d 395, 396-397 (Mo.App. W.D. 1997) (observing that *Roth* and other cases "pre-dated the *Antwine* decision and seem to be in conflict with *Antwine*").

not done anything at all. Moreover, Mr. Brooks attempted to suggest that he had no motive to shoot the victim. By contrast, for example, in *State v. Crow*, the defendant made no statements about the crime – an alleged robbery at knife point. Instead, during the booking process, the defendant merely provided personal information and made an indefinite statement about going to "Jeff City . . . for nothing." 728 S.W.2d at 231. The Court pointed out that the booking information could not be considered a statement about the crime, and that the indefinite statement about going to Jefferson City referred to his possible conviction, and not to the specifics of the criminal act. *Id*; *see State v. Richardson*, 724 S.W.2d at 315 (the prosecutor asked if the defendant had denied ownership of marijuana, but the defendant had already been advised of the *Miranda* warnings and had not made any statements about the marijuana); *State v. Weicht*, 835 S.W.2d at 485 (when the defendant wholly avoided making statements about the alleged crime – for instance, when asked if he had engaged in sexual acts with the victim, the defendant merely said, "I have herpes" – it was not proper for the state to elicit evidence that the defendant had failed to make an exculpatory statement).[8]

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[8] In respondent's estimation, the holding in *Weicht* is questionable, as the defendant's claim that he "had herpes" was arguably an indirect attempt to disclaim culpability for the sexual offense. Nevertheless, the case is distinguishable from Mr. Brooks's case, as Mr. Brooks directly denied any wrongdoing in the shooting.

In short, because Mr. Brooks made post-*Miranda* statements that conflicted with his trial testimony, the trial court did not plainly err in allowing the prosecutor to outline in opening statement the evidence that would reveal the inconsistency between the two accounts. Such use of a defendant's "selective silence" is wholly proper, and this Court should decline Mr. Brooks's invitation to abandon its previous holdings on this issue (e.g. *State v. Hutchison*, 957 S.W.2d 757 (Mo. banc 1997) (App.Sub.Br. 46)).

2. The state's witnesses

Mr. Brooks also argues that the state elicited impermissible comments on his post-*Miranda* silence from four state's witnesses: Officer Jed Guidicy (Tr. 192), Officer Jeff Wynn (Tr. 211-212), Officer Jeff McCreary (Tr. 398-399), and Officer Terry Thomas (Tr. 536-537).

With regard to the first three officers – Guidicy, Wynn, and McCreary – it must first be noted that there was no objection to any of the allegedly inadmissible testimony (Tr. 192, 211-212, 398-399). Thus, Mr. Brooks must show that their testimony, if erroneous, amounted to plain error and resulted in manifest injustice. But this Mr. Brooks cannot do.

Indeed, whether preserved or not, there simply was no error with regard to the first three officers. A review of the challenged testimony of Officers Guidicy, Wynn, and McCreary reveals that the prosecutor was asking them whether Mr.

Brooks had ever told them – while at the scene of the crime (and before any *Miranda* warnings) – anything about the shooting (*see* Tr. 192, 211-212, 398-399). Thus, their testimony simply did not refer to any post-*Miranda* period of time; and, inasmuch as Mr. Brooks later claimed self-defense, it was natural to expect "that he would have given the explanation prior to trial if the explanation were true." *State v. Cornelious*, 258 S.W.3d 461, 466 (Mo.App. W.D. 2008) (holding that various instances of pre-*Miranda* silence were properly admitted); *see Jenkins v. Anderson*, 447 U.S. 231, 238-240 (1980) (impeachment with pre-*Miranda* silence is permissible); *State v. Wallace*, 952 S.W.2d 395, 396 (Mo.App. W.D. 1997) (" 'Where a defendant later offers an explanation for his conduct under circumstances suggesting he would naturally have given the explanation earlier, if true, his previous silence may be used for impeachment purposes if his silence was not the result of an exercise of a constitutional right.' ").

With regard to the testimony of Officer Thomas (one of the officers who questioned Mr. Brooks during the post-*Miranda* interview), Mr. Brooks first takes issue with his testimony on pages 536-537; this testimony was offered largely without objection, as follows:

> 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. Well, besides yourself, who else was there for the interview. You and the defendant?

A. Detective Mike Pruneau from the Crystal City Police Department.

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

A. No.

[DEFENSE COUNSEL]: Your Honor, could we approach, please?

(Tr. 536-537). At that point, defense counsel objected, and pointed out that by using the phrase "ever told" (either while being questioned or not), the prosecutor had arguably referred to a point in time *after* Mr. Brooks invoked his right to remain silent (Tr. 537). The prosecutor explained that he had not been trying to refer to any post-arrest period where Mr. Brooks had invoked his rights (Tr. 537).

After brief discussion at the bench, the trial court sustained the objection in open court and ordered the prosecutor's question stricken from the record (Tr. 539). Thus, to the extent that the prosecutor had arguably referred to any actual post-*Miranda* silence (i.e., after Mr. Brooks invoked and refused to answer any further questions), the reference was very vague, and the trial court removed it from the

jury's consideration with an appropriate instruction.

The prosecutor then returned to asking proper questions about Mr. Brooks's pre-*Miranda* silence, and about Mr. Brooks's failure to offer an explanation during his interview (the propriety of asking about omissions in the post-*Miranda* statement was discussed above) (Tr. 539-540). Mr. Brooks then objected to this question: "Q. Did he ever give you any explanation *during the interview* as to what had actually taken place?" (Tr. 540) (emphasis added). The objection was again based on the prosecutor's use of the word "ever," but the prosecutor explained (and the trial court agreed), that the prosecutor's use of the word "ever" in conjunction with the actual "interview" (as opposed to a period of time when Mr. Brooks was *not* being interviewed, due to an invocation of rights), rendered the question proper (Tr. 541-546). Nevertheless, apparently out of an abundance of caution, the court agreed to sustain the objection and strike it from the record (Tr. 547). Thus, in this particular instance, there was no impermissible comment on any post-*Miranda* silence, but Mr. Brooks was granted relief anyway.

Mr. Brooks also takes issue with the playing of his recorded interview. But, for the reasons discussed above (and because the statement was a voluntary post-*Miranda* statement that tended to show Mr. Brooks's guilt), it was proper to play the tape. Indeed, the tape was highly relevant because it was almost wholly inconsistent with Mr. Brooks's trial testimony.

Additionally, it must be pointed out that any objection to the playing of the tape was affirmatively waived by Mr. Brooks. As the record shows, when the state offered the recorded interview into evidence, immediately before playing it for the jury, defense counsel stated that he had "No objection" to its admission (Tr. 548). "Generally, an announcement of 'no objection' amounts to an affirmative waiver of appellate review of the issue." *State v. Collins*, 188 S.W.3d 69, 77 (Mo.App. E.D. 2006). "Under such circumstances, even plain error review is not warranted." *Id*.

Here, as the record shows, defense counsel affirmatively stated that he had "No objection" to the admission of the recorded interview; thus, any claim regarding the admission of the tape was affirmatively waived. Indeed, given defense counsel's apparent decision *not* to object to questions that merely highlighted the fact that Mr. Brooks had not given an explanation during his interview (prior to his arrest and invocation of his rights), it seems that this decision was deliberate.

In any event, even if plain error review is granted, Mr. Brooks's quarrel with the recorded tape is not well taken. It is usual to question people after the *Miranda* warnings, and, as discussed above, highlighting Mr. Brooks's failure to give an explanation for his conduct in the shooting was entirely proper, i.e., nothing on the tape constituted an improper comment on Mr. Brooks's post-*Miranda* silence.

Lastly, with regard to Officer Thomas, Mr. Brooks points out that the

prosecutor asked a series of questions about what Mr. Brooks had failed to say during his interview and prior to his arrest (App.Sub. Br. 57-58). But, again, inasmuch as these questions only referred to omissions in Mr. Brooks's post-*Miranda* recorded interview – and not to any period after Mr. Brooks invoked his right to remain silent, the questions were proper.[9]

3. The state's closing argument and rebuttal argument

Mr. Brooks also asserts that there were impermissible references to his post-*Miranda* silence in closing argument. He challenges the following (as emphasized by Mr. Brooks):

> 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. 771-772) (emphasis added). Later, in rebuttal closing argument, the prosecutor

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[9] Appellant also points out that, when he testified at trial, he was impeached with his failure to provide an explanation to the officers that was consistent with his claim of self-defense (App.Sub.Br. 58). This, though, was proper impeachment for the reasons discussed above.

stated:

> The only received defense evidence you have got is what he says happened, and quite frankly, no matter how embarrassed a person is, ***if it really had happened like he said, he would have been screaming it to the walls.***

(Tr. 799) (emphasis added).

But there was nothing wrong with these arguments. Mr. Brooks had testified that the reason he did not tell the police his story during the interview was because he was too embarrassed (Tr. 641). And, as discussed above, the evidence plainly showed that Mr. Brooks – who later claimed self-defense at trial – never told anyone about his allegedly justified response, even though there were various opportunities to do so, under circumstances where Mr. Brooks would reasonably be expected to tell his side of the story (e.g., pre-*Miranda* while talking to his mother on the telephone and post-*Miranda* when he was claiming that he had nothing to hide and that he had not done anything). It was, therefore, wholly proper for the prosecutor to argue the admissible evidence in this fashion.

4. The trial court did not commit reversible error

Citing cases like *State v. Mabie*, 770 S.W.2d 331 (Mo.App. W.D. 1989), and *State v. Flynn*, 875 S.W.2d 931 (Mo.App. S.D. 1994), Mr. Brooks argues that he, like the

defendants in those cases, is entitled to reversal (App.Sub.Br. 59-62).[10] But Mr. Brooks's reliance on *Mabie* and similar cases is misplaced. In *Mabie*, immediately after the defendant was arrested, he was advised of the *Miranda* warnings, and the defendant elected to make no statements whatsoever at that time. 770 S.W.2d at 333-334. The next day, the defendant gave a written statement that contained an exculpatory explanation. *Id*. at 333. At trial, the state sought to impeach the defendant with his *Miranda*-induced silence, and the defendant was forced to answer that he had not said anything because he had been advised that he did not have to say anything. *Id*. at 333-334. This was an obvious comment on a post-*Miranda* instance of silence, and, accordingly, the Court found reversible error. Here, Mr. Brooks did not remain silent after receiving the *Miranda* warnings; rather, he made statements and gave an account that was inconsistent with his subsequent trial testimony.

At bottom, the fact is that the state did not make repeated, improper comments upon Mr. Brooks's post-*Miranda* silence. There was one isolated reference in the state's opening statement to Mr. Brooks's invocation of his rigths, and after a timely objection, the prosecutor's comment was struck and removed from the jury's consideration. Mr. Brooks does not challenge this instance. The only other reference

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[10] Mr. Brooks also again discusses *Weicht*, *Crow*, and *Roth* (App.Sub.Br. 63-66). For the reasons discussed above, these cases do not compel reversal in this case.

by the state to Mr. Brooks's actual post-*Miranda* silence (i.e., after invocation) came when the prosecutor asked if Mr. Brooks had "ever told" any officer his explanation for the shooting. But this reference was vague – there was no direct reference to any particular instance of silence (i.e., there was no evidence that Mr. Brooks "clammed up" when confronted with a question) – and the court instructed the jury not to consider this comment.

Additionally, because there was ample properly-admitted evidence of Mr. Brooks's "silence" at other times – both pre-*Miranda* and during Mr. Brooks's post-*Miranda* interview, it is difficult to imagine any sort of prejudice arising from the two isolated instances identified above. *See Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993) ("The State's references to petitioner's post-*Miranda* silence were infrequent, comprising less than two pages of the 900-page trial transcript in this case. And in view of the State's extensive and permissible references to petitioner's pre-*Miranda* silence – *i.e.*, his failure to mention anything about the shooting being an accident to the officer who found him in the ditch, the man who gave him a ride to Winona, or the officers who eventually arrested him – its references to petitioner's post-*Miranda* silence were, in effect, cumulative.").

It must also be noted that Mr. Brooks elicited similar, if not more specific, evidence of his post-*Miranda* silence in this case. Indeed, as the record shows, on cross-examination of Dr. Mary Case, in attempting to undermine her opinion as to

the manner of the victim's death ("homicide"), Mr. Brooks posed the following questions:

> Q. So whatever the information you had going in to signing this [death certificate], that's the information you based your cause of death on, right?
>
> A. The cause of death is apparent at the time of the autopsy, that's a gunshot wound.
>
> Q. Your manner of death?
>
> A. The manner of death is certainly going to wait until I get all of the information. When I sign it out. And it's signed out on November the 7th, at that time I had all of the information I felt I needed.
>
> Q. ***That's right. Which is basically no information from Robert Brooks, as he testifies on the stand, you didn't have any of that, did you?***
>
> A. I certainly did not have that information. I don't believe that occurred.
>
> Q. Right. ***So are you willing to wait around and listen to him testify and keep an open mind as to the manner of death?***

(Tr. 324) (emphasis added). Then, again on cross-examination, defense counsel continued in that same vein:

Q. ***You call it a homicide based on half of the information that you had at the time, right?***

A. The information I had was on November 7th when I signed the case out, some two and a half or so months afterwards. I had a fair amount of information at that time.

Q. Did you have all of the information?

A. I don't know that I had every bit of information. But I had –

Q. Did you have forty percent of it? Eighty percent? What is a scientific certainty, based on what percentage of information does one need?

A. I am not able to answer that question.

Q. ***How about just the other side of the story, would that help?***

A. That is not usually what I base my opinions on. I don't know how people come in and testify, I read the police report, I read the hospital records, I have the autopsy report.

Q. So the answer is, it's almost your job to make a decision before you have all of the information. That is your area of expertise is to jump to conclusions?

A. I very much disagree with that.

(Tr. 331-332) (emphasis added). The clear implication of these questions was that Dr.

Case had "jumped to a conclusion" without waiting to hear Mr. Brooks's side of the story; thus, to an even greater extent than the prosecutor (as these questions were clearly by design), defense counsel highlighted the fact that Mr. Brooks did not – even after his arrest – divulge his self-defense story to the police or any other state agent that compiled information for the medical examiner. Accordingly, inasmuch as Mr. Brooks offered evidence that similarly commented on his post-*Miranda* silence, he should not now be heard to allege prejudice. "It has long been held that '[a] defendant cannot be prejudiced by admission of objectionable evidence if he offers similar evidence.'" *State v. Turner*, 242 S.W.3d 770, 779 (Mo.App. S.D. 2008) (quoting *State v. Holmes*, 978 S.W.2d 440, 442 (Mo.App. E.D. 1998)).

In short, because the state did not make repeated comments upon Mr. Brooks's post-*Miranda* silence, the two isolated comments on Mr. Brooks's silence, which were fully remedied by the trial court – along with the various alleged other errors – did not result in manifest injustice or were harmless beyond a reasonable doubt. Indeed, the evidence of Mr. Brooks's guilt in this case was overwhelming.

There was no real question that Mr. Brooks fired the gun (he admitted that fact immediately after the murder to three different people), and Mr. Brooks's belated story of self-defense – which only came to light at trial, after Mr. Brooks had made various false statements to other people – did not match the physical evidence in any material respect (particularly the lack of stippling and the angle of the shot

(*see* Tr. 282-284, 286, 289-290, 309-310)). Finally, the fact that Mr. Brooks repeatedly lied about what had happened in the immediate aftermath of the crime demonstrated Mr. Brooks's consciousness of guilt. *See Brecht v. Abrahamson*, 507 U.S. at 639 (citing some similar facts in concluding that the erroneously admitted evidence did not have a "substantial and injurious effect or influence in determining the jury's verdict"). This point should be denied.

CONCLUSION

Mr. Brooks's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

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2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and

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