IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-KA-01721-SCT

MICHAEL RAY JONES a/k/a MIKE JONES

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	10/02/2018
TRIAL JUDGE:	HON. JANNIE M. LEWIS-BLACKMON
TRIAL COURT ATTORNEYS:	JOHN DONALDSON MIKE RUSHING MARVIN SANDERS
COURT FROM WHICH APPEALED:	YAZOO COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: W. DANIEL HINCHCLIFF GEORGE T. HOLMES
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ALICIA AINSWORTH ASHLEY SULSER
DISTRICT ATTORNEY:	AKILLIE MALONE OLIVER
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 10/15/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE RANDOLPH, C.J., COLEMAN AND CHAMBERLIN, JJ.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. On August 31, 2018, a jury found Michael Ray Jones guilty of aggravated assault. Jones appeals, arguing that the prosecution's comments on his refusal to give a statement violated his constitutional right to remain silent. Additionally, Jones argues that it was plain error for the trial court to allow hearsay statements.

FACTS AND PROCEDURAL HISTORY

¶2. On April 23, 2016, an altercation broke out between Brandon Jones, brother of the defendant, and Tony Drain, brother of the victim, over a gambling debt. Brandon Jones left the club where the disagreement had occurred and went to get his brother Michael Jones who was at another club across the street. Tony Drain, his brother Vincent, and their friend Jeremy Green allegedly tried to leave the club after the initial fight. In the parking lot between the two clubs, another fight began between the Jones brothers, the Drain brothers, and several others Allegedly, Tony Drain fought Brandon Jones, while Michael Jones fought Vincent Drain. Jeremy Green testified that he saw Michael Jones get pushed to the ground and that Michael Jones then shot Vincent Drain.

¶3. William Nevels, a detective with the Yazoo City Police Department, conducted an investigation after he arrived at the scene. Nevels found blood, a t-shirt, and a live .380 round. Nevels did not interview anyone on the scene, but he did interview Jeremy Green at the police station. Green informed Nevels that Michael Jones shot Vincent Drain. After Michael Jones discovered that the police were searching for him, he went to the station. Michael Jones did not wish to give a statement; he did, however, deny shooting anybody. As will be further discussed below, it is a point of some confusion in the record and briefs that Nevels spoke with Jeremy Green, mentioned above, who testified at trial, and Daquez Green, who spoke with Nevels at the scene but did not testify at trial.

¶4. According to Michael Jones, he fought Maurice Booker while Brandon Jones fought Vincent Drain. Michael Jones claims that while he was fighting Maurice Booker, he heard

gunshots. Michael Jones claims that after hearing the gunshots, he and Brandon Jones left the scene.

¶5. On August 31, 2018, the jury found Michael Jones guilty of aggravated assault. Jones appeals.

STANDARD OF REVIEW

¶6. "The standard of review for admission of evidence is abuse of discretion." ***Debrow v. State***, 972 So. 2d 550, 552 (¶ 6) (Miss. 2007) (citing ***Smith v. State***, 839 So. 2d 489, 494 (¶ 6) (Miss. 2003)). "However, when a question of law is raised, the applicable standard of review is de novo." ***Id.*** (citing ***Biglane v. Under The Hill Corp.***, 949 So. 2d 9, 14 (¶ 17) (Miss. 2007)).

¶7. "Generally, a party who fails to make a contemporaneous objection at trial must rely on plain error to raise the issue on appeal, because otherwise it is procedurally barred." ***Swinney v. State***, 241 So. 3d 599, 605 (¶ 13) (Miss. 2018) (internal quotation marks omitted) (quoting ***Parker v. State***, 30 So. 3d 1222, 1227 (¶ 14) (Miss. 2010)). "For the plain-error doctrine to apply, there must have been an error that resulted in a manifest miscarriage of justice or seriously affects the fairness, integrity or public reputation of judicial proceedings." ***Id.*** (¶ 14) (internal quotation marks omitted) (quoting ***Hall v. State***, 201 So. 3d 424, 428 (¶ 12) (Miss. 2016)). "To determine if plain error has occurred, this Court must determine if the trial court has deviated from a legal rule, whether that error is plain, clear, or obvious, and whether that error has prejudiced the outcome of the trial." ***Id.*** at 606 (¶ 15) (internal quotation marks omitted) (quoting ***Conner v. State***, 138 So. 3d 143, 151 (¶ 19) (Miss. 2014)).

DISCUSSION

¶8. Jones argues that the State's comments on his refusal to give a statement violated his constitutional right to remain silent. Additionally, Jones argues that it was plain error for the trial court to allow hearsay statements.

I. The State did not violate Jones's right to remain silent.

¶9. Jones argues that the State's comment on his failure to make a statement to the police violated his constitutional right to remain silent. At trial, the State commented on Jones's failure to tell his side of the story several times. The first was on the State's direct examination of the officer in charge of the investigation, Detective William Nevels. The State asked, "[a]nd you attempted to speak to defendant but he would not - decided not to give a statement at the time?" Nevels answered, "[t]hat's true." The State went on to ask, "[s]o you picked him up at some point in time . . . . And did he give a statement then?" Nevels answered, "[h]e did not." Counsel for the defense did not object. Later, on redirect of Nevels, the State asked, "[d]id he refuse to give you a statement?" Nevels responded, "[h]e did." The State then asked, "[h]as he ever told you his side of the story?" Nevels responded, "[n]o, sir." Counsel for the defense objected, stating that the defendant had a constitutional right not to respond to questioning. The judge sustained the objection, and no further action was taken.

¶10. Later, when Jones was testifying on direct examination, defense counsel asked, "[a]nd you considered what you told him giving him a statement?" Jones answered, "[y]es sir. My statement was, I didn't shoot anybody." Later on cross-examination, the State asked, "[y]ou

didn't talk to the police about your side of the story?" Jones answered, "I spoke with Detective Nevels and advised him that I didn't shoot anybody."

¶11. In Mississippi, the right to silence is treated differently depending on whether the defendant has been read their ***Miranda*** rights. *See* ***Miranda v. Arizona***, 384 U.S. 436, 442 (1966). The Court has held,

> To the extent that Chief Nelson's testimony referenced pre-***Miranda*** silence, the evidence does not constitute plain error because the Court cannot say that the "trial court deviated from a legal rule" or that the error was "plain, clear, or obvious" in light of the split of authority on the issue.

Swinney v. State, 241 So. 3d 599, 609 (¶ 32) (Miss. 2018).

¶12. The first instance of the State's referencing Jones's silence occurred when the State asked Nevels if Jones had made a statement when he went to the station and when he was later picked up. The references were about Jones's pre-***Miranda*** silence. Since no contemporaneous objection was made, allowing the statements would only constitute reversible error if doing so amounted to plain error. The Court in ***Swinney*** held that testimony referencing pre-***Miranda*** silence does not rise to the level of plain error, thus the trial court's allowing the statements by Nevels referencing Jones's pre-***Miranda*** silence did not constitute plain error.

¶13. When Nevels again commented on Jones's silence on redirect, Jones objected, and the court sustained the objection. The Court has held, "If sustaining the objection alone is considered to be inadequate to remove the alleged prejudicial effect of the objected matter from the minds of the jury, then the court must be requested to instruct the jury to disregard the matter." ***Alpha Gulf Coast, Inc. v. Jackson***, 801 So. 2d 709, 727 (¶ 61) (Miss. 2001)

(citing ***Anderson v. Jaeger***, 317 So. 2d 902, 907 (Miss. 1975)). The Court further stated, "The jury is presumed to understand that the court disapproves of any testimony when an objection is sustained." ***Id.*** (citing ***Estes v. State***, 533 So. 2d 437, 439 (Miss. 1988)). In the case *sub judice* the court sustained the objection, and Jones did not request further action. The Court has held that "where an objection is sustained, and no request is made that the jury be told to disregard the objectionable matter, there is no error." ***Marks v. State***, 532 So. 2d 976, 981 (Miss. 1988) (citing ***Simpson v. State***, 497 So. 2d 424, 431 (Miss. 1986)). Jones objected, and the objection was sustained. However, Jones declined to request that further action be taken. Accordingly, no error occurred.

¶14. Finally, the State's questions to Jones on cross-examination about his silence did not violate Jones's rights. The Court has 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 post-arrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

McGrone v. State, 807 So. 2d 1232, 1235 (¶ 10) (Miss. 2002) (quoting ***Fletcher v. Weir***, 455 U.S. 603, 607 (1982)).

¶15. It is unclear from the record if Jones was ever read his ***Miranda*** rights; however, he certainly had not been read his rights when he made his initial statement to the police. Jones fails to establish plain error stemming from the State's cross-examination.

II. The alleged hearsay statements did not rise to the level of plain error.

¶16. Jones argues that it was plain error for the trial court to allow the State to elicit hearsay statements at trial. Mississippi Rule of Evidence 801(c) defines hearsay as "a statement that: **(1)** the declarant does not make while testifying at the current trial or hearing; and **(2)** a party offers in evidence to prove the truth of the matter asserted in the statement." Miss. R. Evid. 801(c). The Court has held,

> [there] are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Smith v. State, 986 So. 2d 290, 296 (¶ 19) (Miss. 2008) (alteration in orginal) (quoting ***Lee v. Illinois***, 476 U.S. 530, 540 (1986)).

¶17. The first of the statements that Jones argues is hearsay occurred when Tony Drain, the victim's brother, was answering questions on direct examination. The State asked about how Tony knew that Michael Jones was the shooter, and Tony answered, "I don't know that for certain. But that's what [Vincent] told me." The State responded, "Your brother told you who shot him? Did that happen at the time he was shot?" Tony responded, "That happened at the time he was shot." Mississippi Rule of Evidence 803(2) states, "The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . . [a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Miss. R. Evid. 803(2). Vincent Drain's statement to his brother regarding who shot him is an excited utterance, thus Jones's contention that allowing the testimony amounts to plain error fails.

¶18. Second, Jones argues that the court permitted hearsay testimony when the State asked Nevels questions about eyewitness statements contained in his investigative report. The State asked Nevels about statements Daquez Green, an eyewitness who did not testify at trial, made when Nevels interviewed him after the shooting.[1] First, Nevels told the State what Green said he had heard Michael Jones say after the shooting. Soon after, the State asked Nevels, "Who was the person he said did the shooting and made those statements?" Nevels responded, "Mike Jones."

¶19. The State argues that the questions were merely asked to illustrate why Nevels took certain steps in his investigation. The State's argument is supported by law, but there are certain exceptions. "Primarily, hearsay testimony obtained by an officer in conducting an investigation is inadmissible." ***Bridgeforth v. State***, 498 So. 2d 796, 800 (Miss. 1986) (quoting ***Roberson v. State***, 185 So. 2d 667, 668 (Miss. 1966)). However, more recent precedent has distinguished ***Bridgeforth***. The Court in ***Franklin v. State*** held that the lack of other direct evidence apart from hearsay testimony in ***Bridgeforth*** amounted to improper bolstering. ***Franklin v. State***, 136 So. 3d 1021, 1030 (¶ 29) (Miss. 2014) (citing ***Bridgeforth v. State***, 498 So. 2d 796, 800 (Miss. 1986)). Indeed, the Court in ***Bridgeforth*** stated,

> It is apparent from the lack of direct evidence in this case, except through the testimony of accomplice Felix, that the State introduced the two statements of the Tennessee detectives not for the purpose of showing the information upon

[1]Jones confuses the issue somewhat in his brief by citing page numbers of the transcript containing earlier testimony of Nevels regarding his interview with Jeremy Green, who testified at trial. However, because, in the brief, Jones identifies Daquez Green by name, we address Nevels's testimony during redirect regarding what Daquez Green told him at the scene.

> which those detectives acted but in an effort to prove the truth of the matter asserted in the statements and to bolster its case.

Bridgeforth, 498 So. 2d at 800.

¶20. The case *sub judice* is more analogous to ***Franklin*** than ***Bridgeforth***, because there is ample direct evidence in the form of eyewitness testimony. In his brief, Jones relies solely on plain-error review. ***Swinney v. State***, 241 So. 3d 599, 605 (¶ 13) (Miss. 2018) (quoting ***Parker v. State***, 30 So. 3d 1222, 1227 (¶ 14) (Miss. 2010)). "To determine if plain error has occurred, this Court must determine if the trial court has deviated from a legal rule, whether that error is plain, clear, or obvious, and whether that error has prejudiced the outcome of the trial." ***Id.*** at 606 (¶ 15) (internal quotation marks omitted) (quoting ***Conner v. State***, 138 So. 3d 143, 151 (¶ 19) (Miss. 2014)). Given the application of ***Franklin***, as well as the number of witnesses who echoed Daquez Green's statements to Nevels, Jones's plain-error argument fails.

CONCLUSION

¶21. The State's comments on Jones's silence did not violate his right to remain silent, and any potential violation was cured by a sustained objection. Additionally, the admission of purportedly hearsay testimony did not amount to plain error. The judgment of the trial court is affirmed.

¶22. **AFFIRMED.**

RANDOLPH, C.J., MAXWELL, BEAM, CHAMBERLIN, GRIFFIS, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J., AND ISHEE, J.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶23. The majority finds no plain error and argues that Michael Jones's silence was not protected because the statements "referenc[ed] Jones's pre-***Miranda*** silence. . . ." Maj. Op. ¶ 12. The majority finds also that the hearsay testimony did not amount to plain error because "ample direct evidence" supported the hearsay statements. Maj. Op. ¶ 20.

¶24. I respectfully dissent. Jones had a right against self-incrimination during his interview with Detective William Nevels, and he clearly invoked that right by refusing to provide the police a statement. Therefore, the State violated Jones's due process rights by commenting on his refusal to speak. Although not raised by Jones, I find that the State committed an additional due process violation by making disdainful comments about his right to counsel. The majority's analysis regarding Jones's second hearsay argument is erroneous. Hearsay testimony does not become admissible merely because other evidence supports the statement. Here, Daquez Green did not testify, and the admission of his hearsay testimony in the investigative report prejudiced Jones's right to a fair trial. Thus, I would reverse Jones's conviction and remand for a new trial.

I. Jones's Due Process Rights

A. Jones had a right against self-incrimination.

¶25. The majority finds that the State did not violate Jones's due process rights because commenting on an individual's pre-***Miranda***[2] silence does not constitute plain error. Maj. Op. ¶ 12. I disagree. First, the majority does not recognize that the State's comments included

[2]***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Jones's pre-***Miranda*** silence and his postarrest, post-***Miranda*** silence. Second, regardless of whether Jones had been arrested and Mirandized, he had a protected right against self-incrimination that attached the moment Detective Nevels told Jones he was a suspect in the shooting. Jones invoked his right to silence before he had been arrested and Mirandized. Jones remained silent until the State's conduct compelled him to take the stand to explain his actions. The State violated Jones's due process rights by commenting on his silence and on his refusal to provide a statement.

¶26. The majority takes the incorrect position that "[t]he statements referenc[ed] Jones's pre-***Miranda*** silence. . . ." Maj. Op. ¶ 12. The statements referred not only to Jones's pre-***Miranda*** silence. The State's overly broad questions encompassed the entirety of Jones's silence and included prearrest silence to postarrest, post-***Miranda*** silence. The prosecutor repeatedly asked whether Jones "ever" had talked to the police and why he "never" talked to the police. The words *never* and *ever* in this context, are suggestive of all of the time that Jones was in a position to talk to the police. This broad verbiage would include the time after the ***Miranda*** warnings had been given. One question asked whether Jones had talked to the police after he had been arrested and indicted, which points to Jones's postarrest, post-***Miranda*** silence. Thus, "[i]t is improper and, ordinarily, reversible error to comment on the accused's post-***Miranda*** silence." ***Quick v. State***, 569 So. 2d 1197, 1199 (Miss. 1990). The State's questions were framed in a way that amounted to repeated comments on Jones's post-***Miranda*** silence.

¶27. "Under both the state and federal constitutions, a defendant is guaranteed the right against self-incrimination in all criminal prosecutions." ***Reed v. State***, 523 So. 2d 62, 65 (Miss. 1988); *see* U.S. Const. amend. V; Miss. Const. art. 3, § 26. "[T]he Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination requires that the accused be advised of his right to remain silent and his right to counsel before any custodial interrogation." ***Moore v. State***, 287 So. 3d 905, 912 (Miss. 2019) (alteration in original) (internal quotation mark omitted) (quoting ***Jordan v. State***, 995 So. 2d 94, 106 (Miss. 2008)). "Evidence of post-arrest silence is improper, because it violates the accused's right against self-incrimination." ***Swinney v. State***, 241 So. 3d 599, 608 (Miss. 2018) (internal quotation marks omitted) (quoting ***Austin v. State***, 384 So. 2d 600, 601 (Miss. 1980)). We note that the Court of Appeals has acknowledged that there is "a split of authority on whether the introduction of a defendant's post arrest, pre-***Miranda*** silence during the prosecution's case-in-chief violates a defendant's Fifth Amendment privilege against self incrimination." ***Swinney***, 241 So. 3d at 608 (citing ***Jenkins v. State***, 75 So. 3d 49, 58 (Miss. Ct. App. 2011)).

¶28. Allowing the State to comment on a suspect's pre-***Miranda*** silence creates a compulsion on the suspect either to speak before the issuance of ***Miranda*** warnings or to have his silence used against him, which is antithetical to the protections provided by the Fifth Amendment to the United States Constitution. *See* ***State v. Leach***, 807 N.E.2d 335, 341 (Ohio 2004) ("Use of pre-arrest silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior silence.").

¶29. This Court is "empowered by our state constitution to exceed federal minimum standards of constitutionality[,]" thereby allowing us to "more strictly enforce" the right against self-incrimination. ***Downey v. State***, 144 So. 3d 146, 151 (Miss. 2014) ("We are empowered by our state constitution to exceed federal minimum standards of constitutionality and more strictly enforce the right to counsel during custodial interrogations." (citing Miss. Const. art. 3, § 26)). Our state's constitution mandates that an accused "shall not be compelled to give evidence against himself[.]" Miss. Const. art. 3, § 26. Other states have recognized the unconstitutionality of using prearrest silence as substantive evidence and have held that prearrest, pre-***Miranda*** silence is protected by their states' constitutions. *See* ***State v. Horwitz***, 191 So. 3d 429, 442 (Fla. 2016) ("[W]e conclude that a defendant's privilege against self-incrimination guaranteed under article I, section 9 of the Florida Constitution is violated when his or her pre-arrest, pre-***Miranda*** silence is used against the defendant at trial as substantive evidence of the defendant's consciousness of guilt."); ***Commonwealth v. Molina***, 104 A.3d 430, 453 (Pa. 2014) ("[W]e hold that the prosecutor's use of the properly admitted evidence of Defendant's pre-arrest silence to infer guilt violates Article I, Section 9 of the Pennsylvania Constitution."); ***State v. Burke***, 181 P.3d 1, 9 (Wash. 2008) ("In circumstances where silence is protected, a mere reference to the defendant's silence by the government is not necessarily a violation of this principle; however, when the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated." (citing ***State v. Lewis***, 927 P.2d 235 (Wash. 1996))).

¶30. Although Jones went to the police station voluntarily, the attempt to interview him became a circumstance in which he was compelled either to remain silent or to give a potentially incriminating statement. Thus, Jones's decision to remain silent was constitutionally protected, and the State violated his federal and state due process rights by commenting on his lawful exercise of those rights.

B. The State violated Jones's due process rights by continuously commenting on his refusal to talk to the police.

¶31. The relentless comments and questions by the State regarding Jones's refusal to talk, regardless of whether he had been Mirandized or not, violated his right against self-incrimination and constitutes plain error.

¶32. During the State's direct examination of Detective Nevels, the prosecuting attorney asked, "[a]nd you said you interviewed Mr. Jones also?" Detective Nevels's response was as follows:

> I attempted to interview Mr. Jones. He came into the police department. . . . I took him back to my office and I asked him why he was there. And he said, I heard y'all needed to speak to me. And then he stated, you know, as I was starting, you know, kind of go back and forth with him, that he didn't wish to make a statement at that time. I didn't have anything to hold him. So he gave me his phone number and he told me to call him if I needed him.

¶33. After Detective Nevels's initial comment on Jones's unwillingness to talk, the State elicited the following testimony from the detective regarding Jones's silence:

> State: And you attempted to speak to the defendant but he would not—decided not to give a statement at the time?
>
> A: That's true.
>
> . . . .

State: So you picked him up at some point in time?

A: Yes.

State: And did he give a statement then?

A: He did not.

¶34. Then on redirect, the State asked Detective Nevels about Jones's silence again:

State: Who was the best person to give you Michael Jones' side of the case?

A: Michael Jones.

State: Did he give you—did he come to your police department?

A: He did.

State: Has he *ever* told you his side of story?

A: No, sir.

(Emphasis added.) When Jones took the stand, the State already had commented on his silence multiple times, and he described the interview with Detective Nevels as follows:

> [W]e walked into his office and sat down. He said, my name is Detective Nevels. He said, I heard you shot somebody, what else was going on. You supposedly shot someone. I said, I didn't shoot anybody. He said, well that's what we said. Are you willing to give a statement? I said, no sir.

¶35. The State, again, repeatedly inquired about and commented on Jones's silence during cross-examination. The relevant parts of the State's cross-examination of Jones are as follows:

State: So you, police officer, you should know that your side of the story needs to be there before the case goes to grand jury, right?

Jones: My side of the story was with my attorney. And I think that was secure for me.

State: You didn't talk to police about your side of the story?

Jones: I spoke with Detective Nevels and advised him that I didn't shoot anybody.

State: You didn't give a statement—sorry.

Jones: That's all they need to know.

State: Did you give a statement?

Jones: That was my statement. I didn't shoot. Did I give a recorded statement? No, sir.

. . . .

State: Investigator Jones, just tell the jury again, why is it that you *never* told the police your side of the story?

Jones: I told the police officer I did not shoot anybody. That's all I needed to tell the police officer.

State: . . . So why didn't you feel like I need to tell the totality of what happened? Let me get my story about this guy jumping me and this person was the one that hit me and I didn't do it. Why didn't you go to the police and tell them that, *ever*?

Jones: Only thing I had to do was advise my attorney everything that was going on, sir.

. . . .

State: So you, a former police officer, waited until you *got arrested*, and *indicted* on a case and then you *never* talked to the police and you only told your lawyers what supposedly happened?

Jones: Yes, sir.

> . . . .
>
> State: But did you *ever* give your side to the police? That's what counts, right?
>
> Jones: No, sir. I did not give it to the police. It is not my job to ask you questions, sir.
>
> . . . .
>
> State: You can't tell us why you *never* told the police what happened?
>
> Jones: No, sir.

(Emphasis added.)

¶36. The majority relies on ***Swinney***, 241 So. 3d 599, to find that, because "[t]he Court in ***Swinney*** held that testimony referencing pre-***Miranda*** silence does not rise to the level of plain error, thus the trial court's allowing the statements by Nevels referencing Jones's pre-***Miranda*** silence did not constitute plain error."[3] Maj. Op. ¶ 12. But the majority's interpretation ***Swinney*** is erroneous. Also, ***Swinney*** is distinguishable from Jones's case.

¶37. In ***Swinney***, a police officer, Chief Nelson, testified that he had attempted to interview the defendant, but the defendant had refused to be interviewed. ***Swinney***, 241 So. 3d at 608. The Court found that Chief Nelson's comment on Swinney's silence did not rise to the level of plain error because "the Court cannot say that the 'trial court deviated from a legal rule' or that the error was 'plain, clear, or obvious' in light of the split of authority on the issue." ***Id.*** at 609. The majority interprets the holding in ***Swinney*** to mean that any comment made

[3]The Court in ***Swinney*** reviewed the case under the plain error doctrine "because there was no objection to Chief Nelson's comment" at the trial level. ***Swinney***, 241 So. 3d at 608.

by the State referencing a defendant's pre-***Miranda*** silence does not constitute plain error. *See* Maj. Op. ¶ 12 ("The Court in ***Swinney*** held that testimony referencing pre-***Miranda*** silence does not rise to the level of plain error . . . ."). But the Court in ***Swinney*** did not hold that a comment on a defendant's pre-***Miranda*** silence never could constitute plain error. Rather the Court determined that

> the State did not intentionally elicit Chief Nelson's comment, and it was not directly responsive to the State's question. Chief Nelson's comment was the *sole* reference over the course of Tony's trial regarding his choice to remain silent, and the State did not suggest to the jury that Tony was guilty because he declined to interview. We discern no manifest miscarriage of justice or that the fairness, integrity, or public reputation of the judicial proceeding was seriously affected.

Swinney, 241 So. 3d at 609 (emphasis added) (citation omitted).

¶38. The same cannot be said of Jones's case. Jones had a right against self-incrimination under the federal Fifth Amendment and our state's constitution. Unlike the ***Swinney*** case, the State commented on Jones's silence multiple times, and each comment was intentionally elicited by the State or it was in response to the State's questioning. The State commented on Jones's refusal to give a statement at least sixteen times. The majority does not dispute that "the State commented on Jones's failure to tell his side of the story several times." Maj. Op. ¶ 9. Also, the trial judge, before closing arguments, warned the prosecutor to refrain from mentioning Jones's silence because the prosecutor had "continuously talk[ed] about the defendant not giv[ing] a statement[,] which we all know he doesn't have to do." The State's relentless criticism of Jones's silence caused "a manifest miscarriage of justice" and "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial

proceeding[].” ***Hall v. State***, 201 So. 3d 424, 428 (Miss. 2016) (internal quotation marks omitted) (quoting ***Brown v. State***, 995 So. 2d 698, 703 (Miss. 2008)).

¶39. In ***Swinney***, the Court determined that the officer’s single comment on the defendant’s silence was not being used to imply that the defendant was guilty. ***Swinney***, 241 So. 3d at 609. In this case, it is obvious that the State was trying to suggest to the jury that Jones was guilty because he refused to tell his side of the story to the police. The prosecutor implied guilt from Jones’s silence by asking him, “[w]hy didn’t you feel like I need to tell the totality of what happened? Let me get my story about this guy jumping me and this person was the one that hit me and I didn’t do it. Why didn’t you go to the police and tell them that, ever?” That question served no other purpose than to lead the jury to infer guilt, by implying that an innocent person would have wanted to explain the whole story. The State should not be allowed to weaponize Jones’s protected silence against him as substantive evidence of guilt.

¶40. Other states have found that the prosecution can use prearrest silence if it is being used for impeachment purposes and/or for non-substantive uses. *See* ***Molina***, 104 A.3d at 450 (“We recognize that the right is not violated by a mere reference to a defendant’s silence, as occurred during the detective’s testimony in this case while she explained her investigation.” (citing ***Commonwealth v. DiNicola***, 866 A.2d 329, 336-37 (Pa. 2005))); ***Horwitz***, 191 So. 3d at 440 (“[A] testifying defendant may be impeached with pre-arrest, pre-***Miranda*** silence ‘*only if the silence was inconsistent with the defendant’s testimony at trial*.’” (quoting ***State v. Hoggins***, 718 So. 2d 761, 770 n.11 (Fla. 1998))); ***Burke***, 181 P.3d at 9 (“We have concluded that even when the defendant testifies at trial, use of prearrest

silence is limited to impeachment and may not be used as substantive evidence of guilt." (citing ***Lewis***, 927 P.2d at 235)); ***State v. Taylor***, 780 S.E.2d 222, 224 (N.C. Ct. App. 2015) ("[A] defendant's pre-arrest silence and post-arrest, pre-***Miranda*** warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial." (alteration in original) (internal quotation marks omitted) (quoting ***State v. Mendoza***, 698 S.E.2d 170, 174 (N.C. Ct. App. 2010))). This Court has addressed the use of postarrest, pre-***Miranda*** silence for impeachment purposes and held that,

> 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 post-arrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to *impeach a criminal defendant's own testimony*.

McGrone v. State, 807 So. 2d 1232, 1235 (Miss. 2002) (emphasis added) (quoting ***Fletcher v. Weir***, 455 U.S. 603, 607, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982)).

¶41. But ***McGrone*** is not applicable here because the State was not trying to impeach Jones's trial testimony by commenting on his prior silence. Instead, the State was using Jones's silence substantively to imply that Jones was guilty because he remained silent when an innocent man would have talked to the police. To be able to use Jones's silence for impeachment purposes, the State would need to show there was some material inconsistency between Jones's testimony at trial and his pretrial silence. *See* ***Taylor***, 780 S.E.2d at 224 ("[A] defendant's pre-arrest silence and post-arrest, pre-***Miranda*** warnings silence may not

be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial." (internal quotation marks omitted) (quoting ***Mendoza***, 698 S.E.2d at 174)). For example, if Jones had claimed at trial that he had given the police a detailed statement, the State would have been allowed to adduce proof that he had, in fact, declined to make a statement. No such inconsistencies were present here. Detective Nevels testified first and stated that Jones had met with him and that Jones did not want to give a statement. Jones's trial testimony provided a more detailed description of the exchange between the two; but his testimony, nevertheless, established that he had not made a statement, which was consistent with Detective Nevels's testimony. Even if the State had been trying to use Jones's silence for impeachment purposes, this Court has held that "impeachment should not be allowed where . . . the purported purpose of impeachment for offering the statement(s) is in bad faith, or is subterfuge to mask the true purpose of offering the statement(s) to prove the matter asserted." ***Carothers v. State***, 152 So. 3d 277, 284 (Miss. 2014). It is clear that the State's sole purpose of referencing Jones's silence was to make Jones look guilty, not to impeach his trial testimony.

¶42. "To constitute a due process violation, the prosecutorial misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" ***Walker v. State***, 913 So. 2d 198, 240 (Miss. 2005) (internal quotation marks omitted) (quoting ***Manning v. State***, 735 So. 2d 323, 345 (Miss. 1999)). This Court has held that

> the test to determine if an improper argument by a prosecutor requires reversal is whether the natural and probable effect of the prosecuting attorney's

> improper argument created unjust prejudice against the accused resulting in a decision influenced by prejudice.

Rushing v. State, 711 So. 2d 450, 455 (Miss. 1998) (quoting ***Taylor v. State***, 672 So. 2d 1246, 1270 (Miss. 1996)). The State improperly commented on Jones's right against self-incrimination and improperly argued that Jones was guilty because he had refused to talk to the police. The relentless prosecutorial comments on Jones's silence were prejudicial because they clearly implied that Jones was guilty because he had refused to tell his side of the story to the police. The prosecutor's misconduct clearly prejudiced Jones's right to a fair trial, constituting a blatant due process violation.

II. The State committed an additional due process violation by commenting on Jones's constitutional right to counsel.

¶43. Although Jones does not raise this argument in his brief, I find that the State's actions also improperly commented on Jones's right to counsel and prejudiced his right to a fair trial. The Mississippi Rules of Appellate Procedure allow this Court to, "at its option, notice a plain error not identified or distinctly specified" in the appellant's brief. M.R.A.P. 28(a)(3). "Under the plain-error doctrine, we can recognize obvious error which was not properly raised by the defendant on appeal, and which affects a defendant's 'fundamental, substantive right.'" ***Smith v. State***, 986 So. 2d 290, 294 (Miss. 2008) (citing ***Debrow v. State***, 972 So. 2d 550, 553 (Miss. 2007)). "Plain-error review is properly utilized for 'correcting obvious instances of injustice or misapplied law.'" ***Id.*** (quoting ***City of Newport v. Fact Concerts, Inc.***, 453 U.S. 247, 256, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981)).

¶44. "[B]oth the Sixth Amendment of the U.S. Constitution and Article 3, Section 26 of the Mississippi Constitution guarantee that the accused shall enjoy the right to have assistance of counsel for his or her defense." ***Franklin v. State***, 170 So. 3d 481, 486 (Miss. 2015) (citing ***Grayson v. State***, 806 So. 2d 241, 247 (Miss. 2001)). "The United States Supreme Court has long held that the Sixth Amendment guarantees the right to counsel at 'critical' stages of criminal proceedings even before trial." ***Riddley v. State***, 777 So. 2d 31, 34 (Miss. 2000) (citing ***Powell v. Alabama***, 287 U.S. 45, 57, 53 S. Ct. 55, 77 L. Ed. 158 (1932)). This Court has held that "[a]ny reference to the seeking of legal counsel prior to police involvement in a crime should not be used against a criminal defendant as it would be more prejudicial than probative and should be excluded under the rules of evidence." ***Id.*** at 35. Again, "[t]o constitute a due process violation, the prosecutorial misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" ***Walker***, 913 So. 2d at 240 (internal quotation marks omitted) (quoting ***Manning***, 735 So. 2d at 345).

¶45. The prosecutor asked Jones why he had not told the police his side of the story, to which Jones responded that his "side of the story was with [his attorney]" and the "[o]nly thing [he] had to do was advise [his] attorney of everything that was going on." The prosecutor also made the following statements regarding Jones's right to counsel:

> State: So you talked to your attorney after you were arrested. Or did you talk to him before you were arrested?
>
> Jones: I talked to him after I was arrested.
>
> State: So you, a former police officer, waited until you got arrested, and indicted on a case and then you never talked to the

> police and you only told your lawyers what supposedly happened?
>
> . . . .
>
> State: You told your defense attorney that y'all got together and came up with a story, more concise then you ever told police?
>
> . . . .
>
> State: You gave more information to your defense attorney then you ever gave to law enforcement officers, right?

¶46. The prosecutor's questions and comments regarding Jones's right to counsel were intertwined with questions and comments regarding Jones's silence. The right to counsel had attached. The State's comments were directed at Jones's consultation with an attorney after his arrest. *See* ***Swinney v. State***, 829 So. 2d 1225, 1232 (Miss. 2002) ("An accused's right to counsel attaches after arrest . . . ." (quoting ***Jimpson v. State***, 532 So. 2d 985, 988 (Miss. 1988))). The Fifth and Sixth Amendments are intended to shield individuals from the State's use of their silence and assistance from an attorney against them. Here, the State's clear intent was to use Jones's silence and his private communications with his attorney as a sword against him to imply guilt because he elected to talk with his attorney instead of the police. The prosecutor implied also that the defense witnesses colluded with Jones and his attorney because neither Jones nor his witnesses had talked to the police and because Jones's side of the story only came to light after he had talked to his lawyer. The State's implication that there was something wrong with Jones's choosing to talk with his attorney rather than to the police caused unfair prejudice because the comments deprived Jones of the protections afforded him under the Sixth Amendment to the United States Constitution and article 3,

section 26, of the Mississippi Constitution. *See* U.S. Const. amend. VI; Miss. Const. art. 3, § 26.

III. Hearsay Statements

¶47. "Jones argues that it was plain error for the trial court to allow the State to elicit hearsay statements at trial." Maj. Op. ¶ 16. Jones contends that the trial court erred by permitting hearsay testimony in two instances: 1) "when Tony Drain, the victim's brother was answering questions on direct examination" and informed the jury that the victim had said Jones was the one who shot him, Maj. Op. ¶ 17, and 2) "when the State asked Nevels questions about eyewitness statements contained in his investigative report." Maj. Op. ¶ 18. I agree that Jones's first hearsay contention is without merit because "Vincent Drain's statement to his brother regarding who shot him is an excited utterance[.]" Maj. Op. ¶ 17. But I disagree with the majority regarding Jones's second hearsay contention, and I find that the State did elicit hearsay testimony from Detective Nevels that prejudiced Jones's right to a fair trial.

¶48. The facts surrounding the admission of the hearsay statements are unusual and must be explained. *See* Maj. Op. ¶ 18. During the cross-examination of Detective Nevels, Jones's attorney questioned him about portions of the investigative report, which was marked for identification only. Specifically, Jones's attorney asked Detective Nevels whether the report contained "any discrepancies in the gun descriptions given by the Greens"[4] and whether the

[4]"[T]he Greens" refers to Daquez Green and Jeremy Green, collectively. Unlike Daquez Green, Jeremy Green testified at Jones's trial and stated that the weapon used in the shooting was a black gun.

report contained information about what Jones did after the shooting. Nevels testified that according to Daquez Green's statements in the report, Green told him that Jones had a small black gun and that after the shooting, Jones handed the gun to his brother as the two fled the scene.

¶49. On redirect, the State asked Detective Nevels to testify about statements made by Kimberly Drain, which were also in the investigation report. Jones's attorney objected on the grounds of hearsay. The State responded, stating that Jones's attorney had "opened the door" and that the rule of completeness[5] allowed the State to use the entirety of Detective Nevels's investigative report. The trial judge determined that the State could "ask about Daquez." The State proceeded then to inquire about the statements Daquez Green allegedly heard Jones make.[6] According to Detective Nevels, Daquez Green told him that Green had heard Jones say "Yea, I'm here now" before the fight occurred and then say "Yea, N——, yea" after allegedly shooting the victim.

¶50. Jones argues that it was plain error for the trial court to allow Detective Nevels to testify regarding the two statements Daquez Green claimed to have heard Jones make. Jones contends that these alleged statements are hearsay and prejudicial because they are

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[5]*See* MRE 106.

[6]The State erroneously exceeded the scope of redirect examination by asking questions not related to the matters addressed on cross-examination. *See* ***Bernard v. State***, 288 So. 3d 301, 313 (Miss. 2019) ("The scope of re-direct examination, while largely within the discretion of the trial court, is limited to matters brought out during cross-examination." (internal quotation marks omitted) (quoting ***Conley v. State***, 790 So. 2d 773, 786 (Miss. 2001))). The State's redirect of Detective Nevels concerning Daquez Green should have been limited to the portion of the report concerning his statements about the color of the gun and Jones's actions after the shooting, which were brought out during cross-examination.

"admissions of participation and [imply] guilt." I agree. The statements are hearsay because Daquez Green did not testify, even though he was available.

¶51. This Court has long held the general rule is that "hearsay testimony obtained by an officer in conducting an investigation is inadmissible." ***Bridgeforth v. State***, 498 So. 2d 796, 800 (Miss. 1986) (quoting ***Roberson v. State***, 185 So. 2d 667, 668 (Miss. 1966)). But this Court has held also that a police officer can testify about the investigation process and statements made during that process, as long as the officer does not go into details and the statements are not being offered to prove the truth of the matter asserted. ***Swinney***, 241 So. 3d at 610 ("It is elemental that a police officer may show that he has received a complaint, and what he did about the complaint without going into details of it." (internal quotation marks omitted) (quoting ***Swindle v. State***, 502 So. 2d 652, 658 (Miss. 1987))); ***Gillett v. State***, 56 So. 3d 469, 504 (Miss. 2010) ("[A] statement is not hearsay if it is offered merely to show its effect on someone." (alteration in original) (internal quotation marks omitted) (quoting ***Thorson v. State***, 895 So. 2d 85, 126 (Miss. 2004))).

¶52. To support the State's use of hearsay testimony in this case, the majority erroneously interprets ***Franklin v. State***, 136 So. 3d 1021 (Miss. 2014), to create a new exception to hearsay: if other direct evidence supports the hearsay statement, then there is no error. Maj. Op. ¶ 20. But the Court relies erroneously on the ***Franklin*** Court's interpretation of the general rule set forth in ***Bridgeforth***, which dealt with an improper bolstering argument, not whether the hearsay statements were admissible. *See* ***Franklin***, 136 So. 3d at 1030. The Court in ***Franklin*** did not say that ample other direct evidence would excuse the admission

of a hearsay statement. ***Id.*** The defendant in ***Franklin*** argued that the officer's statements were hearsay and that "the statements were used improperly to bolster the State's case[.]" ***Id.*** The Court in ***Franklin*** found that the officer's statements "were not hearsay and therefore were admissible" because the statements were offered to "explain the reason for the officers' belief that a dangerous and emergency situation existed[,]" not to prove the truth of the matter asserted. ***Id.*** After finding the statements were not hearsay, the Court then addressed the defendant's improper bolstering argument and stated, "this Court based its finding of improper bolstering in ***Bridgeforth*** on '. . . lack of direct evidence . . .' to support the case." ***Id.*** (quoting ***Bridgeforth***, 498 So. 2d at 800). While ***Franklin***'s interpretation of ***Bridgeforth*** regarding an improper bolstering argument may be true, the majority's application is misplaced. Here, Jones is not arguing that the State improperly bolstered its case. He is arguing only that the trial court erred by permitting inadmissible hearsay testimony that prejudiced his right to a fair trial.

¶53. Additionally, the majority finds that because "there is ample direct evidence in the form of eyewitness testimony" and there are a "number of witnesses who echoed Daquez Green's statements" there is no plain error. Maj. Op. ¶ 20. After examining the record, I find that while other witnesses identified Jones as the shooter, none testified that Jones made the two statements alleged by Daquez Green. Actually, the victim's testimony contradicts Daquez Green's statements. The victim testified that Mike Jones never said anything to him. Thus, even if one accepts the majority's interpretation of ***Franklin***, no other direct evidence

established that Jones said, "Yea, I'm here now" before the fight and "Yea, N——, yea" after the fight.

¶54. "When determining whether a statement is prejudicial, th[e] Court has established an objective test asking how a reasonable objective observer would under the circumstances be likely to perceive the statement." ***Swinney***, 241 So. 3d at 609 (alteration in original) (internal quotation marks omitted) (quoting ***Franklin***, 136 So. 3d at 1029). The State argues that its questions and Detective Nevels's testimony were "to illustrate why Nevels took certain steps in his investigation." Maj. Op. ¶ 19. But these statements were not being offered to show why Nevels took certain steps in the investigation. Instead, they were offered to prove the truth of the matter asserted. In ***Bridgeforth***, the Court found that the trial judge erred by allowing hearsay testimony because

> the State introduced the two statements of the Tennessee detectives not for the purpose of showing the information upon which those detectives acted but in an effort to prove the truth of the matter asserted in the statements and to bolster its case.

Bridgeforth, 498 So. 2d at 800. The Court found that the detectives' testimonies were hearsay because the statements were offered "to prove the truth of the matter asserted in the statements[,]" not to show the steps the detectives took in the investigation. ***Id.*** Detective Nevels's testimony went into detail about what Jones allegedly said and repeated Green's exact words contained in the investigative report. The State introduced Daquez Green's statements for the purpose of proving the truth of the matter asserted, Jones's guilt, "not for the purpose of showing the information upon which [Detective Nevels] acted[.]" ***Id.*** The State had established how Jones became a suspect in this case without those two statements.

The introduction of Daquez Green's statements was to imply that Jones would not have made those statements if he were not involved in the shooting. It is likely that a reasonable, objective observer would perceive those statements as admissions of participation or implied guilt. Thus, I find that Daquez Green's statements contained in the investigative report are hearsay and prejudiced Jones's right to a fair trial.

IV. Conclusion

¶55. Jones's refusal to give the police more information and to remain silent throughout the criminal investigation was a clear invocation of his federal and state right against self-incrimination. The State violated Jones's due process rights by using his silence as a means of implying guilt to the jury. The State violated Jones's due process rights also by improperly commenting on his right to counsel. The trial court also erred by allowing two statements from a nontestifying, available witness to be used by the State to imply guilt because a reasonable objective observer likely would perceive those statements as admissions of participation in the shooting.

¶56. I find that Jones has been unfairly prejudiced by the State's actions in this case and would reverse his conviction and remand for a new trial.

KING, P.J., AND ISHEE, J., JOIN THIS OPINION.