No. 127223

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. MICHAEL B. PINKETT, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-19-0172 There on Appeal from the Circuit Court of the Eighth Judicial Circuit, Pike County, Illinois, No. 17 CF 84 The Honorable Jerry J. Hooker, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

JOSHUA M. SCHNEIDER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7123
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
4/20/2022 6:40 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS

Page(s)

POINTS AND AUTHORITIES

NATURE OF THE ACTION

Following a jury trial in the Circuit Court of Pike County, defendant was convicted of aggravated fleeing or attempting to elude a peace officer and speeding, and was sentenced to two years in prison. Sup. 2d R403; C108.[1]

Defendant appealed, and the Illinois Appellate Court reversed. The court held that the trial court abused its discretion by denying defendant's motion for a mistrial when the prosecution commented on defendant's postarrest, pre-*Miranda* silence in its opening statement, evidence of that silence was improperly admitted and commented upon during closing argument, and the error was not harmless. *People v. Pinkett*, 2021 IL App (4th) 190172-U, ¶¶ 54, 56. The People now appeal that judgment. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court acted within its discretion by declining to declare a mistrial when the prosecution noted during its opening statement that defendant did not ask why he was being arrested.

---

[1] The common law record is cited as "C__"; the report of proceedings as "R__"; the 302-page supplement to the report of proceedings issued on May 17, 2017, as "Sup. R__"; the 461-page supplement to the report of proceedings issued on August 21, 2019, as "Sup. 2d R__"; the 46-page supplement to the exhibits issued on May 31, 2019, as "Sup. 2d E__"; the 5-page supplement to the exhibits issued on July 17, 2020, as "Sup 6th E__"; and defendant's appellant's brief below, filed in this Court pursuant to Rule 318(c), as "Def. App. Br.__." The four DVD exhibits are cited as "Peo. Exh. 1," "Peo. Exh. 2," "Peo. Exh. 3," and Peo. Exh. 41," with time stamps referring to the progress bar of the video player rather than any time-stamp on the videos themselves.

2. Whether any error in the prosecution's opening statement was harmless.

3. Whether the admission of evidence of defendant's silence during arrest and the prosecution's comment on that silence during closing argument constituted plain error.

JURISDICTION

On September 29, 2021, this Court allowed the People's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

Defendant was charged with aggravated fleeing or attempting to elude a peace officer (for failing to stop after being given a visual or audible signal to stop by a peace officer while traveling at least 21 miles over the speed limit), 625 ILCS 5/11-204.1(a)(1) (2017); speeding, 625 ILCS 5/11-601(b) (2017); and failing to use a turn signal before changing lanes, 625 ILCS 5/11-804(d) (2017). C13, C65-66. The case proceeded to jury trial in July 2018. Sup. R4.

The prosecutor gave a lengthy opening statement explaining that he expected to present evidence of a high-speed chase that ended at a Walmart, where defendant was arrested by two off-duty officers. Sup. R231-41, 247-49. In the course of that opening statement, the prosecutor said that the two officers would testify that defendant did not ask why he was being detained.

Sup. R241. Defendant objected, *id.*, the court excused the jury, *id.*, and defendant moved for a mistrial on the ground that the prosecution had improperly commented on his exercise of his constitutional right to remain silent, Sup. R242-43. The prosecution responded that defendant had yet to receive any *Miranda* warnings at that point, and so his silence could not have rested on any assurance that it would not be used against him. Sup. R243. After hearing argument, Sup. R242-46, the court denied defendant's motion for a mistrial, Sup. R246-47. The jury returned, the court announced that the objection had been overruled, and the prosecutor resumed his opening statement, making no further mention of defendant's silence. *See* Sup. R247-49.

The trial evidence showed that shortly before 6:00 p.m. on June 10, 2017, Pike County Sheriff's Deputy Brad Wassell was driving west on U.S. Route 54 near Atlas, Illinois, when he saw three motorcycles — two appeared to be Harley Davidsons, one with a single rider and the other with two riders, and the third was a sport[2] motorcycle with a single rider, Sup. R260-61, 70-71; Sup. 2d E7-8; Sup. 6th E4 — travelling eastbound at a speed that appeared to exceed the posted speed limit of 55 mph. Sup. R254-56. Wassell clocked the motorcycles with his radar unit at 78 mph, then pulled over onto the shoulder of the highway and activated his emergency lights. Sup. R255-

[2] This third motorcycle is also described as a "Ninja-style" motorcycle, *see*, *e.g.*, Sup. 2d R119-20, or a "crotch rocket," *see*, *e.g.*, Sup. R261.

26. The motorcycles continued past him, so he made a U-turn and began pursuing them. Sup. R256-57. By the time he caught up with them, they had reduced their speed to 60 or 65 mph, but they did not stop. Sup. R257-58. He activated his siren and continued pursuing them at a distance of about 200 feet. *Id.*

Eventually they reached a four-way stop at an intersection in Atlas, where the motorcycles briefly stopped. Sup. R258. Wassell pulled up within 10 or 15 feet of them, from which distance he saw that the rider of the sport motorcycle was wearing a helmet and carried a large black knife in a sheath at his belt. Sup. R260-61; Sup. 2d R121. The sport motorcycle did not have rearview mirrors. Sup. 2d R120; *see* Sup. 2d E15-17. The rider of one of the two Harley Davidsons turned around and looked directly at Wassell, who gestured for him to pull over. Sup. R258-59. Rather than doing so, the rider turned back around, Sup. R259-60, the motorcycles proceeded through the intersection, and Wassell reactivated his siren (which he had turned off), and radioed for assistance as he continued to pursue at distances of 100 to 300 feet, Sup. R262-64, 266. He noticed that a piece of plastic appeared to be dragging from the sport motorcycle, and its license plate was darkened. Sup. R265; *see* Sup. 2d E15.

Wassell continued to pursue the motorcycles from a distance of between 100 and 300 feet as they traveled east along U.S. Route 54, through Summer Hill and toward Pittsfield. Sup. R264-66. As they approached

Pittsfield, Wassell looked ahead and saw Pittsfield Police Officer Lisa Hobbs in her car at the side of the road. Sup. R266. She had heard his radio request for assistance and positioned her car along the highway. Sup. 2d R170-72. When she heard Wassell's siren approaching, she turned on her emergency lights, which activated her dashboard camera. Sup. 2d R172. About fifty-three seconds later, the motorcycles drove past, with Wassell a few seconds behind. Peo. Exh. 3 at 0:00:52-0:00:56; *see* Sup. 2d E7-8; Sup. 6th E4. Hobbs joined the pursuit and turned on her sirens. Sup. 2d R186; Sup. 2d R194; Peo. Exh. 3 at 0:00:55-0:00:12.

After they passed Hobbs, the motorcycles approached a silver SUV, sped up, and passed it. Sup. R267-68; Peo. Exh. At 00:00:52-00:01:05. The SUV pulled over to the shoulder, Peo. Exh. 3 at 0:01:06-0:00:09, and Wassell increased his own speed to 90 mph, but he still fell farther behind the motorcycles, Sup. R268-69; Sup. 2d R150-51. The Harley Davidson with a single rider eventually slowed down, Wassell reduced his speed to match, and the other two motorcycles — the sport motorcycle and the Harley Davidson with two riders — pulled even farther ahead and eventually out of Wassell's sight. Sup. R275-76; Sup. 2d R151. Wassell later regained sight of the Harley Davidson with two riders as they approached the Walmart. Sup. 2d. R129-32, 151; *see* Sup. 2d E19-20.

Frank Smith was in the Walmart parking lot when a sport motorcycle sped by at between 40 and 45 mph and drove behind the Walmart to the

loading dock area. Sup. 2d R196-98; Sup. 2d E22-28; Peo. Exh. 1, Clip 1 at 6:09:58-6:10:13, Clip 5 at 6:10:14-6:10:15, Clip 2 at 6:10:18-6:10:20, Clip 3 at 6:10:22-6:10-39. A short time later, Smith heard sirens and saw two Harley Davidson-style motorcycles pass by, pursued by two police cars. Sup. 2d R197-98; Peo. Exh. 1, Clip 1 at 6:10:10-6:10:34. The sport motorcycle reemerged from behind the Walmart and parked among some stacked pallets of mulch, and the rider, whom Smith identified as defendant, Sup. 2d R243-44, walked across the parking lot and into the store. Sup. 2d R199; *see* Peo. Exh. 1, Clip 2 at 6:10:41-6:11:01, Clip 5 at 6:11:29-6:12:06, Clip 4 at 6:12:15-6:12:19. Security footage of the Walmart entrance showed defendant enter with a large black knife in a sheath on his hip and a black biker vest in his hand. Sup. 2d E34-45; Peo. Exh. 1, Clip 4 at 6:12:15-6:12:19.

After it passed the Walmart, the Harley Davidson motorcycle with one rider pulled into a gas station, where Wassell arrested the rider. Sup. R277; Peo. Exh. 3 at 0:03:43-0:04:20. The Harley Davidson with two riders was never caught. Sup. 2d R111. Altogether, Wassell had pursued the motorcycles for about 13 minutes over a distance of approximately 13 miles. Sup. 2d R120-21, 153. As Wassell was arresting the rider at the gas station, Sup. 2d R177, Smith placed a call from the Walmart parking lot to a friend employed by the state police, Sup. 2d R200-01, who contacted the sheriff's department and relayed the information that defendant's motorcycle was at the Walmart, Sup. 2d R254-55.

Pike County Sheriff's Sergeant Matt Frazier and Pike County Sheriff Paul Petty heard the report of defendant's motorcycle at the Walmart and went to investigate. Sup. 2d R260, 285-86. Both men were off duty at the time and were wearing t-shirts and shorts. Sup. 2d 258-59, 288. Frazier had no equipment; "no cuffs or guns or anything." Sup. 2d R272. When Frazier arrived at the Walmart, he found a sport motorcycle with a darkened license plate "tucked in where it couldn't be seen from the roadway." Sup. 2d R260-61; Sup. 2d E15. Frazier positioned his truck to prevent the bike from leaving, then went inside. Sup. 2d R261-62. Once inside, Petty stood by the return desk at the front of the store while Frazier went to the restroom in back. Sup. 2d R262-63, 288-89.

Defendant was in the restroom, standing at the sink in "biker-type attire" and wearing a large knife in a sheath at his side. Sup. 2d R 263-64, 274; Sup. 2d E45. He appeared nervous. Sup. 2d R263. When Frazier entered, defendant grabbed the black motorcycle vest from the sink and left. Sup. 2d R267, 274-75. As defendant exited the restroom, Frazier approached him from behind and grabbed the knife from the sheath while identifying himself as a deputy sheriff. Sup. 2d R263, 265, 274-75. Frazier told defendant that they had to walk out of the store without making a scene, and defendant accompanied him out of the store. Sup. 2d R265.

The prosecution asked Frazier without objection whether, when he detained defendant, defendant asked why he was being detained. Sup. 2d

R267. Frazier responded, "No, not like somebody going to your side and grabbing — in plain clothes grabbing a knife off your waistband and anything. [Defendant] didn't act like [Frazier] was doing anything out of line whatsoever which to [Frazier] [wa]s odd." Sup. 2d R267.

Although defendant did not make any statement when Frazier disarmed him from behind as he left the restroom, he made several statements on the way out of the store. As they walked to the front of the store, defendant asked how he could know that Frazier was actually a police officer and asked to see identification, which Frazier was unable to provide at the time. Sup. 2d R265, 281-82. When they reached the return desk at the front of the store, Perry placed defendant in handcuffs, and defendant offered Frazier the sheath because he was concerned someone might get cut on the exposed blade of the knife that Frazier had taken from him. Sup. 2d R265-66. Defendant also told Petty that Petty should take defendant's motorcycle (which had a piece hanging off the bottom) to the sheriff's department so that it would not need to be towed. Sup. 2d 291-92. And while Frazier was transporting defendant to jail, defendant said that he had been at the Walmart to buy zip ties to repair something on his motorcycle and that he had not been running from police. Sup. 2d R266, 282.

Defense counsel cross-examined Frazier extensively about defendant's silence during arrest. *See* Sup. 2d 276-29. Frazier agreed that defendant was an ideal arrestee because he was compliant and did not "give [him] a lot

of mouth." Sup. 2d R276-77. Frazier told defendant not to make as scene, and he did not. Sup. 2d R277. Frazier agreed that defendant had the right to remain silent and that defendant exercised that right inasmuch as he remained silent. Sup. 2d R277-78. Frazier agreed that he did not "infer any guilt on [defendant's] part by his remaining silent." Sup. 2d R278.

That same evening, Wassell interviewed defendant at the Pike County Sheriff's Department. Sup. R278. He read defendant the *Miranda* warnings, Sup. R278, and defendant answered some questions, Sup. R278-79; Peo. Exh. 41 at 0:10:50-0:16:00. Defendant told Wassell that he did not remember seeing Wassell's emergency lights. Peo. Exh. 41 at 0:14:34-0:14:51.

The defense had cross-examined Hobbs and Frazier about an object visible around defendant's neck as he entered Walmart, *see* Sup. 2d E40, 42-44 — Hobbs did not know whether they were earplugs, Sup. 2d 191-93, and Frazier thought they looked like "earplugs or headphones or something," Sup. 2d 280-81 — and recalled Wassell to ask about the object. Sup. 2d R317-19. Wassell agreed that if a person were riding a motorcycle while wearing something that covered his ears and ear plugs, it would be more difficult to hear, but he declined to speculate whether defendant was unable to hear Wassell's siren. Sup. 2d 319-21.

The prosecutor's closing argument spanned almost 20 pages of transcript. Sup. 2d R347-66. For less than one page, the prosecutor argued, without objection, that the "normal" response to being disarmed and detained

in a Walmart restroom would be to ask what was going on and why one was being detained. Sup. 2d R360-61. But the prosecutor acknowledged twice in that portion of his closing argument that defendant had "the right to remain silent" and "the right to say nothing." *Id.* Defendant did not object to the argument regarding his silence during arrest. *See id.*

Defendant's closing argument also addressed the testimony that he did not ask why he was being detained. Sup. 2d R369-72. Defendant argued that the fact that he did not ask why he was being detained could not support an inference of guilt because it merely reflected good judgment and compliance with the arresting officers by refraining from "argu[ing] with them" or "call[ing] them names." Sup. 2d R369-70. Defendant argued that his silence was consistent with exercising his constitutional rights or submitting to the officers' authority, not guilt. Sup. 2d R371-72.

After deliberations, the jury found defendant guilty of aggravated fleeing and speeding, and acquitted him of failing to signal a lane change. Sup. 2d R403. Defendant filed a written post-trial motion arguing that the trial court erred in denying his motion for a mistrial based on the prosecution's comment on defendant's silence during the People's opening statement, but alleging no error in admitting the evidence of defendant's silence at trial or commenting on it during closing argument. C98-99. The court denied the motion, R42, and sentenced defendant to two years in prison, R60-61; C108.

Defendant appealed, C140, arguing that (1) the trial court erred in denying his motion for a mistrial based on the prosecutor's comment in opening statement on defendant's silence, Def. App. Br. 16-21, (2) trial counsel was ineffective for not better arguing the motion for a mistrial, *id.* at 21-22, (3) the admission of evidence of defendant's silence and the prosecution's comments on that silence during opening and closing arguments constituted first- and second-prong plain error, *id.* at 26-41; and (4) trial counsel was ineffective for not objecting to the evidence of defendant's silence or the prosecution's comment on that silence during closing argument, *id.* at 41-43.

The appellate court reversed and remanded for a new trial. *People v. Pinkett*, 2021 IL App (4th) 190172-U, ¶ 74. The appellate majority held that the trial court abused its discretion by denying defendant's motion for a mistrial. *Id.* ¶ 54. Specifically, the majority held that (1) evidence of a defendant's silence during and after arrest is never admissible unless for the purposes of impeachment, regardless of whether the silence is before or after *Miranda* warnings, (2) evidence of silence is not relevant to guilt, and (3) the prosecution erred by eliciting testimony regarding defendant's postarrest, pre-*Miranda* silence and commenting on that silence during open statement and closing argument. *Id.* ¶¶ 52-54. The appellate majority further held that the error was not harmless. *Id.* ¶ 67. The dissent would have found any error harmless because of the overwhelming weight of the evidence of

defendant's guilt. *Id.* ¶¶ 77, 85 (Turner, J., dissenting) ("any error was not only harmless beyond a reasonable doubt, but was harmless beyond any and all doubt").

STANDARDS OF REVIEW

The trial court's denial of defendant's motion for a mistrial based on the prosecutor's comment during opening argument "will not be disturbed unless the denial was a clear abuse of discretion," *People v. Bishop*, 218 Ill. 2d 232, 251 (2006), meaning that the denial was "'arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it,'" *People v. Fane*, 2021 IL 126715, ¶ 48 (quoting *People v. King*, 2020 IL 123926, ¶ 35).

If the circuit court's denial of defendant's motion for mistrial (which was premised solely on the prosecutor's comment during opening argument, Sup. R242-43; C98) was erroneous under Illinois law, then that error is subject to harmless-error review, under which an error is harmless if there is no reasonable probability that the jury would have acquitted absent the error. *See In re E.H.*, 224 Ill. 2d 172, 180 (2006); *People v. Dent*, 230 Ill. App. 3d 238, 245 (1st Dist. 1992) (reviewing claim of improper comment during opening statement for harmless error). If, however, the prosecutor's remarks referred to evidence barred by the Fifth Amendment, then the error is reviewed under the constitutional harmless-error standard, which requires the People to prove that it was harmless beyond a reasonable doubt.

Chapman v. California, 386 U.S. 18, 24 (1967); *see People v. Hart*, 214 Ill. 2d 490, 518 (2005).

Although the appellate court purported to address only the propriety of the court's order denying a mistrial, the court further held that admission of the evidence at trial and the prosecutor's reference to that evidence in closing argument were error. *Pinkett*, 2021 IL App (4th) 190172, ¶ 54. But because, as defendant conceded in the appellate court, Def. App. Br. 27, he did not object to the admission of evidence of his silence during arrest or the prosecutor's comment on that evidence during closing argument or include those claims of error in his post-trial motion, *see* Sup. 2d R267, 360-61; C98-99, those alleged errors are properly reviewed for plain error. *See People v. Herrett*, 137 Ill. 2d 195, 209-110 (1990).

ARGUMENT

I. The Circuit Court Acted Within Its Discretion by Declining to Declare a Mistrial Based on the Prosecution's Comment upon Defendant's Silence During Arrest in Its Opening Statement.

The circuit court acted within its discretion by declining to declare a mistrial. "A mistrial should be declared only if there is an occurrence of such character and magnitude as to deprive a party of a fair trial and that party demonstrates actual prejudice." *People v. Soto*, 2022 IL App (1st) 201208, ¶ 153. Here, the evidence of defendant's silence when an off-duty deputy wearing a t-shirt and shorts grabbed and disarmed him while defendant was leaving the Walmart restroom where he had been hiding minutes after

eluding police was barred by neither the Fifth Amendment nor Illinois Rules of Evidence, with the result that the prosecutor's comment on that silence during opening statement did not deny defendant a fair trial. Evidence of defendant's silence was not barred by the Fifth Amendment because it neither reflected an exercise of his right not to answer government questions nor was itself the product of government compulsion. And evidence of defendant's silence was admissible under the Illinois Rules of Evidence because, unlike a defendant's silence during a typical arrest, defendant's silence under the circumstances of this case — where he was detained by a plain-clothed officer after being discovered hiding in a Walmart restroom following his flight from police — was sufficiently probative of consciousness of guilt to outweigh the risk of unfair prejudice. Accordingly, the circuit court did not abuse its discretion when denying defendant's motion for a mistrial and the appellate court's contrary holding should be reversed.

A. The Prosecutor's Comment Was Not Improper Because the Evidence of Defendant's Silence During Arrest Was Not Barred by the Fifth Amendment.

The Fifth Amendment bars evidence of a defendant's silence only if (1) that silence represents his exercise of the right not to be compelled to incriminate himself by answering questions put to him by the government, or (2) the silence was itself the product of compulsion. "[P]opular misconceptions notwithstanding, the Fifth Amendment . . . does not establish an unqualified 'right to remain silent.'" *Salinas v. Texas*, 570 U.S. 178, 189 (2013) (plurality opinion). Rather, the Fifth Amendment's direction that "[n]o

person . . . shall be compelled in any criminal case to be a witness against himself," U.S. Const. amend. V, prohibits "compulsory self-incrimination," *Colorado v. Connelly*, 479 U.S. 157, 163 (1986).[3] This not only prohibits the government from compelling a person "to testify against himself in a criminal trial in which he is a defendant," but also "'privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings.'" *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). Once a person invokes this right not to answer questions posed by the government, neither his invocation of the right nor his subsequent silence may be used against him at trial. *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966).

Here, defendant's silence during his arrest — that is, the fact that he said nothing when an unknown man in a t-shirt and shorts grabbed and disarmed him as he exited a Walmart restroom — does not represent an exercise of his Fifth Amendment right not to answer questions because he

[3] The Fifth Amendment's prohibition against compulsory self-incrimination is applicable to the States through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), and "has also been incorporated in the Illinois Constitution, which provides: '[n]o person shall be compelled in a criminal case to give evidence against himself,'" *People v. Stevens*, 2014 IL 116300, ¶ 16 (quoting and altering Ill. Const. 1970, art. I, § 10); *see Relsolelo v. Fisk*, 198 Ill. 2d 142, 150 (2001) (holding that article I, section 10 is interpreted in lockstep with the United States Supreme Court's interpretation of the Fifth Amendment absent "the substantial grounds necessary for this court to depart from the federal interpretation of the self-incrimination clause").

had not invoked that right. The right not to answer questions posed by the government "'generally is not self-executing,'" *Salinas*, 570 U.S. at 181 (quoting *Murphy*, 465 U.S. at 425, 427), and so one who desires its protection must unambiguously invoke it, *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010). "Although 'no ritualistic formula is necessary in order to invoke the privilege,'" *Salinas*, 570 U.S. at 181 (quoting *Quinn v. United States*, 349 U.S. 155, 164 (1955)) — on the contrary, any clear refusal to submit to questioning will do, *see*, *e.g.*, *People v. Nielson*, 187 Ill. 2d 271, 287 (1999) (defendant invoked right during custodial interrogation by covering his ears and chanting "nah nah nah") — it cannot be invoked by "simply standing mute," *Salinas*, 570 U.S. at 181, 186-88; *Berghuis*, 560 U.S. at 376, 380-82 (defendant did not invoke right by remaining largely silent throughout nearly three hours of custodial interrogation).

Defendant's momentary silence when grabbed while leaving the restroom did not unambiguously invoke his Fifth Amendment right. First, as a factual matter his silence was not in response to questioning, *see* Sup. 2d R263-64. *See Miranda*, 384 U.S. at 478 ("The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated."). For this reason alone, defendant's silence is admissible under the Fifth Amendment, just as any outcry (had he made one) of "What are you doing?" or "Hey!" would have been. *See id.* ("Any statement given

freely and voluntarily without any compelling influence is, of course, admissible in evidence."). Indeed, although defendant said nothing when Frazier grabbed him, Sup. 2d R265, R267, defendant did not remain silent. As they walked to the front of the store, defendant asked how he could know that Frazier was actually a police officer and asked to see Frazier's police identification, Sup. 2d R265, and when they reached Petty at the returns desk, defendant expressed concern that someone could get cut by the exposed blade of the knife that Frazier had taken from him and offered Frazier the sheath, Sup. 2d R265-66. Defendant then told Petty to take defendant's motorcycle to the police station rather than arrange to have it towed. Sup. 2d R290-91. And defendant volunteered additional statements while Frazier transported him to jail, telling Frazier that he had gone into the Walmart to buy zip ties to repair the motorcycle, Sup. 2d R266, and that he had not been running from police, Sup. 2d R282. Because defendant was not being questioned and did not invoke his Fifth Amendment right to remain silent (or even remain silent), his lack of a response at the moment of arrest was not inadmissible evidence of him exercising that right.

Indeed, if a defendant could invoke his right not to answer questions simply by not volunteering a statement at the moment of his arrest, then police would be placed in the impossible position of trying to determine when a defendant's lack of comment was an invocation of his Fifth Amendment right rather than attributable to surprise or anger or any of the myriad other

reasons a person might not say something at a particular moment. Officers would then have to guess whether initiating an interview would "scrupulously honor" that possible invocation of the right. *See Michigan v. Mosely*, 423 U.S. 96, 104 (1975) ("[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'"). *Berghuis* requires an unambiguous invocation of the right to avoid just this kind of confusion. *See* 560 U.S. at 581 ("A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity.") (quoting and altering *Davis v. United States*, 512 U.S. 452, 458-59 (1994)); *see Salinas*, 570 U.S. at 188 ("[R]egardless of whether prosecutors seek to use silence or a confession that follows, the logic of *Berghuis* applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.").

Nor was defendant's silence at the moment of arrest the product of government compulsion. After a defendant receives the *Miranda* warnings that he has the right to remain silent and to the presence of an attorney, his subsequent silence may not be used against him at trial. *Fletcher v. Weir*, 455 U.S. 603, 605-06 (1982). But the constitutional prohibition against the prosecution's use of a defendant's post-*Miranda* silence rests not on some

categorical inadmissibility of silence, but on "the nature of *Miranda* warnings," *id.* at 605, which carry "the implicit assurance . . . 'that silence will carry no penalty,'" *Wainwright v. Greenfield*, 474 U.S. 284, 290 (1986) (quoting *Doyle v. Ohio*, 426 U.S. 610, 618 (1976)). Accordingly, it is "fundamentally unfair" to use a defendant's post-*Miranda* silence against him "where the government had [by giving the *Miranda* warnings] induced silence by implicitly assuring the defendant that his silence would not be used against him." *Fletcher*, 455 U.S. at 606; *see Wainwright*, 474 U.S. at 291 (explaining that basis for excluding evidence of defendant's post-*Miranda* silence is that "breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires"). In other words, when the government gives a defendant *Miranda* warnings, it effectively compels any subsequent silence.

But this rationale does not extend to defendant's pre-*Miranda* silence while he was being arrested (or shortly thereafter). *Fletcher* expressly rejected the argument that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." 455 U.S. at 606 (internal quotations omitted); *see Salinas*, 570 U.S. at 188 n.3 (noting that although due process prohibits evidence "that a defendant was silent after he heard *Miranda* warnings," that rule "does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him"). Arrest itself does not compel a person to react at all, whether

through speech, silence, or other action, but merely places him in custody. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 300 (1980) (*Miranda* warnings "are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation," which "reflect[s] a measure of compulsion above and beyond that inherent in custody itself"); *People v. Villalobos*, 193 Ill. 2d 229, 239 (2000) ("Absent the interplay of custody and interrogation, an individual's privilege against self-incrimination is not threatened.").

Therefore, the Fifth Amendment did not bar admission of evidence of defendant's reaction to arrest — neither his speech nor his silence — because police did not compel him to react as he did. *See*, *e.g.*, *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005) (use of "the defendant's silence during and just after his arrest" in prosecution's "case-in-chief as evidence of guilt did not violate his Fifth Amendment rights" because "there was no governmental action at that point inducting his silence" and he "was under no government-imposed compulsion to speak"); *see also Connelly*, 479 U.S. at 170 ("The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion."); *People v. Winsett*, 153 Ill. 2d 335, 357 (1992) ("[T]he fifth amendment bars only the use of statements which are compelled."). To the extent that defendant lacked perfect control over his reaction to arrest due to non-governmental forces such as conscience, that is not compulsion within the meaning of the Fifth Amendment; compulsion

under the Fifth Amendment "depend[s] on the absence of police overreaching, not on 'free choice' in any broader sense of the word," for "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" *Connelly*, 479 U.S. at 170 (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)).

The appellate majority attempted to distinguish *Fletcher* on the ground that it concerned the use of evidence of silence to impeach a testifying defendant rather than, as here, in the prosecution's case-in-chief. *See Pinkett*, 2021 IL App (4th) 190172-U, ¶¶ 51-52. But that factual distinction is irrelevant to *Fletcher*'s explanation that the Fifth Amendment only protects silence induced through the provision of the *Miranda* warnings. *See* 455 U.S. at 605-07; *see also Frazier*, 408 F.3d at 1111 (government may use defendant's postarrest, pre-*Miranda* silence as evidence of guilt). Indeed, *Wainwright* explained that the distinction between silence used to impeach and silence used as substantive evidence of guilt is irrelevant to the fairness rationale underlying the prohibition against commenting on a defendant's post-*Miranda* silence identified by the United States Supreme Court in *Doyle* and its progeny. *See Wainwright*, 474 U.S. at 292. Nor did the appellate majority address the requirement that a defendant unambiguously invoke the Fifth Amendment right.

Instead of analyzing whether the Fifth Amendment rationale for excluding evidence of a defendant's silence is applicable to pre-*Miranda* silence, the appellate majority relied on *Herrett*, 137 Ill. 2d at 213-14, for the proposition that "[p]rosecutorial questions and remarks on a defendant's postarrest silence are generally improper, except when used to impeach a defendant's testimony at trial." *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 52. But *Herrett* involved a defendant's post-*Miranda* silence and relied on federal cases prohibiting the admission of a defendant's silence after *Miranda* warnings had been given. *See Herrett*, 137 Ill. 2d at 212-14 (citing *Doyle*, 426 U.S. 610). *Herrett* held that the ambiguity of post-*Miranda* silence makes it insufficiently probative to admit because "[s]ilence in the wake of *Miranda* warnings may be nothing more than the arrestee's exercise of his right not to speak." *Id.* at 213; *see Fletcher*, 455 U.S. at 604-05 ("silence following the giving of *Miranda* warnings [i]s ordinarily so ambiguous as to have little probative value"). Thus, *Herrett* is simply inapposite where, like here, defendant's silence was not compelled by the provision of *Miranda* warnings.

In sum, because defendant's momentary silence as he was arrested leaving the Walmart restroom was neither an invocation of his Fifth Amendment privilege against compulsory self-incrimination nor itself compelled, the Fifth Amendment did not bar evidence of that silence at trial and the trial court did not abuse its discretion by declining to declare a

mistrial on the basis of the prosecutor's comment on that evidence in opening statement.

B. The Prosecutor's Comment Was Not Improper Because the Evidence of Defendant's Silence During Arrest Was Admissible Under Illinois Law.

Although the Fifth Amendment does not bar admission of evidence of a defendant's pre-*Miranda* silence, *see supra* § II.A, that does not mean that such evidence is necessarily admissible at trial. *Cf. Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) ("Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial."). To the contrary, evidence that a defendant did not speak during arrest or while being transported to the station will often be inadmissible under Illinois Rule of Evidence 403 on the ground that its probative value is substantially outweighed by the danger of unfair prejudice. Whether evidence of silence during arrest is admissible turns on the application of the same fact-specific balancing test that is applied to determine the admissibility of any other piece of evidence. Under some circumstances, including those presented in this case, a defendant's silence may be sufficiently probative of consciousness of guilt to be admitted.

Under Illinois law, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401; *see People v. Lewis*, 165 Ill. 2d 305, 329 (1995) ("Relevant evidence is evidence having any tendency to make the existence of any fact

that is of consequence to the determination of the action more probable than it would be without the evidence."). A defendant's silence "prior to arrest" and "after arrest if no *Miranda* warnings are given" is "probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993). In other words, absent the inducement to stay silent provided by the *Miranda* warnings, silence in the face of arrest is at least somewhat probative of consciousness of guilt, inasmuch as one might expect an innocent person to protest their innocence upon arrest. *See People v. Aughinbaugh*, 36 Ill. 2d 320, 322-23 (1967) (under tacit admission rule, defendant's silence in face of accusations of guilt is admissible if "one similarly situated would ordinarily deny the imputation of guilt"); *see also United States v. Hale*, 422 U.S. 171, 176 (1975) ("Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation" if "it would have been natural under the circumstances to object to the assertion in question.").

Relying on *People v. Sanchez*, 392 Ill. App. 3d 1084 (3d Dist. 2009), the court below held that postarrest silence is categorically irrelevant to guilt. *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 53. *Sanchez* relied on *People v. Clark*, 335 Ill. App. 3d 758 (3d Dist. 2002), which in turn rested on this Court's pre-*Miranda* decisions in *People v. Rothe*, 358 Ill. 52 (1934), and *People v.*

Lewerenz, 24 Ill. 2d 295 (1962). *See Clark*, 335 Ill. App. 3d at 763. But neither *Rothe* nor *Lewerenz* held that a defendant's silence is never relevant to guilt. Rather, both cases effectively predicted the United States Supreme Court's eventual conclusion that a defendant's unambiguous invocation of the Fifth Amendment right not to give a statement to police cannot be used against him at trial. *See Miranda*, 384 U.S. at 468 n.37; *Berghuis*, 560 U.S. at 381-82. *Lewerenz* held that it was error to admit evidence that the defendant "had refused to make a statement on advice of counsel" because "an accused is within his rights when he refuses to make a statement, and the fact that he exercised such right has no tendency to prove or disprove the charge against him." 24 Ill. 2d at 299. Similarly, *Rothe* held that it was error to admit evidence that "defendants refused to make a statement at the police station" because "[i]n this refusal they were within their rights, and the fact that they refused to make a statement had no tendency to either prove or disprove the charge against them." 358 Ill. at 57. Neither case suggested that evidence of a defendant's silence during arrest, absent an invocation of the right not to give a statement, is categorically irrelevant. As both this Court and the United States Supreme Court have recognized, silence during arrest *is* relevant, even if not always admissible. *See Brecht*, 507 U.S. at 628 (1993); *Hale*, 422 U.S. at 176; *Aughinbaugh*, 36 Ill. 2d at 322-23.

Ultimately, the admissibility of evidence of silence during arrest, like any other evidence, turns on whether "its probative value is substantially

outweighed by the danger of unfair prejudice[.]" Ill. R. Evid. 403. Although evidence of pre-*Miranda* silence is relevant under Rule 401, in most cases it will be insufficiently probative to outweigh the risk of unfair prejudice, as required for admission under Rule 403. "In most circumstances silence is so ambiguous that it is of little probative force," *Hale*, 422 U.S. at 176, yet it carries "a significant potential of prejudice" due to the risk "that the jury is likely to assign much more weight to the defendant's previous silence than is warranted," *id.* at 180. For example, a defendant's silence upon being arrested by a uniformed officer supports a weak inference of consciousness of guilt, but is also entirely consistent with a person complying with police or refraining from comment based on prior experience or advice, and therefore of minimal probative value. Accordingly, such silence likely will be inadmissible under Rule 403 because its probative value will be substantially outweighed by the risk of unfair prejudice.

But, here, defendant was grabbed from behind as he walked out of a Walmart restroom by an unknown man wearing shorts and a t-shirt. Sup. 2d R263, 265, 267. The man seized defendant's knife from his belt, announced himself as a sheriff's deputy, and told defendant to accompany him outside without making a scene. Sup. 2d R263, 265. That defendant showed no surprise at being grabbed and disarmed while exiting a Walmart restroom by an unknown man wearing a t-shirt and shorts, Sup. 2d R267, supports a much stronger inference of consciousness of guilt than a typical arrest by a

uniformed officer, and, accordingly, evidence of such silence carries much more probative value.

In fact, defendant's lack of response to what would be an extremely surprising event for anyone not hiding from police and expecting to be caught at any moment was highly probative of consciousness of guilt because, unlike silence in the face of a run-of-the-mill arrest by a uniformed officer on the street or at the scene of a crime, it was not readily susceptible of an innocent explanation. An innocent person grabbed and disarmed in a public restroom by a stranger in a t-shirt and shorts would be expected to have *some* kind of reaction. Instead, defendant "didn't act like [the stranger] was doing anything out of line whatsoever." Sup. 2d R267. That defendant did not ask why he was being detained as he was marched out of a Walmart restroom was highly probative of his consciousness of guilt: he knew he was being detained because he had just led police on a high-speed chase that ended in the Walmart restroom. Indeed, while defendant was being transported to jail, he volunteered without prompting that he had not been running from police, Sup. 2d R282, further evidencing his consciousness of guilt.

Moreover, not only was the probative value of defendant's silence unusually high, but the countervailing risk of unfair prejudice was unusually low. Defendant's silence when grabbed and disarmed while leaving the restroom plainly was not an attempt to exercise his Fifth Amendment right, given that only moments later he began making statements of all kinds —

asking if Frazier was really a police officer, offering advice about how to prevent injury from the knife that Frazier had taken from him, giving Petty permission to take his motorcycle to the station, explaining that he had been in the Walmart to buy zip ties to repair his motorcycle, and volunteering that he had not been running from police.

Thus, this case presents the unusual circumstance where evidence of a defendant's silence during arrest is admissible under Rule 403 because its probative value is not substantially outweighed by the risk of unfair prejudice. Accordingly, the circuit court did not abuse its discretion by declining to grant a mistrial based on or the prosecution's comment on evidence of defendant's silence during opening statements.

II. In the Alternative, Any Error in Permitting the Prosecutor to Comment on Defendant's Silence in His Opening Statement Was Harmless.

Because the evidence of defendant's guilt was overwhelming, any error in permitting the prosecutor to comment, in opening statement, on defendant's silence during arrest was harmless beyond a reasonable doubt, and therefore was harmless, regardless of whether reviewed under the federal harmless-error standard or Illinois's less demanding harmless error standard, under which error is harmless if there is no reasonable probability that the jury would have acquitted absent the error. *See In re E.H.*, 224 Ill. 2d 172, 180-81 (2006) (comparing Illinois's and federal harmless-error standards). Under harmless-error review, the error is "'quantitatively assessed in the context of other evidence presented to determine [the effect it

had on the trial].'" *Brecht*, 507 U.S. at 629 (quoting and altering *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991)).[4]

Here, the prosecutor's comment on defendant's silence constituted five lines, Sup. R241, out of an opening argument that spanned nearly 13 pages, Sup. R231-41, 247-49. The jury was instructed twice that opening statements are not evidence: once before opening statements began, Sup. R230, and then again during final instructions, Sup. 2d R389. To the extent that the prosecutor's comment that defendant did not ask during his arrest why he was being arrested had any prejudicial effect, that effect was mitigated substantially by defendant's extensive cross-examination of Frazier regarding the that silence, during which he elicited testimony that defendant's silence reflected the compliance that police hope for from detainees and that Frasier did not infer any guilt from defendant's silence. Sup. 2d R276-79. Any prejudicial effect was then further mitigated through

[4] Although the appellate majority considered the five factors discussed in *People v. Dameron*, 196 Ill. 2d 156, 164 (2001), for determining the harmlessness of testimony regarding a defendant's post-*Miranda* silence admitted in violation of *Doyle*, *see Pinkett*, 2021 IL App (4th) 190172-U, ¶¶ 57-58, four of the five factors are part of any harmlessness analysis — the frequency and degree of the impropriety, the prosecution's reliance on the impropriety, whether curative instructions were given, and the strength of the overall evidence of guilt — and the fifth factor — which party elicited the testimony of silence — is inapplicable to a claim that an improper comment was made during opening argument, at which point no evidence has been admitted at all. *See Dameron*, 196 Ill. 2d at 164 (listing factors relevant to harmlessness of *Doyle* violation). Accordingly, the People apply the usual harmlessness analysis to the prosecutor's comment during his opening statement.

closing argument. Although the prosecutor briefly argued — in less than one page of the nearly 20-page argument, which also included re-playing several video clips, *see* Sup. 2d R347-66 — that the normal response to being disarmed and detained in a Walmart restroom would be to ask what was going on and why one was being detained, Sup. 2d R360-61, he also acknowledged twice in that short passage that defendant had "the right to remain silent" and "the right to say nothing," *id.* And defendant then argued, based on Frazier's testimony, that the jury should draw no inference of guilt from defendant's silence during arrest because such silence merely reflected an effort to comply with police or an exercise of defendant's Fifth Amendment right. Sup. 2d R369-72.

In sum, there is no reasonable doubt that the jury would have reached the same verdict even in the absence of the prosecutor's brief reference in its opening argument to defendant's silence during arrest because the evidence of defendant's guilt was overwhelming. Wassell's testimony and Hobbs's dashboard camera footage conclusively established that defendant was chased on his sport motorcycle by first one and then two police cars with emergency lights flashing and sirens blaring for approximately 13 minutes at speeds reaching more than 90 miles per hour. After defendant eventually gained some distance from his pursuers, he drove through the Walmart parking lot at 40 or 45 miles per hour and behind the building to the loading dock area, where he could not be seen from the highway. After the pursuing

police cars passed, he reemerged, parked the motorcycle between two cars, entered the store, and went into the restroom, where he remained until Frazier entered, dressed in a t-shirt and shorts. Defendant looked nervous, but when was grabbed from behind and disarmed, he showed no surprise, demonstrating that he was expecting to be detained and indicating consciousness of guilt.

Defendant's argument that he did not know police wanted him to pull over due to his motorcycle's lack of sideview mirrors and noisy engine, along with the speculation that he could have been wearing earplugs or headphones during the chase, was implausible. Sup. 2d R374-78. During the chase, Wassel's car followed at a distance of between 100 to 300 feet behind defendant's motorcycle, and its siren was audible to Hobbs sitting in her car nearly a mile away. When defendant and the other two motorcycles paused briefly at a four-way stop, Wassell briefly turned off his sirens, but his lights continued flashing as he pulled to within 10 or 15 feet of defendant's motorcycle. And Wassell reactivated the siren when the chase continued. Moreover, while Frazier was transporting defendant to the police station, defendant volunteered that he had not been running from police, demonstrating that he knew why he had been detained and sought to exculpate himself.

Given the overwhelming evidence of defendant's guilt, any error in denying defendant's motion for a mistrial based on the comment in the

prosecution's opening statement was harmless under both the federal and Illinois harmlessness standards, for there was neither a reasonable doubt nor a reasonable possibility that the jury would have acquitted defendant but for the prosecutor's brief comment in his opening statement about defendant's silence during arrest.

III. The Admission of Evidence of Defendant's Silence at Trial and the Prosecutor's Reference to That Evidence During Closing Argument Did Not Constitute Plain Error.

Defendant's unpreserved claims that the trial court erred by admitting evidence of his silence during arrest and that the prosecutor erred by commenting on that evidence during closing argument is reviewed under the first prong of the plain-error standard because neither the erroneous admission of evidence nor improper comments during closing argument are structural error, as required for review under the second prong of the plain-error standard. *See People v. Herrett*, 137 Ill. 2d 195, 209-110 (1990) (reviewing unpreserved claim that prosecutor improperly commented on defendant's postarrest silence for first-prong plain error); *see also People v. Moon*, 2022 IL 125959, ¶ 74 ("under Illinois's well-established plain error standard, we have equated second prong plain error with structural error," meaning "'presumptively prejudicial error[]'") (quoting *People v. Herron*, 215 Ill. 2d 167, 185 (2005)). Thus, "[a]lthough the errors complained of [here] involve constitutional rights, they are not of such a character that the second prong of the plain error rule must be invoked to preserve the integrity and reputation of the judicial process," for even "improper reference to the

accused's failure to testify in his own behalf at trial is not an error which is so substantial that it deprives the accused of a fair and impartial trial." *Herrett*, 137 Ill. 2d at 215; *accord People v. Hampton*, 149 Ill. 2d 71, 104-05 (1992) (claim of Fifth Amendment violations "is not of such character that the second prong of the plain error exception must be invoked").

To establish first-prong plain error, defendant must establish that (1) the error was clear or obvious and (2) that the evidence was so closely balanced that any error, regardless of its seriousness, could have caused the jury to find defendant guilty where it otherwise would have acquitted him, such that "severely threatened to tip the scales of justice." *People v. Sebby*, 2017 IL 119445, ¶ 51. Defendant made neither showing. The evidence was properly admitted (and therefore properly commented upon during closing argument) and the evidence of defendant's guilt was overwhelming.

First, defendant failed to establish clear or obvious error in admitting the evidence of his silence during arrest because, as demonstrated above, that evidence was properly admitted. *See supra*, § II. Defendant's silence (or, rather, lack of outcry) when he was grabbed from behind by an unknown man wearing a t-shirt and shorts while leaving a Walmart restroom neither reflected an exercise of his Fifth Amendment right not to answer governmental questions, nor was itself the product of governmental compulsion, and so it was not admitted in violation of the Fifth Amendment. *See supra* § II.A. And defendant's silence at the moment of arrest was not

admitted in violation of Illinois evidentiary law because, unlike a defendant's silence during a typical arrest by a uniformed officer, the probative value of defendant's silence was not substantially outweighed by the risk of unfair prejudice. *See supra* § II.B. Defendant's lack of outcry in response to an event virtually guaranteed to elicit outcry from anyone not hiding in a Walmart restroom after leading police in a high-speed chase ending at that restroom was highly probative of consciousness of guilt and therefore admissible.

Second, defendant failed to establish that the evidence was closely balanced as to whether he was guilty of aggravated fleeing or attempting to elude a peace officer, *see* 625 ILCS 5/11-204.1(a)(1) (2017), and speeding, *see* 625 ILCS 5/11-601(b) (2017). To prove defendant guilty of aggravated fleeing or attempting to elude a peace officer, the People had to show that (1) a uniformed peace officer driving a vehicle equipped with flashing red and blue lights and a siren gave an audible or visual signal through the use of the lights or siren that defendant should stop, (2) defendant willfully failed to stop, and (3) while failing to stop, traveled at least 21 miles per hour over the legal speed limit. 625 ILCS 5/11-204.1 (2017) (a)(1) (2017); 625 ILCS 5/11-204(a) (2017). And to prove defendant guilty of speeding, the People had to show that he was driving on a highway at a speed faster than the speed limit. 625 ILCS 5/11-601(b) (2017). Wassell's uncontested and credible testimony that, while he was pursuing defendant, he clocked defendant driving more

than 90 mph in an area with a 45 mph speed limit, Sup. R268-69, proved that defendant was traveling not only faster than the speed limit, but more than 21 miles per hour faster. Similarly, Wassel's uncontested testimony established that he was in uniform, Sup. R253-54, his car was equipped with working blue and red lights and a siren, Sup. R252-53, he used both the lights and siren to signal that defendant should pull over, Sup. R256-58, and defendant did not pull over in response to those signals, Sup. R257-58, 263.

The only point in contention was whether defendant's failure to stop in response to Wassell's signals was willful, and the evidence was not closely balanced on that issue. The evidence showed that Wassell pursued defendant from a distance of 100 to 300 feet for nearly 13 miles with his lights flashing and sirens blaring, and that he was as close as 10 to 15 feet behind defendant with his emergency lights flashing while defendant paused at a four-way stop, yet defendant not only did not stop, but accelerated to more than 90 mph, causing Wassell to fall behind. Once he had gained some distance from his pursuers, defendant pulled into the Walmart parking lot at 40 to 45 miles per hour and drove behind the building to the loading dock, where he could not be seen from the highway, until the pursuing police passed by.

Defendant offered no evidence that he was not fully aware of the lights and sirens that pursued him for nearly 13 miles, but instead speculated that it was possible that he was wearing headphones or earplugs during the chase

and it was possible that they were so effective that he could not hear the siren 100 feet behind him, even though the evidence proved that the siren was audible from about a mile away. As the dissent below recognized, the evidence of defendant's guilt was overwhelming. *Pinkett*, 2021 IL App (4th) 190172-U, ¶ 77 (Turner, J., dissenting) ("any error was not only harmless beyond a reasonable doubt, but was harmless beyond any and all doubt"). Certainly, the evidence of defendant's guilt was not so closely balanced that any clear or obvious error at all, no matter how slight, could have tipped the balance and caused the jury to find him guilty. Accordingly, any error in admitting and commenting upon the evidence of defendant's silence during arrest did not constitute first-prong plain error.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court.

April 20, 2022

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

JOSHUA M. SCHNEIDER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7123
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 37 pages.

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 20, 2022, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which served the person named below at this registered email address:

Simon A. Patras
Assistant Appellate Defendant
Office of the State Appellate Defender,
Fourth Judicial District
400 West Monroe, Suite 303
Springfield, Illinois 62704
4thdistrict.eserve@osad.state.il.us

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General

APPENDIX

Table of Contents to the Appendix

2021 IL App (4th) 190172-U

NO. 4-19-0172

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 14, 2021
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Pike County
MICHAEL B. PINKETT,	)	No. 17CF84
Defendant-Appellant.	)	
	)	Honorable
	)	Jerry J. Hooker,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Knecht concurred in the judgment.
Justice Turner dissented.

ORDER

¶ 1 *Held*: The appellate court reversed and remanded with directions, concluding the trial court erred in denying defendant's motion for a mistrial and the error was not harmless.

¶ 2 After a July 2018 trial, a jury found defendant, Michael B. Pinkett, guilty of aggravated fleeing or attempting to elude a peace officer, a Class 4 felony (625 ILCS 5/11-204.1(a)(1) (West 2016)) and speeding (625 ILCS 5/11-601(b) (West 2016)). The jury acquitted defendant of failure to use a turn signal (625 ILCS 5/11-804(d) (West 2016)). In September 2018, the trial court sentenced defendant to two years' imprisonment.

¶ 3 Defendant appeals, arguing (1) the trial court erred in denying defendant's motion for a mistrial or, in the alternative, defense counsel provided ineffective assistance of counsel by failing to distinguish the State's case law in regard to defendant's postarrest silence, (2) the State

committed prosecutorial misconduct violating defendant's right to remain silent, and (3) defense counsel provided ineffective assistance of counsel by failing to object to the State's pattern of prosecutorial misconduct. We reverse and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In July 2017, the State charged defendant with aggravated fleeing or attempting to elude a peace officer, a Class 4 felony (625 ILCS 5/11-204.1(a)(1) (West 2016)). The charge stemmed from a June 10, 2017, incident where "defendant, after being given a visual and/or audible signal to stop by a Peace Officer, failed to stop his vehicle and traveled at a speed at least 21 miles per hour over the legal speed limit[.]" Police subsequently arrested defendant in a Walmart bathroom. In July 2018, the State also charged defendant with speeding (625 ILCS 5/11-601(b) (West 2016)) and failure to use a turn signal (625 ILCS 5/11-804(d) (West 2016)).

¶ 6 A. Defendant's July 2018 Jury Trial

¶ 7 Below, we summarize the relevant testimony elicited during defendant's July 2018 jury trial.

¶ 8 1. *Opening Statements*

¶ 9 Before proceeding to opening statements, the trial court informed the jury that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys, which is not based on the evidence, should be disregarded."

¶ 10 During opening statements, the State informed the jury "[the arresting police officers will] both testify in spite of the fact that they tried to arrest [defendant] there at the Walmart without making a scene since it's in the middle of the store, at no point did he ever ask in any way the reason why he was being detained." Defense counsel objected, and the trial court excused the jury to hear the parties' arguments. Defense counsel made a motion for a mistrial,

arguing that when the prosecutor stated defendant did not say anything or ask why he was being arrested this was an improper comment on defendant's exercise of his constitutional right to remain silent.

¶ 11 The prosecutor indicated he researched the issue prior to trial and stated as follows:

> "In Illinois Practice Volume 5 Criminal Practice and Procedure, on comment about prosecutor on defendant's pre-arrest silence, 16.24, it says, the United States Supreme Court has held *Fletcher v. Weir*[, 455 U.S. 603 (1982),] that the use of [postarrest] silence does not violate the defendant's right to silence.
>
> The basis for the ruling is that because the *Miranda* [v. *Arizona*, 384 U.S. 436 (1966)] warnings have not yet been given. The State gives no assurances to the defendant that his silence would not be used against him, and thus, creates a sense of reliance on the statement by the defendant. The State of Illinois follows this decision. The citation is *People v. Givens*, [135 Ill. App. 3d 810,] 482 N.E.2d 211 [(1985)]. It's a 1985 Fourth District case and it's still the law."

¶ 12 Defense counsel responded that *Givens* was distinguishable because defendant was clearly in custody and counsel reiterated that the State's comments violated defendant's right to remain silent. The trial court stated it understood the parties' positions and knew the *Givens* case. Finding *Givens* applied, the court denied defense counsel's motion for a mistrial and overruled defense counsel's objection.

¶ 13 2. *Deputy Brad Wassell*

¶ 14 Brad Wassell, a Pike County sheriff's deputy, testified that on June 10, 2017, around 6 p.m., he observed three motorcycles driving above the speed limit of 55 miles per hour on U.S. 54 in Pike County, Illinois, a two-lane road. Deputy Wassell activated his radar unit and clocked one of the motorcycles traveling at 78 miles per hour in a 55 miles per hour speed limit zone. Deputy Wassell described the motorcycles as driving in a triangle-type formation.

¶ 15 As the motorcycles traveled toward him, Deputy Wassell pulled over to the side of the road in his unmarked police vehicle and activated his emergency lights. After the motorcycles continued to travel past him, Deputy Wassell made a U-turn to follow the motorcycles. Once Deputy Wassell caught up with the motorcycles, he estimated the motorcycles continued to travel between 60-65 miles per hour. At that point, Deputy Wassell activated his emergency siren.

¶ 16 Eventually the motorcycles reached the four-way intersection of U.S. 54 and Illinois 96, and the motorcycles made complete stops at the stop sign. Deputy Wassell deactivated his emergency siren at the four-way intersection. Deputy Wassell, about 10 feet behind the motorcycles, described the front motorcycle as "a Ninja crotch-rocket-style motorcycle." Deputy Wassell also observed the individual driving the Ninja motorcycle wore a "large black knife on his belt that was in a sheath." Deputy Wassell testified the driver of the Ninja motorcycle wore a helmet. Deputy Wassell also testified that when the motorcycles stopped at the intersection, the motorcyclist in the back turned around and made eye contact with him and he motioned for the motorcyclist to stop.

¶ 17 After making complete stops, the motorcycles proceeded through the intersection. As a result, Deputy Wassell reactivated his emergency siren and requested assistance. Deputy

Wassell testified the motorcycles maintained "a 60-mile-an-hour pace." Deputy Wassell continued following the motorcycles from about 200 to 300 feet behind. Deputy Wassell observed a piece of plastic dragged from the bottom of the Ninja motorcycle, the license plate was "blacker" than the others, possibly from dirt or grime, and the motorcycle did not have rearview mirrors. Deputy Wassell testified the motorcyclist on the Ninja-style bike never turned around and looked at him.

¶ 18 After the motorcycles passed through the intersection of U.S. 54 and State Highway 106, Deputy Wassell observed Officer Lisa Hobbs ahead. Before the motorcycles and Deputy Wassell reached Officer Hobbs, she activated her lights. At that point, the motorcycles began traveling in a single-line formation. The motorcycles continued driving and encountered a silver SUV traveling in the right-hand lane. The motorcycles followed the SUV for a mile before they increased their speed to 90 miles per hour to pass the silver SUV. Deputy Wassell testified that when the motorcycles increased their speed to 90 miles per hour, they were in a 45-miles per hour speed zone. Deputy Wassell also passed the silver SUV and continued to follow the motorcycles. Deputy Wassell testified that as he followed the motorcycles into Pittsfield, Illinois, he lost sight of the first two motorcycles, one being the Ninja motorcycle. Deputy Wassell continued following the third motorcycle to an Ayerco Convenience Center where he arrested the driver, Mikhail Williams. Deputy Wassell then transported Williams to the Pike County jail.

¶ 19 Later that evening, Deputy Wassell interviewed defendant at the Pike County Sheriff's Department. Deputy Wassell read defendant his constitutional rights and defendant waived his rights and agreed to speak with Deputy Wassell. When Deputy Wassell asked defendant if he noticed emergency lights while he drove his motorcycle, defendant alleged he did

not see any emergency lights while driving his motorcycle. The trial court allowed excerpts of the video recorded interview to be admitted during Deputy Wassell's testimony.

¶ 20 Deputy Wassell also observed photographs of defendant entering Walmart. On cross-examination, defense counsel asked Deputy Wassell if the photographs showed defendant wearing earplugs around his neck as he walked into Walmart. Deputy Wassell responded, "I don't know if they are earplugs." Defense counsel also asked Deputy Wassell, "if, in fact, a person on one of those motorcycles was wearing something covering his ears, and also had plugs in his ears, the combination of the loud noise of the motorcycle and the plugged ears and the wind, do you believe or would you concede that that person might not be able to hear your siren?" Deputy Wassell responded, "As I previously testified, I could see where it would be more difficult, but again, I don't think I'm the best person to answer that question, sir."

¶ 21 3. *Officer Lisa Hobbs*

¶ 22 Lisa Hobbs, a part-time Pittsfield police officer, testified that on June 10, 2017, she "heard radio traffic from Deputy Wassell that he was following three motorcycles that were refusing to stop, so I positioned myself." Officer Hobbs positioned herself perpendicular to U.S. 54 on the south side of the roadway, facing north "just a few" feet from the eastbound lane of traffic on U.S. 54. Officer Hobbs testified once she heard Deputy Wassell's siren and observed the motorcycles approaching, she turned on her overhead emergency lights. Officer Hobbs activated her overhead lights before the motorcycles passed her. Officer Hobbs's dash camera started recording when she activated her emergency lights.

¶ 23 Once the motorcycles and Deputy Wassell passed her, Officer Hobbs turned right onto U.S. 54 and activated her emergency siren. Officer Hobbs then followed Deputy Wassell to the Ayerco. After arriving at the Ayerco, dispatch informed Officer Hobbs of a sighting of one

of the other motorcycles. Officer Hobbs responded to the Pittsfield Walmart. Upon arrival at Walmart, Officer Hobbs observed a black motorcycle in the parking lot. Officer Hobbs also observed a black face mask in the parking lot. Officer Hobbs waited outside while Sergeant Matt Frazier went inside Walmart to look for the motorcycle driver. A while later, Officer Hobbs witnessed Sergeant Frazier come out of the Walmart with defendant. Officer Hobbs retrieved a helmet, vest, and knife from Sergeant Frazier.

¶ 24 4. *Frank Smith*

¶ 25 Frank Smith testified that on June 10, 2017, he pulled into the Pittsfield Walmart parking lot and observed a "sport bike come through Walmart really close to my Jeep at kind of a high rate of speed and kind of startled us, and it went behind Walmart back to, like, the loading dock area for a minute." Smith then heard sirens and observed police chasing an additional motorcycle on the street in front of Walmart. Smith also witnessed a second bike with two individuals on it enter the Walmart parking lot, park by his vehicle, and then exit out of the parking lot. Eventually, Smith witnessed the motorcyclist on the "sports bike" park the motorcycle behind a stack of mulch near the garden center.

¶ 26 Smith contacted Brian Douglas, an off-duty police officer, to inform him of the suspected police chase and "sport bike" that entered Walmart. Smith observed the motorcyclist on the "sport bike" enter Walmart. Smith later came across Officer Hobbs and informed her about the motorcyclist that entered Walmart and where to locate his motorcycle. Smith identified defendant as the individual on the "sport bike" who passed him in the Walmart parking lot and then walked into the store.

¶ 27 5. *Trooper Brian Douglas*

¶ 28 Brian Douglas, an Illinois State Police trooper, testified that on June 10, 2017, he received a telephone call from Smith reporting "the motorcycle that the police were chasing pulled into Walmart and parked by the mulch." Trooper Douglas "called the sheriff's department and relayed the information."

¶ 29 6. *Sergeant Matt Frazier*

¶ 30 Matt Frazier, a Pike County sheriff, testified that on June 10, 2017, around 6 p.m., he was off duty when he received a telephone call from Deputy Wassell that "he had three motorcycles that he attempted to stop and they weren't stopping and they were heading towards Pittsfield." Sergeant Frazier reported to the Pittsfield Walmart upon receiving information that one of the motorcyclists entered the store. Upon entering the Walmart parking lot, Sergeant Frazier located the motorcycle outside by the mulch, and he positioned his vehicle in front of the motorcycle to prevent it from leaving.

¶ 31 Sergeant Frazier and Sheriff Paul Petty, both in plain clothes, entered Walmart. Once inside, Walmart employees directed Sergeant Frazier back toward the bathroom to look for the motorcyclist. Sergeant Frazier entered the bathroom and observed defendant washing his hands at the sink. Sergeant Frazier testified defendant appeared "somewhat nervous."

¶ 32 Sergeant Frazier then followed defendant out of the bathroom and identified himself as a deputy sheriff. Sergeant Frazier testified, "[A]t that time I just grabbed that knife from the sheaf [*sic*] that was on his side and pulled it out and I said, 'We need to walk out of the store without making a scene,' and he did it with no problem." Defendant then asked Sergeant Frazier, "Well, how do I know you're actually a police officer?" Defendant also asked Sergeant Frazier to see some identification. Sergeant Frazier explained that he did not have his identification on him but that a uniformed officer was outside the store. Once at the front of the

store, Sheriff Petty handcuffed defendant. Defendant informed Sergeant Frazier of the presence of the sheath on his waist out of concern that someone would get cut. The prosecutor asked whether defendant told Sergeant Frazier why he was in the store. Sergeant Frazier responded, "At some point. It may have been the ride to the jail. He informed me he was buying zip ties for something that came off his motorcycle."

¶ 33 The prosecutor asked Sergeant Frazier, "You talked about walking in from the bathroom to the front. Did he at that point, when you had detained him, ask why he was being detained?" Sergeant Frazier responded, "No, not like somebody going to your side and grabbing—in plain clothes grabbing a knife off your waistband and anything. He didn't act like I was doing anything out of line whatsoever which to me is odd."

¶ 34 On cross-examination, Sergeant Frazier agreed defendant had a right to remain silent and he exercised that right. Sergeant Frazier also observed photographs of defendant entering Walmart. Defense counsel asked Sergeant Frazier if defendant appeared to be wearing earplugs around his neck in the photographs. Sergeant Frazier responded, "It does look like earplugs or headphones or something." Sergeant Frazier did not recall if defendant had earplugs with him when he picked him up inside Walmart.

¶ 35 7. *Closing Arguments*

¶ 36 During closing arguments, the prosecutor stated as follows:

> "[Defendant] doesn't ask why he's being detained. [Defense counsel] made a lot of arguments about he has a right to remain silent. Certainly, he has the right to remain silent, but, again, you just have to ask yourself what would a normal person who, if it's his argument 'it wasn't me, I had nothing to do with

this,' what would that normal person do when someone comes up to you in the bathroom of a Walmart, plain clothes—now, he does say I'm a deputy sheriff—takes your knife and detains you? Don't you think a normal person would say what's this all about, why, why are you detaining me, what's going on? Just, that would be a normal response.

Again, he has the right to say nothing. But you have to ask yourself what would a normal person who had—if that's his argument—nothing to do with this, what would that normal person have said when they're suddenly detained in the bathroom of Walmart? If it's his argument that he had nothing to do with it, surely you would ask what's going on.

* * *

Okay. They're going 60 for a long time and they never have any opportunity to pass. Everybody on this jury, we live in Pike County, sometimes we drive on two-lane roads and sometimes, when somebody else passes, we can't pass behind them immediately. Obviously, that's not how this one worked out. But the way I think of it, I mean I'm not in the business of fleeing from the police but I feel like, if I were, this would be a logical technique. A coordinating maneuver, there's finally an opportunity to pass, it's a two-lane road, everybody suddenly accelerates, which you can do on a motorcycle really fast, and if it

> takes the officer 10 seconds to get around that vehicle because of oncoming traffic on a two-lane road, you're gone. I mean that's the idea, that's the technique, and that's the coordinated attempt to flee or attempt to elude that you clearly see on the video."

¶ 37 8. *Verdict*

¶ 38 Following deliberations, the jury found defendant guilty of aggravated fleeing or attempting to elude a peace officer and speeding. The jury found defendant not guilty of failure to use a turn signal when required.

¶ 39 B. Sentence and Posttrial Motions

¶ 40 On July 19, 2018, defendant filed a posttrial motion alleging, in relevant part, that the trial court "erred in denying defense motion for a mistrial based upon the State[']s comments of his refusal to say anything after [d]efendant was arrested in its opening statement."

¶ 41 At a September 20, 2018, sentencing hearing, the trial court first heard arguments on defendant's posttrial motion. Defense counsel argued the State improperly commented on defendant's postarrest silence. Specifically, where the State used defendant's silence as "evidence of guilt because he refused to ask why he was being arrested or to question the individual's authority." Defense counsel stated, "I realize what the case law is on that. To my way of thinking, the case law is wrong. I would ask the court to grant the motion." The trial court found the case law presented by the State at trial to be good law and denied defendant's posttrial motion. Ultimately, the court sentenced defendant to two years' imprisonment.

¶ 42 On October 17, 2018, defendant filed a *pro se* motion to reconsider sentence. On January 24, 2019, defendant filed an amended motion to reconsider sentence. After a February 2019 hearing, the trial court denied the motion.

¶ 43 This appeal followed.

¶ 44 II. ANALYSIS

¶ 45 On appeal, defendant argues (1) the trial court erred in denying his motion for a mistrial or, in the alternative, defense counsel provided ineffective assistance of counsel by failing to distinguish the State's case law in regard to defendant's postarrest silence, (2) the State committed prosecutorial misconduct violating defendant's right to remain silent, and (3) defense counsel provided ineffective assistance of counsel by failing to object to the State's pattern of prosecutorial misconduct. As we find the issue dispositive, we turn first to whether the trial court erred in denying defendant's motion for a mistrial.

¶ 46 "Generally, a mistrial should be awarded where there has been an error of such gravity that it has infected the fundamental fairness of the trial, such that continuation of the proceeding would defeat the ends of justice." *People v. Sims*, 167 Ill. 2d 483, 505, 658 N.E.2d 413, 423 (1995). "[F]or a reversal following the denial of a motion for a mistrial, the appellant must show prejudice from the introduction of the incompetent evidence at issue and also that the resulting damage could not be remedied by the court's admonitions and instructions." *People v. Middleton*, 2018 IL App (1st) 152040, ¶ 29, 107 N.E.3d 410. The trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *Sims*, 167 Ill. 2d at 505. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20, 74 N.E.2d 126, 138 (2000).

¶ 47 A. Defendant's Postarrest Silence

¶ 48 Defendant argues the trial court erred in denying his motion for a mistrial where the prosecutor erroneously commented on his postarrest silence as evidence of guilt during

opening statements. The State argues the court did not err in denying defendant's motion for a mistrial where the prosecutor's comments were proper because defendant's postarrest silence occurred prior to defendant receiving his *Miranda* rights.

¶ 49 During opening statements, the prosecutor stated, "[the arresting police officers will] both testify in spite of the fact that they tried to arrest [defendant] there at the Walmart without making a scene since it's the middle of the store, at no point did he ever ask in any way the reason why he was being detained." Defense counsel objected and made an oral motion for a mistrial, arguing that, when the prosecutor stated defendant did not say anything or ask why he was being arrested, this was an improper comment upon defendant's exercise of his constitutional right to remain silent. In response, the State cited *Fletcher* and *Givens* to argue it could comment on defendant's postarrest silence because *Miranda* warnings had not yet been given. The trial court stated it understood the parties' positions and knew the *Givens* case. Finding *Givens* applied, the court denied defendant's motion for a mistrial and overruled defense counsel's objection.

¶ 50 Defendant argues the case law cited by the State and relied on by the trial court in denying his motion for a mistrial was distinguishable because he never testified and therefore was not impeached with his postarrest, pre-*Miranda* silence. While the State acknowledges the defendants in the cited case law testified at trial, it asserts the principles behind the cases are still applicable here. Specifically, the State asserts the prosecutor was not commenting on defendant's silence in reliance upon government assurances that he could remain silent. Instead, the prosecutor elicited testimony based on reasonable inferences drawn from the evidence or invited by defense counsel. In support of its argument, the States cites to *Doyle v. Ohio*, 426 U.S. 610 (1976), *Fletcher*, and *Givens*.

¶ 51 In *Doyle v. Ohio*, 426 U.S. at 619, the Supreme Court held it is a federal due process violation for the State to impeach a defendant with his postarrest, post-*Miranda* silence. Subsequently, in *Fletcher*, 455 U.S. at 605-07, the Supreme Court found no automatic federal due process violation for the State to impeach a defendant with his postarrest, pre-*Miranda* silence. Specifically, the Supreme Court held, "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* at 607. The Supreme Court further permitted the state courts to create their own rules. *Id.* Relying on *Fletcher*, the Illinois Supreme Court in *Givens* found no due process violation of the Illinois or federal constitutions where the State used the defendant's postarrest, pre-*Miranda* silence as impeachment of his trial testimony. *Givens*, 135 Ill. App. 3d at 825. We find the cases distinguishable.

¶ 52 Here, defendant did not testify at trial and thus was not impeached with his postarrest, pre-*Miranda* silence. Rather, the prosecutor commented on defendant's postarrest silence as evidence of his guilt during opening statements. Prosecutorial questions and remarks on a defendant's postarrest silence are generally improper, except when used to impeach a defendant's testimony at trial. See *People v. Herrett*, 137 Ill. 2d 195, 213-14, 561 N.E.2d 1, 9-10 (1990). We find the fact defendant did not testify to be significant because a testifying defendant places himself in a different position than a nontestifying defendant. Specifically, a testifying defendant opens the door to impeachment. Here, defendant did not "cast aside his cloak of silence" by testifying at trial. See *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980). Thus, the case law cited by the State and relied on by the trial court in denying defendant's motion for a mistrial was not applicable to defendant's case where he did not testify.

¶ 53 Moreover, under Illinois evidentiary law, impeachment of a defendant with his or her postarrest silence is impermissible, regardless of whether the silence occurred before or after the defendant was given *Miranda* warnings. *People v. Sanchez*, 392 Ill. App. 3d 1084, 1096, 912 N.E.2d 361, 371 (2009) (citing *People v. Clark*, 335 Ill. App. 3d 758, 763, 781 N.E.2d 1126, 1130 (2002)). "Evidence of the defendant's [postarrest] silence is considered neither material [n]or relevant to proving or disproving the charged offense." *Sanchez*, 392 Ill. App. 3d at 1096 (quoting *Clark*, 335 Ill. App. 3d at 763).

¶ 54 Under the circumstances here, the testimony regarding defendant's postarrest silence was inadmissible. Because defendant did not testify at trial, the State had no basis to impeach him. Further, the State erred when it commented on defendant's postarrest silence during opening statements, elicited testimony from Frazier about defendant's postarrest silence, and again commented on defendant's postarrest silence during closing arguments. Therefore, we find the trial court abused its discretion when it relied on *Givens* to deny defendant's motion for a mistrial.

¶ 55 B. Harmless Error

¶ 56 The State argues that even if the trial court erred in denying defendant's motion for a mistrial, any error was harmless beyond a reasonable doubt. Here, defendant properly preserved his claim of error, warranting a harmless-error analysis. Thus, the State maintains the burden of persuasion with respect to prejudice. *Middleton*, 2018 IL App (1st) 152040, ¶ 29. For the following reasons, the State fails to sustain its burden in this case.

¶ 57 The State argues a violation of the *Doyle* rule may constitute harmless error. See *People v. Dameron*, 196 Ill. 2d 156, 164, 741 N.E.2d 1111, 1115-16 (2001). The State cites five factors to consider when deciding whether a violation of the *Doyle* rule was harmless beyond a

reasonable doubt: "(1) the party who elicited the testimony about the defendant's silence; (2) the intensity and frequency of the references to the defendant's silence; (3) the use that the prosecution made of the defendant's silence; (4) the trial court's opportunity to grant a mistrial motion or to give a curative jury instruction; and (5) the quantum of other evidence proving the defendant's guilt." *Id.*

¶ 58 As stated above, *Doyle* presents a different procedural posture than the matter before us where defendant did not testify and was not impeached with his postarrest silence at trial. Even so, we find it appropriate to consider the factors used to determine whether the State has met its burden of proof in showing a *Doyle* violation to be harmless beyond a reasonable doubt.

¶ 59 The State argues that while the prosecutor elicited testimony about defendant's postarrest silence through Sergeant Frazier and referred to that testimony during opening and closing, it only did so after the trial court ruled the testimony admissible. Further, the State alleges the prosecutor sparingly mentioned defendant's postarrest silence. Moreover, the State during closing argument informed the jury that defendant had a right to remain silent.

¶ 60 When analyzing defendant's case under a totality of the circumstances, we cannot find the prosecutor's comments on defendant's postarrest silence and the trial court's ruling were harmless. During opening statements, the prosecutor informed the jury that police officers would testify to defendant's postarrest silence as evidence of his guilt. After defense counsel objected and called for a mistrial, the State provided citations to case law alleging a defendant's postarrest silence can be used to impeach at defendant. However, at this point the State was unaware if defendant planned to testify at trial. Further, while the trial court acknowledged it knew the *Givens* case, the court relied on the State's assurance that defendant's postarrest silence

occurred pre-*Miranda* and neglected to address the fact *Givens* involved impeaching a defendant's trial testimony. Therefore, the court overruled defendant's objection and denied the motion for a mistrial.

¶ 61 The prosecutor next elicited testimony from Sergeant Frazier about defendant's postarrest silence. The prosecutor asked Sergeant Frazier, "You talked about walking in from the bathroom to the front. Did he at that point, when you had detained him, ask why he was being detained?" Sergeant Frazier responded, "No, not like somebody going to your side and grabbing—in plain clothes grabbing a knife off your waistband and anything. He didn't act like I was doing anything out of line whatsoever which to me is odd." Then, on cross-examination, Sergeant Frazier acknowledged that defendant had a right to remain silent and he exercised that right.

¶ 62 During closing argument, the prosecutor acknowledged defendant had the right to remain silent after his arrest but called defendant's actions into question when he stated, "But you have to ask yourself what would a normal person who had—if that's his argument— nothing to do with this, what would that normal person have said when they're suddenly detained in the bathroom at Walmart? If it's his argument that he had nothing to do with it, surely you would ask what's going on."

¶ 63 The prosecutor argued defendant's postarrest silence at every stage of trial. Moreover, the prosecutor failed to cure any prejudice to defendant where he stated during closing argument that defendant has a right to remain silent but then directly called into question defendant's postarrest silence. The prosecutor asked the jury what a "normal person" would do in that situation. The prosecutor invited the jury to view defendant's postarrest silence as an admission of guilt. Further, the prosecutor's comments during closing argument—questioning

defendant's silence while recognizing defendant's right to remain silent, only served to confuse the jury.

¶ 64 The State also argues the trial court had the opportunity to grant a mistrial but as explained above, denied defendant's motion. The court further instructed the jury that prior to opening statements, that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys, which is not based on the evidence, should be disregarded."

¶ 65 While the trial court provided a curative instruction about opening statements and closing argument, the instruction alone is not always curative but rather a factor to be considered in determining the prejudice to defendant. See *People v. Bunning*, 298 Ill. App. 3d 725, 729, 700 N.E.2d 716, 720 (1998). Here, we have the added problem that the prosecutor also elicited testimony from Sergeant Frazier about defendant's postarrest silence.

¶ 66 Last, the State argues that even if the prosecutor did not mention defendant's postarrest silence, the result of the proceedings would not have been different due to the overwhelming evidence of defendant's guilt. Specifically, the State asserts the three motorcycles acted together to elude Deputy Wassell where Deputy Wassell (1) pursued the motorcycles for 13 miles—part of that time with his emergency lights and sirens on—to no avail, (2) observed the motorcycles change formation over the course of the pursuit, and (3) observed the motorcycles speed up to pass a silver SUV. The State further argues defendant's statement to police that he was unaware he was being pursued by police was unbelievable because Officer Hobbs turned on her emergency lights before defendant passed her parked vehicle on the side of the road.

¶ 67 Based on the evidence presented, we decline to find the State presented overwhelming evidence of defendant's guilt. Rather, a reasonable person could find defendant was unaware police officers attempted to stop him. While Deputy Wassell testified he clocked the motorcycles speeding, activated his emergency lights, then proceeded to follow the motorcycles, he admitted he did not initially activate his emergency siren. Only once he caught up to the motorcycles did Deputy Wassell activate his emergency siren. Deputy Wassell testified defendant rode "a Ninja crotch-rocket-style motorcycle" in the front of the pack and wore a helmet. Deputy Wassell also acknowledged that while one of the motorcyclists turned around and looked at him, defendant did not. Deputy Wassell also noticed defendant's motorcycle did not have review mirrors. At the four-way intersection, Deputy Wassell deactivated his emergency siren. After the motorcycles stopped at the four-way intersection, Deputy Wassell reactivated his emergency siren but the motorcycles continued to drive.

¶ 68 Officer Hobbs testified once she heard Deputy Wassell's siren and observed the motorcycles approaching, she turned on her overhead emergency light. However, Officer Hobbs was parked on the side of the road, in front of the motorcycles, with her emergency lights on and did not indicate to the motorcycles that she was in pursuit of them.

¶ 69 Deputy Wassell observed photographs of defendant entering Walmart but stated he did not know if defendant was wearing earplugs around his neck. Sergeant Frazier analyzed the same photographs of defendant walking into Walmart and stated it appeared defendant had earplugs or headphones around his neck. Deputy Wassell acknowledged that it may be hard for a motorcyclist with earplugs to hear police sirens.

¶ 70 The physical characteristics of defendant's motorcycle along with defendant's manner of dress supported an inference that defendant could not hear the police sirens. Notably,

defendant's motorcycle did not have a rearview mirror, and the State provided no evidence that defendant ever turned around during the chase. Thus, the State's argument that the motorcycles traveled in a triangular formation and then moved to a single formation to elude police is not convincing where defendant maintained his position in the front and followed the requisite signage at the four-way intersection. Specifically, defendant made a complete stop at the stop sign. The evidence suggests defendant was unaware that police officers attempted to stop him where he eventually pulled ahead of the other motorcycles and proceeded to Walmart.

¶ 71 While the State argues defendant tried to hide his bike behind mulch at Walmart, the evidence does not show that defendant attempted to change or hide his appearance as he walked into Walmart. Rather, defendant parked his motorcycle and proceeded to go inside the store with his helmet and vest. Further, defendant told Sergeant Frazier he went to Walmart to buy "zip ties for something that came off his motorcycle." Deputy Wassell testified he observed a piece of plastic dragged from the bottom of defendant's motorcycle. Considering all the evidence presented, we find the trial court's denial of defendant's motion for a mistrial was not harmless beyond a reasonable doubt.

¶ 72 Although not raised by the State or the defendant, we further find the double-jeopardy clause does not preclude retrial in this matter because the evidence presented during trial was sufficient to sustain a conviction. See *People v. Drake*, 2019 IL 123734, ¶ 21, 131 N.E.3d 555. Here, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Therefore, we reverse defendant's conviction and remand for a new trial.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, we reverse the trial court's judgment and remand for a new trial.

¶ 75 Reversed and remanded with directions.

¶ 76 JUSTICE TURNER, dissenting:

¶ 77 I respectfully dissent. Assuming *arguendo* the State improperly commented on defendant's postarrest silence, I would find the other evidence of defendant's guilt was overwhelming and thus agree with the State any error was harmless.

¶ 78 The other evidence at defendant's trial showed the initial encounter between Deputy Wassell and the motorcyclists, including defendant, occurred when they were approaching each other from opposite directions on U.S. 54. The deputy clocked the motorcycles going 78 mph in a 55-mph speed limit zone and activated his vehicle's emergency lights. Notably, Deputy Wassell pulled over on the right shoulder of the road and activated his emergency lights *before* defendant drove past the deputy's vehicle. Thus, defendant saw the flashing emergency lights, and the jury could infer defendant knew (1) he was traveling in excess of 20 mph over the speed limit, (2) the deputy activated his vehicle's emergency lights as a signal for defendant to pull over, and (3) the deputy drove his vehicle onto the shoulder of the roadway so he could make a U-turn to get behind the motorcycles. The fact Deputy Wassell did not turn his siren on when he turned on the emergency lights is irrelevant since the lights would have been visible to defendant.

¶ 79 After making the U-turn, Deputy Wassell turned on his siren and then proceeded to follow the motorcycles, now traveling at 60-65 mph, with his emergency lights activated and his siren blaring. The deputy was mostly following the motorcycles at a distance of around 200 to 300 feet. When the motorcycles came to a stop at a four-way-stop intersection, the deputy pulled up behind the motorcycles to within 10 to 15 feet. Although the deputy deactivated his siren at the

four-way-stop intersection, the emergency lights on his vehicle remained activated and flashing. When the motorcyclists pulled away, the deputy again engaged his siren. He continued to follow the motorcycles at 200 to 300 feet but at one point got within 100 feet.

¶ 80 Deputy Wassell next radioed for assistance, and Officer Hobbs responded by positioning her police vehicle in a driveway of Beard Implement. Her vehicle was perpendicular to U.S. 54 on the south side of the roadway and facing north "just a few" feet from the eastbound lane of traffic on U.S. 54. When she heard Deputy Wassell's siren, she activated her emergency lights, which also activated the video camera of her vehicle. The video shows it was around 50 seconds later that the motorcycles sped by her vehicle, a few feet away, coming from her left, heading eastbound, and paying no heed to her overhead emergency lights, which defendant would have seen in front of him from a substantial distance away. Once the motorcycles and Deputy Wassell's vehicle passed by her, Officer Hobbs turned right onto U.S. 54 and activated her own vehicle's siren. Then, with two police vehicles in pursuit, both with emergency lights activated and sirens blaring, the motorcycles completed a maneuver from the triangle formation to single file. With defendant in the lead, the motorcycles moved to the left-hand lane to pass a vehicle and increased their speed to over 90 mph in a 45-mph speed limit zone.

¶ 81 Having left Deputy Wassell far behind, defendant entered into Pittsfield and drove into the Walmart parking lot at a high rate of speed. A Walmart patron, Smith, was also in the parking lot and observed defendant drive his motorcycle to the back of Walmart where the loading docks were located before eventually parking his motorcycle behind piles of mulch. Because defendant appeared to be fleeing from a police vehicle on U.S. 54, Smith telephoned an off-duty police officer to report what he had observed and had his wife and kids get back into their vehicle because he did not want to be present if an altercation occurred.

¶ 82 Against this deluge of evidence, defendant focuses on a photograph taken of him as he entered the Walmart store. Depicted in the photograph is something hanging from defendant's neck. One witness could give no opinion on what the object was hanging from defendant's neck. Another witness believed it to be earplugs or headphones, and defendant emphatically argues the earplugs or headphones may have prevented him from hearing the blaring sirens. However, there are three problems with defendant's argument. First, no evidence was presented defendant was wearing earplugs or headphones while he was pursued by Deputy Wassell and/or Officer Hobbs. Second, no earplugs or headphones were found on defendant's person when he was placed under arrest or when he exited Walmart. Third, the statute under which defendant was charged (625 ILCS 5/11-204.1(a)(1) (West 2016)) does not even require officers to use a siren if their vehicle's emergency lights are engaged. See *People v. O'Malley*, 356 Ill. App. 3d 1038, 1043-44, 828 N.E.2d 376, 381-82 (2005).

¶ 83 Defendant also argues the State failed to prove he ever saw any emergency lights during the chase. Part of defendant's argument is his motorcycle had no mirror which would have allowed him to see behind him. This is a novel and creative defense. Section 12-502 of the Illinois Vehicle Code (625 ILCS 5/12-502 (West 2016)) requires vehicles, including motorcycles, to be equipped with a rearview mirror. Thus, in essence, defendant maintains his wilful violation of the Illinois Vehicle Code serves as a defense to fleeing and eluding. I further note that, while the jury lacked direct evidence defendant turned his head to watch Deputy Wassell complete his initial U-turn, the evidence shows the motorcycles slowed to 60 mph after Deputy Wassell started following them. Significantly, defendant's bike was in the lead and controlling the pace of the triangle formation. A reasonable inference is defendant slowed the pace because he knew the deputy was now pursuing him and his fellow motorcyclists.

¶ 84 Additionally, the evidence of defendant's front position and his stopping at the four-way-stop intersection does not suggest defendant was unaware the deputy was trying to stop him. While defendant stopped at the intersection, he then proceeded to disobey each and every speed limit sign and yellow caution sign during the remainder of his 13-mile flight. Moreover, presumably the rider of a crotch-rocket-style motorcycle would need to stop at such an intersection to avoid crashing into another vehicle which may be entering into the intersection. I also note the motorcyclists' formation began to change from a triangle to a single line as they approached Officer Hobbs's vehicle. Given Deputy Wassell's U-turn and pursuit of the motorcycles and the sight of another set of emergency lights, it is implausible the motorcyclists did not think Officer Hobbs was also in pursuit of them. Further, the evidence demonstrates defendant attempted to alter his appearance after attempting to hide his motorcycle. Defendant first apparently discarded his mask on the ground in the Walmart parking lot and later disposed of the item he wore around his neck after he entered the Walmart store. (As previously indicated, whatever item defendant wore was never found.)

¶ 85 Finally, in its brief on appeal, the State argues it "strains common sense" for defendant to claim he did not notice the police car behind him for *13 miles*. In oral argument, the State went further, asserting the defense's theory defendant did not know Deputy Wassell was initially behind him and later Deputy Wassell and Officer Hobbs were both behind him is "absurd" and "ridiculous." I note in *People v. Pena*, 170 Ill. App. 3d 347, 354-55, 524 N.E.2d 671, 676 (1988), a case cited by defendant, the court held where an officer followed the defendant for over a mile with lights and a siren activated, the jury could reasonably infer a wilful attempt to elude the officer. Based on the aforementioned evidence including the length of the pursuit, I would find any error was not only harmless beyond a reasonable doubt but was harmless beyond any and all

doubt. Accordingly, I would affirm the trial court's judgment.

IN THE CIRCUIT COURT OF THE 8th JUDICIAL CIRCUIT
Pike COUNTY, ILLINOIS

The People of the State of Illinois -Appellee

v.

Michael Pinkett -Appellant

Appeal to the 4th District Appellate Court of Illinois,
App.Ct.No.

From the Circuit Court of Pike County, Illinois,
Case No. 17CF84

NATURE OF APPEAL:
[ ]Civil or [ ]Criminal
[ ]Post-Conviction

FILED
MAR 18 2019
Clerk of the Circuit Court
Eighth Judicial Circuit, Pike County, IL

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken:

(2) Name of appellant and address to which notices shall be sent:
Name: Michael Pinkett
Address: 100 Hillcrest road East Moline IL, 61244

(3) Name and address of appellant's attorney on appeal:
Name: N/A
Address: N/A

If appellant is indigent and has no attorney, does he want one appointed?
[X] YES or [ ]NO

(4) Date of judgment or order: 9/20/18

(5) Offense(s) of which convicted: Class 4 Agg fleeing & Eluding Peace Officer

(6) Sentence(s): 2 years 50 % (50%)

(7) If appeal is not from a conviction, nature of judgment or order appealed from:

(signed)
(print) Pinkett, Michael, pro-se
Register No.

EMCC
100 Hillcrest Road
East Moline, IL 61244

C 140

Index to the Record on Appeal

***People v. Pinkett*, No. 17 CR 84 (Pike Cty. Cir. Ct.)**

I. Common Law Record (cited as "C__")

IV. Supplement to the Record (issued May 17, 2019) (cited as "Sup. R__")

V. Supplement to the Record (issued Aug. 21, 2019) (cited as "Sup. 2d R__")

VI. Supplement to the Record (issued May 31, 2019) (cited as "Sup. 2d R__")

VII. Supplement to the Record (issued July 17, 2020) (cited as "Sup. 2d R__")