MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

DeWayne Edward Patterson,

Appellant-Defendant

v.

State of Indiana,

Appellee-Plaintiff

March 20, 2024

Court of Appeals Case No.
23A-CR-975

Appeal from the Marion Superior Court

The Honorable James Osborn, Judge

Trial Court Cause No.
49D21-2008-MR-25173

Memorandum Decision by Judge Riley
Judges Brown and Foley concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, DeWayne Edward Patterson (Patterson), appeals his conviction for murder, a felony, Ind. Code § 35-42-1-1(1).

[2] We affirm.

ISSUES

[3] Patterson presents this court with two issues on appeal, which we restate as:

(1) Whether the State presented sufficient evidence to rebut Patterson's claim of self-defense; and

(2) Whether the State committed prosecutorial misconduct which resulted in reversible error.

FACTS AND PROCEDURAL HISTORY

[4] At the beginning of 2020, Patterson was in a romantic relationship with John Patton (Patton), and they were living together in Patterson's apartment in Indianapolis, Indiana. Patton contributed to the rent. By the summer of 2020, the relationship had deteriorated and the two became just roommates. Patterson did not allow Patton to bring people to the apartment because he believed Patton was doing drugs, running around with people on the street, and "turning tricks." (Transcript Vol. III, p. 148). Patterson became upset and angry because Patton was "sleeping around" and refused to move elsewhere. (Tr. Vol. III, p. 148).

[5] Video footage from the apartment, admitted during the trial, indicated that Patterson entered the apartment on August 4, 2020. An analysis of Patton's cellphone data showed that he actively used his phone, with the last outgoing communication on August 4, 2020, at 5:10 p.m. The video footage starting on August 6 and running through August 9, 2020, reflected that Patterson left and returned to the apartment several times.

[6] On August 8, 2020, Patterson called 911 to report that he had killed somebody and that he had been abused by his lover, who had been "hitting [him] all day long." (St. Ex. 182). When two officers knocked on the apartment's door to conduct a welfare check, they received no response and did not see or hear anything. Video footage from the apartment showed Patterson looking out of the apartment after the officers left. The final video footage from the apartment depicted Patterson leaving the apartment at 8:51 p.m. on August 9, 2020.

[7] Sometime after 9 p.m. on August 9, 2020, Patterson approached a police detective outside the City-County Building in Indianapolis. Patterson told the detective that he had stabbed someone named "John." (Tr. Vol. II, p. 155). James Hurt (Detective Hurt), a homicide detective with the Indianapolis Metropolitan Police Department, came down to speak with Patterson, who was upset, crying, and incoherent. Detective Hurt turned Patterson away, advising him to seek help for his medical or mental issues. Patterson made his way to the jail building, where he informed an officer that he wanted to turn himself in for a murder and provided more information about the crime. The jail officer contacted Detective Hurt and gave him the information. After obtaining the

apartment keys from Patterson, Detective Hurt sent some officers to Patterson's residence.

[8] In the early morning of August 10, 2020, after receiving a search warrant, Detective Hurt entered the apartment and smelled the strong odor of a decomposing body. Patton's body was lying on the floor of the bedroom and was covered with a blanket. The body was in a moderate state of decomposition "consistent with a 4-day period." (Tr. Vol. III, p. 78). There was a large amount of blood on the floor, as well as on the wall and wood trim pieces. Swabs from the wood trim revealed the presence of DNA profiles consistent with Patterson and Patton. Officers located an "exacto" or art knife, which contained a DNA profile that matched Patterson's, and a blue folding knife from which the blade was missing. (Tr. Vol. II, p. 203).

[9] Patton's body had multiple sharp force traumatic injuries that could have been caused by a knife, with twenty superficial sharp force injuries to the head, three sharp force injuries to the neck, four sharp force injuries to the front of the chest, one sharp force injury to the posterior chest, one sharp force injury to the posterior right flank, and twenty-five sharp force injuries to the extremities. The forensic pathologist advised that the number of injuries detailed—fifty-four—was an approximation because two injuries caused by two motions could overlap to appear as one injury, or a single injury caused by a single motion could have separated and appear as two injuries. Patton also had multiple blunt force injuries to his torso and extremities. The cause of death was multiple sharp force injuries to the jugular vein, carotid artery, and chest, which caused

Patton to bleed to death. Patton had 45.5 nanograms per milliliter of cocaine and 23,000 nanograms per milliliter of the cocaine metabolite in his system. The forensic pathologist could not determine how long the process of metabolization would have taken other than to say that the cocaine would have had to have been ingested before Patton died.

[10] After reading his *Miranda* rights, Detective Hurt interviewed Patterson on August 10, 2020. During the interview, Detective Hurt did not observe any injuries to Patterson's face or head. He did have superficial cuts on his hands, his bicep, and an injury to the back of his right shoulder. Patterson told Detective Hurt that Patton had been living with him for a couple of years and that they were in a relationship. When asked about Patton's death, Patterson advised the detective that "I killed him," and "I cut him." (St. Ex. 6 at 8:00-8:02, 8:07). He explained that Patton had threatened to kill him and tried to stab him with a blue pocketknife. After taking the knife away from Patton, he stabbed him more than twenty times. Despite Patton asking Patterson to stop, he did not stop because Patton's infidelity had made him "so mad." (St. Ex. 6 at 14:45-15:28). Patterson did not immediately call 911 but remained in the apartment with Patton for four days. While he acknowledged calling 911 eventually, he admitted to not responding when the officers came to the apartment because he was scared.

[11] On August 12, 2020, the State filed an Information, charging Patterson with murder. On January 23 and 24, 2023, the trial court conducted a jury trial. Patterson testified on his own behalf. During his testimony, Patterson told the

jury that he and Patton were in the apartment on August 4, 2020, when he overheard Patton on the phone talking with someone, whom Patterson believed to be one of Patton's "tricks," arguing and demanding money. (Tr. Vol. III, p. 149). After the call, Patton yelled at Patterson and asked him for money. When Patterson refused to give Patton money, Patton drew a blue knife from his pocket, again ordered Patterson to give him money, and threatened to kill him. Patterson informed the jury that he reached under the couch, grabbed an exacto knife with a little blade, and both men "rushed at each other, and w[ere] just twirling around in the front room fighting." (Tr. Vol. III, p. 150). Patterson described the scene as "[two] people getting ready to fight and they, it's just going down." (Tr. Vol. III, p. 151). They pulled at each other, tried to throw each other across the room, and stabbed each other. During the fight, the men moved from the living room to the hallway. Patterson explained that, at some point, they fell to the ground and only had one knife. While fighting to gain control over the single remaining knife, Patton had control of it first and tried to stab Patterson, Patterson then gained control of the knife and tried to stab Patton. The knife fell out of their hands and when the knife rolled outside their control, they stopped arguing and just laid on the floor. After the fight, Patterson did not see any injuries on Patton that concerned him. Patterson informed the jury that he then took a "handful" of his prescription medications, including sleeping pills, in an attempt to commit suicide and did not remember leaving the apartment or calling 911. (Tr. Vol. III, p. 176).

[12] During cross-examination, the State asked Patterson whether he had four days to come up with a story before talking to police officers and "898 days to come up with the story that you just told the jury." (Tr. Vol. III, pp. 179-80). Patterson objected but then withdrew the objection. Later during the cross-examination, the State asked Patterson whether, in the 898 days between talking to Detective Hurt and trial, he had ever reached out to police officers to advise them what had happened. The trial court, *sua sponte*, called a sidebar and Patterson asked for the comment to be stricken and for an admonition. When the trial court questioned the parties about the admonishment to be given, the State offered to strike the comment and to tell the jury to disregard it because of Patterson's right to remain silent. However, Patterson preferred to just leave it alone and move forward. No admonishment was given.

[13] In closing argument, the State told the jury that words alone were insufficient provocation to reduce the murder charge to a manslaughter charge. The State further noted that the evidence of Patterson's motive to kill due to losing his partner and the long process of the arguments and fight indicated that Patterson's impetus to kill was not sudden. The State also argued that the knife was incapable of making injuries to the jugular and carotid, while acknowledging that the skin can be depressed. The State advised that Patterson stabbed Patton fifty-four times. Patterson did not object to any of the State's statements or request an admonishment or mistrial. The State also argued that, based on the level of illegal substances in his system, Patton was not actively under the influence of the drugs. Patterson objected but did not ask for an

admonishment or mistrial. The trial court offered Patterson the opportunity for surrebuttal, which he declined because the State offered to move on. In his closing argument, Patterson argued that the jury should put aside the "ick factor, [] I know it's hard. Those are gross pictures." (Tr. Vol. III, p. 230). In rebuttal, the State mentioned that it did not want to show all the gruesome photos and that it could have shown more but had refrained from doing so. The State also reiterated that it was "convenient 898 days later to come in and say he's cracked out of his mind." (Tr. Vol. III, p. 231). Patterson did not object and did not ask for an admonishment or mistrial. At the close of the evidence and arguments, the jury found Patterson guilty of murder.

[14] On April 10, 2023, the trial court conducted a sentencing hearing, at which it sentenced Patterson to forty-eight years executed.

[15] Patterson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Claim of Self-Defense*

[16] Patterson contends that the State failed to present sufficient evidence to rebut his self-defense claim. The standard of review for a challenge to the sufficiency of the evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. *Hughes v. State*, 153 N.E.3d 354 (Ind. Ct. App. 2020). When analyzing a claim of insufficient evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the judgment. *Sallee v. State*, 51 N.E.3d 130, 133 (Ind.

2016). "It is the factfinder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." *Id*. The evidence does not have to overcome every reasonable hypothesis of innocence, and it is sufficient if an inference may reasonably be drawn to support the conviction. *Id.*

[17] Self-defense is a legal justification for an otherwise criminal act. *Gammons v. State*, 148 N.E.3d 301, 304 (Ind. 2020). The self-defense statute provides that an individual has the right to use "reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force." I.C. § 35-41-3-2(c). A person is justified in using deadly force, and does not have a duty to retreat, if the person reasonably believes such force is necessary to prevent serious bodily injury to himself or a third person, or to prevent the commission of a forcible felony. I.C. §§ 35-41-3-2(c)(1), -(2).

[18] To prevail in presenting a self-defense claim, the defendant must show he was in a place where he had a right to be; did not provoke, instigate, or participate willingly in the violence; and had a reasonable fear of death or great bodily harm. *Stewart v. State*, 167 N.E.3d 367, 376 (Ind. Ct. App. 2021). When the defendant raises a self-defense claim which finds support in the evidence, the State carries the burden of negating at least one of the necessary elements. *Hughes*, 153 N.E.3d at 354. The State may meet its burden by rebutting the defense directly—by affirmatively showing the defendant did not act in self-defense—or by simply relying on the sufficiency of its evidence in chief.

Stewart, 167 N.E.3d at 376. Whether the State has met its burden is a question of fact for the jury. *Id*. If a defendant is convicted despite his claim of self-defense, an appellate court will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. *Id*.

[19] In support of his claim of self-defense, Patterson refers to his own testimony to claim that he acted without fault and reasonably feared death or great bodily harm when he noticed Patton come at him with a knife, threatening that he "was going to cut [him]; he was going to kill [him]." (St. Ex. 6, at 8:48-8:58; 9:55-10:02). However, it is well-established that "[a]n initial aggressor or a mutual combatant, whether or not the initial aggressor, must withdraw from the encounter and communicate the intent to do so to the other person, before he may claim self-defense." *Kimbrough v. State*, 911 N.E.2d 621, 635 (Ind. Ct. App. 2009). In *Kimbrough*, this court found Kimbrough's claim of self-defense rebutted when "by Kimbrough's own account, it was established that he and [the victim] were engaged in a mutual shoving match that escalated without any attempt by Kimbrough to withdraw from the encounter[,]" which demonstrated that Kimbrough either instigated the fight or was a mutual combatant. *Id*. at 636. Similarly, here, Patterson, by his own testimony, admitted that he was a mutual combatant in the fight when he described the scene as both men "rush[ing] at each other, and w[ere] just twirling around in the front room fighting." (Tr. Vol. III, p. 150). Patterson depicted the altercation as "[two] people getting ready to fight and they, it's just going down." (Tr. Vol. III, p. 151). He clarified that they pulled at each other, tried

to throw each other across the room, and stabbed each other. There is no evidence in the record that at any point during the fight Patterson withdrew from the encounter.

[20] Furthermore, the evidence favorable to the jury's verdict rejecting Patterson's claim of self-defense supported an inference that Patterson's use of deadly force was excessive or disproportionate. *See Mickens v. State*, 742 N.E.2d 927, 930 (Ind. 2001) ("A defendant may use deadly force to repel an attack only if such force is reasonable and believed to be necessary.") In his interview with Detective Hurt, Patterson conceded that after taking the knife away from Patton, he continued to stab Patton more than twenty times. Although Patton begged Patterson to stop, he refused to stop because Patton's infidelity had made him "so mad." (St. Ex. 6 at 14:45-15:28). *See Embry v. State*, 923 N.E.2d 1, 10 (Ind. Ct. App. 2010) (Where a defendant has a motive to attack the victim, it is relevant to the defendant's self-defense claim, as it makes it more likely that the defendant was the initial aggressor), *trans. denied*. The forensic pathologist testified that Patton was cut or stabbed approximately fifty-four times, while Patterson only had what the jury could have found to be relatively minor injuries which did not require medical attention.

[21] Although there appear to be several discrepancies between Patterson's interview with Detective Hurt and his testimony at trial, the jury was "not required to believe every part of a defendant's testimony." *Edgecomb v. State*, 673 N.E.2d 1185, 1194 (Ind. 1996). We have little trouble concluding that the evidence presented at trial affirmed that the State rebutted Patterson's claim of self-

defense. There was ample evidence from which a reasonable juror could conclude beyond a reasonable doubt that Patterson was, if not the initial aggressor, a mutual combatant who continued stabbing Patton in anger because of Patton's infidelity and betrayal of trust, resulting in an excessive amount of deadly force from which he did not retreat when he had an opportunity. Accordingly, we will not disturb the jury's decision.

II. *Prosecutorial Misconduct*

A. *Prosecutorial Statements*

[22] Patterson also contends that the State engaged in multiple acts of prosecutorial misconduct during the State's closing argument and that the cumulative effect of these multiple acts placed him in a position of grave peril to which he should not have been subjected. Specifically, Patterson asserts that the State engaged in misconduct by: (1) misleading the jury about the legal and evidentiary requirements for sudden heat; (2) the ability of the knife to make the fatal cuts to Patton; (3) telling the jury that Patton was cut or stabbed fifty-four times; (4) alluding that there were other gruesome photos that the State had elected not to show to the jury; and (5) advising the jury that Patton had not been actively under the influence of cocaine.

[23] In reviewing a claim of prosecutorial misconduct properly raised in the trial court, we determine "(1) whether misconduct occurred, and if so, (2) 'whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected'

otherwise." *Ryan v. State*, 9 N.E.3d 663, 667 (Ind. 2014) (quoting *Castillo v. State*, 974 N.E.2d 458, 468 (Ind. 2012)). Whether a prosecutor's comments constitute misconduct is measured by reference to case law and the Rules of Professional Conduct. *Id.* "'The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct.'" *Id.* (quoting *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)). "To preserve a claim of prosecutorial misconduct, the defendant must—at the time the alleged misconduct occurs—request an admonishment to the jury, and if further relief is desired, move for a mistrial." *Id.* (citations omitted).

[24] Out of all of the alleged instances of misconduct that Patterson contends occurred during the State's closing argument, he only objected once—when the State advised the jury that Patton had not been actively under the influence of illegal substances—but did not ask for an admonishment or mistrial. Therefore, none of these perceived occurrences were preserved as claims of prosecutorial misconduct. *See Ryan*, 9 N.E.3d at 667.

[25] Patterson now contends that these multiple acts of prosecutorial misconduct resulted in a cumulative prejudicial effect that made a fair trial impossible. Where a claim of prosecutorial misconduct has been procedurally defaulted for failure to properly raise the claim in the trial court, our standard of review is different. *Id.* The defendant must establish not only the grounds for prosecutorial misconduct but must also establish that the prosecutorial misconduct constituted fundamental error. *Id.* at 667-68. Fundamental error is

an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible. *Id*. at 668. In other words, the defendant must show that, under the circumstances, the trial court erred in not *sua sponte* raising the issue because the alleged errors (a) "constitute clearly blatant violations of basic and elementary principles of due process" and (b) "present an undeniable and substantial potential for harm." *Id*. In evaluating the issue of fundamental error in this context, we look at the alleged misconduct in the context of the entire trial, including the evidence admitted, the closing arguments of the parties, and the instructions to the jury, to determine whether the alleged misconduct had an undeniable and substantial effect on the jury's decision such that a fair trial was not possible. *Ward v. State*, 203 N.E.3d 524, 533 (Ind. Ct. App. 2023) (citing *Ryan*, 9 N.E.3d at 668).

[26] Looking at the alleged instances of perceived prosecutorial misconduct during the State's closing argument cumulatively, we do not find that these alleged errors were so prejudicial to Patterson's rights as to make a fair trial impossible. Arguments made by attorneys at trial are not evidence, and here the trial court instructed the jury of this prior to the parties' closing arguments. *Fouts v. State*, 207 N.E.3d 1257, 1267 (Ind. Ct. App 2023). Specifically, the trial court instructed the jury prior to the parties' closing arguments that the "verdict should be based only on the evidence admitted and the instructions on the law." (Appellant's App. Vol. II, p. 161). Also, the trial court informed the jury that:

> [w]hen the evidence is completed, the attorneys may make final arguments. These final arguments are not evidence. The attorneys are permitted to characterize the evidence, discuss the law and attempt to persuade you to a verdict. You may accept or reject those arguments as you see fit.

(Appellant's App. Vol. II, p. 164).

[27] However, the prosecutor is required to confine closing argument to comments based upon the evidence presented in the record. *Lambert v. State*, 743 N.E.2d 719, 734 (Ind. 2001). The prosecutor may argue both law and facts and offer conclusions based upon his analysis of the evidence. *Id*. Our review of the objected to statements in light of the evidence presented at trial, indicates that even though the State might have characterized the evidence in a different light, these characterizations were not unfair or completely devoid of any basis in the record. Even the State's statement that Patton was not actively under the influence of cocaine during the altercation finds support in the forensic pathologist's testimony when he testified that the level of the active substance of cocaine was in a range below what would be considered actively under the influence.

[28] Moreover, even if the State's comments in its closing argument could be considered misconduct, even after the jury was instructed that attorneys' arguments are not evidence, we cannot say that these comments were "so prejudicial to the defendant's rights as to make a fair trial impossible." *Id.* (no fundamental error was found by statements made in closing argument because

jury was instructed that attorneys' arguments are not evidence); *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014)

[29] Considering the alleged instances of misconduct that were not preserved as prosecutorial misconduct in light of the evidence presented at trial, we do not conclude that the alleged misconduct had an undeniable and substantial effect on the jury's decision such that a fair trial was not possible. *See Ward*, 203 N.E.3d at 533. Thus, the alleged misconduct did not rise to the level of fundamental error.

B. *Doyle Violation*

[30] In a related argument, Patterson contends that the State committed prosecutorial misconduct by referring to Patterson's prolonged silence between his arrest and the trial during the State's cross-examination of Patterson and again during its closing argument. Characterizing the State's questioning of Patterson about his silence to police officers for 898 days as a *Doyle* violation, Patterson claims that the State's use of his post-arrest, post-*Miranda* warning silence as substantive and impeachment evidence against him at trial impermissibly impeached his credibility.

[31] Patterson's claim is based on *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), in which the Court held that "a prosecutor may not use the silence of a defendant who's been arrested and *Mirandized* to impeach the defendant." *Trice v. State*, 766 N.E.2d 1180, 1182 (Ind. 2002). The gravamen of *Doyle* "is that a defendant's silence after he has been advised of his rights cannot

be used to obtain a conviction by implying that the silence is rooted in guilty knowledge." *Allen v. State*, 686 N.E.2d 760, 774 (Ind. 1997). In *Wainwright v. Greenfield*, 474 U.S. 284, 291 n.7, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), the Court observed that a *Doyle* violation implicates the Due Process Clause of the Fourteenth Amendment and its prohibition against fundamental unfairness, not the Fifth Amendment's prohibition against self-incrimination. The Indiana Supreme Court adopted *Doyle* the year it was handed down. *Trice*, 766 N.E.2d at 1182 (citing *Jones v. State*, 265 Ind. 447, 355 N.E.2d 402 (1976)); *Sylvester v. State*, 698 N.E.2d 1126, 1130 (Ind. 1998) (observing that Indiana recognizes the *Doyle* rule and does not allow prosecutors to use a defendant's post-*Miranda* silence to impeach). For *Doyle* to apply, the defendant must exercise his right to remain silent. *See Sylvester*, 698 N.E.2d at 1130-31 (finding no *Doyle* violation where the defendant did not exercise his *Miranda* right, did not remain silent, and spoke to law enforcement); *Trice*, 766 N.E.2d at 1183-84 (concluding that the prosecutor's impeachment of Trice with her prior inconsistent statement was not an impermissible "use of her later decision to stop answering questions.").

[32] During the State's cross-examination of Patterson, the prosecutor asked him, "[i]n the 898 days from August 10th of 2020 until January 24th of 2023, did you ever reach out to Detective Hurt to tell him exactly what happened between you and [Patton] that evening?" (Tr. Vol. III, p. 181). Without waiting for Patterson's objection, the trial court *sua sponte* called a sidebar. During the sidebar, Patterson "ask[ed] that [the comment] be stricken and for an

admonishment." (Tr. Vol. III, p. 181). When the trial court inquired as to what admonishment should be given, Patterson preferred to "just leave it alone and we move forward." (Tr. Vol. III, p. 182). Here, the trial court's *sua sponte* interruption of the State's cross-examination of Patterson affirmed that the State's questioning invaded Patterson's right not to speak with officers "when he's represented by counsel. [] That's a step way too far." (Tr. Vol. III, p. 181-82).

[33] However, even without having to analyze whether the trial court properly concluded that the State had committed a *Doyle* violation, we find that the State's comment would amount to a harmless error. A *Doyle* violation may be harmless if it is clear to us beyond a reasonable doubt that the violation did not contribute to the defendant's conviction. *Kubsch v. State*, 784 N.E.2d 905, 914 (Ind. 2003). We will consider the following factors to determine whether a *Doyle* violation is harmless beyond a reasonable doubt:

> (1) the use to which the prosecution puts the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence indicative of guilt; (4) the intensity and frequency of the reference; and (5) the availability to the trial court of an opportunity to grant a motion for mistrial or give a curative instruction.

Id. at 914-15.

[34] Here, the State asked Patterson a single question about his prolonged silence which went unanswered and was not repeated during the State's cross-examination. There was a substantial amount of other evidence of guilt,

including Patterson's admission to stabbing or cutting Patton many times because Patton had betrayed his trust, and the forensic pathologist's testimony about the number and extent of Patton's injuries. Despite the trial court's willingness to give an admonishment to the jury about the State's impermissible question, Patterson advised the trial court that he would prefer not to give a curative instruction.

[35] In his appellate argument, Patterson now attempts to tie the State's perceived *Doyle* statement with another statement made in closing argument to increase the intensity of the initial reference on the jury. In closing argument and without objection from Patterson, the State stated,

> How convenient, how convenient to come up here and talk about a dead person, talk about their faults, to talk about how this was all his fault. How convenient 898 days later to come in and say he's cracked out of his mind.

(Tr. Vol. III, p. 231). However, this statement that Patterson had time to come up with a plausible story about being affected by taking prescription medications and unsuccessfully attempting to commit suicide is not a reference to Patterson's right to remain silent. Rather, it is a reflection of Patterson's presence at trial and being able to listen to the testimony of all the other witnesses prior to taking the witness stand. The State's comment upon Patterson's presence throughout trial and inference to his ability to fabricate his own testimony are distinguishable from comments on his refusal to speak with officers. *See Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006) (State was

permitted to argue that defendant was not offering truthful testimony to the jury when defendant's testimony was inconsistent with his own prior statements and the testimony of other witnesses); *Hobson v. State*, 675 N.E.2d 1090, 1096 (Ind. 1996) (where evidence introduced at trial indicates that either the defendant was lying or that other witnesses were lying, comments by the prosecutor which merely "pointed out the incongruities in the testimony presented at trial, concluded that someone must not be testifying truthfully, and invited the jury to determine which witness was telling the truth" did not constitute misconduct). Accordingly, as the State's reference in closing argument simply noted that Patterson had a substantial amount of time to think about and compose his testimony in light of the other testimonial evidence presented during his trial, the statement does not amount to prosecutorial misconduct and cannot be used to intensify the State's earlier perceived *Doyle* violation during its cross-examination of Patterson.

[36] In light of the five-factor test to determine the harmless error of a *Doyle* violation, we conclude that it is clear beyond a reasonable doubt that the State's brief and single reference to Patterson's right to remain silent did not contribute to Patterson's conviction. *See Kubsch*, 784 N.E.2d at 914. As such, we do not disturb Patterson's conviction.

CONCLUSION

[37] Based on the foregoing, we hold that the State presented sufficient evidence to rebut Patterson's claim of self-defense and the State did not commit prosecutorial misconduct.

[38] Affirmed.

Brown, J. and Foley, J. concur

ATTORNEY FOR APPELLANT

Sarah Medlin
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Daylon L. Welliver
Deputy Attorney General
Indianapolis, Indiana