UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0964

September Term, 2014

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JAMES BRADDY

v.

STATE OF MARYLAND

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Eyler, Deborah S.,
Nazarian,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: October 5, 2015

James Braddy was convicted in the Circuit Court for Prince George's County of voluntary manslaughter and use of a handgun in the commission of a crime of violence, and sentenced to thirty years imprisonment. He contends on appeal that the circuit court erred when it allowed the State to elicit testimony from Mr. Braddy about his post-arrest silence, and again when it admitted hearsay statements and then delivered incorrect instructions to the jury about those statements. We disagree and affirm.

## I. BACKGROUND

The events that gave rise to Mr. Braddy's conviction unfolded in an apartment complex and parking lot in Oxon Hill on August 12, 2012. Mr. Braddy went to the apartment of Tinika Dow, his one-time girlfriend (and mother of his three-year-old daughter), to store some belongings, including marijuana and a handgun. He described himself as a "part-time" drug dealer, in addition to his day job at an assisted living facility, and he regularly kept marijuana at Ms. Dow's apartment and visited his daughter there. He knocked on the apartment door and, after getting no response, used his key to get in.

Ms. Dow, surprised to see Mr. Braddy, told him that she had company. Mr. Braddy testified at trial that he was not upset or jealous to find a man in her apartment. He did want privacy, though, so he could put his belongings away quickly (he was concerned his double-parked van might get towed). So he asked Ms. Dow to get her guest, Alejandro Trevor Johnson, out of the shower, but she did nothing. He then walked to the open door of the bathroom, knocked to let Mr. Johnson know he was there, and asked that he leave:

> I called him Main Man. I said excuse me, Main Man. He looked out. . . . I said, hey, no disrespect. I said when you get a chance, you and Tinika are going to probably be rolling in a little while.

> I'm just trying to get something situated, you know, and I'll be out of the way, no disrespect, and I walked away.

Mr. Braddy claims he then walked away, but Mr. Johnson stated, "[N]*****, don't be rushing me; I just came home." (Mr. Braddy understood from this comment that Mr. Johnson had recently gotten out of prison.) He then heard footsteps behind him, and Mr. Johnson struck him on the side of his head. Mr. Braddy raised his gun and told Mr. Johnson to back up; because Mr. Johnson moved closer to him in spite of this request, and because he thought he saw Mr. Johnson wielding a weapon (he saw a glint of silver that he believed might be a knife or boxcutter), Mr. Braddy shot Mr. Johnson in the shoulder.

For her part, Ms. Dow testified that she was afraid that Mr. Braddy would make *her* his target, so she hid in her son's room to avoid getting involved in any altercation. She heard a conversation between the men, but she did not hear arguing, yelling, or any struggle. She heard a gunshot, and ran out of the room to find Mr. Johnson lying on the floor, with Mr. Braddy pacing nearby and telling him to leave. When Mr. Johnson said he couldn't move, Mr. Braddy took him by the feet and dragged him out of the apartment, after which Ms. Dow locked the door in fear that Mr. Braddy would return.

Mr. Braddy told Mr. Johnson he would take him to a nearby hospital; he evidently struggled to carry Mr. Johnson, who was "considerably larger," and when the two reached the parking lot, Mr. Braddy's legs gave out and he fell backward to the ground. Mr. Johnson jumped on top of him, punched him in the mouth, and continued to attack him—trying to grab his gun, according to Mr. Braddy. Convinced that Mr. Johnson would kill him if that

happened, Mr. Braddy shot Mr. Johnson three times, then got in his van and left. He testified that he took a week to collect funds for a lawyer, then turned himself in and was placed under arrest. (That delay and how much it should have been made known to the jury became the subject of much discussion at trial, and we will discuss it in greater detail below.)

Ms. Dow removed all signs of the struggle from the apartment (including cleaning the blood from the scene with Clorox wipes), and put in her purse a cartridge casing that she found on the floor. She did not respond when police came to the door because, she said, she was afraid she would get blamed for what happened. Instead, she left her apartment, saw a police officer, and asked him to put the trashbag in a dumpster for her. She then went to see her cousin, Harold Graves, and after telling him what happened, they returned to her apartment and she spoke to Detective Sergeant Joseph Bergstrom. Both Detective Bergstrom and Mr. Graves testified, over defense objection, about their conversations with Ms. Dow, and their testimony formed the basis of part of Mr. Braddy's appeal here, so we detail their testimony below.

The jury found Mr. Braddy not guilty of first- and second-degree murder, but guilty of voluntary manslaughter and use of a handgun in the commission of a crime of violence. He filed a timely notice of appeal.

## II. DISCUSSION

Mr. Braddy appeals the admission of what he characterizes as his post-arrest silence, and the trial court's decision to permit Mr. Graves and Detective Bergstrom to testify about Ms. Dow's conversations with each of them.[1] We say "what he characterizes as his post-arrest silence" because the statements he challenges don't fall in that protected class of statements in the first place. As to the witnesses' testimony, we assume for purposes of argument that they were admitted erroneously, but conclude that any such error, if it occurred, was harmless.

### A. The Trial Court Did Not Err In Permitting The State's Questions And Comments About Mr. Braddy's Decision Not To Speak With Police After The Shooting.

Mr. Braddy is right that every criminal defendant enjoys an absolute privilege under the Fifth Amendment to say nothing, and courts must not "'penaliz[e]' a defendant for remaining silent." *Lupfer v. State*, 420 Md. 111, 123 (2011). But his ability to shield his silence from the knowledge of the jury at trial depends on whether his silence came before or after he had been arrested or advised by a law enforcement officer, *see Miranda v.*

[1] Mr. Braddy phrased the questions in his brief as follows:

1. Did the trial court err by permitting the State to infringe upon Mr. Braddy's privilege against self-incrimination?

2. Did the trial court err by admitting prior out-of-court statements made by the State's key witness through the trial testimony of two other State witnesses and by giving conflicting jury instructions on the issue?

*Arizona*, 384 U.S. 436, 444 (1966), of his right to remain silent. Although Mr. Braddy would have us treat the time period between his disappearance from the scene and his decision to turn himself in to police the same as the period after he was arrested or *Mirandized*, they are not the same. And the testimony he challenges did not, viewed in context, reveal any protected post-arrest silence.

**1. Testimony at trial.**

There were five opportunities for Mr. Braddy's silence to come up: on direct examination, on cross-examination by counsel for the State, on redirect examination, on recross-examination, and during closing argument. He takes issue with exchanges or statements during each of these phases.

**a. Direct examination**

On direct examination, Mr. Braddy testified that after he shot Mr. Johnson, he got in his van and drove out of the complex. He turned himself in "a week and some days" after the shooting took place. His counsel then asked him why he waited so long, and the two discussed the delay:

> [Counsel for Mr. Braddy]: What were you doing during that time? Why did you wait so long to turn yourself in?
>
> [Mr. Braddy]: Well, I was trying to get financing together to obtain me a lawyer, and I didn't really know what was going on. So I just wanted to make sure I at least had me a lawyer before I turned myself in.
>
> [Counsel for Mr. Braddy]: Did you eventually, before you turned yourself in, get the advice of a lawyer?

[Mr. Braddy]: Yes, sir, once I talked to a lawyer, yes.

[Counsel for Mr. Braddy]: Okay. And when you talked to that lawyer, how soon after you met with that lawyer did you turn yourself in?

[Mr. Braddy]: That day.

Mr. Braddy's counsel stated that he had no other questions.

**b. Cross-examination.**

After a brief recess, counsel for the State immediately began where counsel for Mr. Braddy had left off, asking about the delay and what Mr. Braddy did next—and the exchange prompted a series of objections:

[Counsel for the State]: All right, Mr. Braddy. So 13 days later you got your lawyer and you went right down to the police and told them, with your lawyer, I know what happened; this was self-defense.

[Counsel for Mr. Braddy]: Objection.

[Mr. Braddy]: No, sir.

THE COURT: Overruled.

[Counsel for the State]: You never told that story until today; is that correct?

[Mr. Braddy]: I've never talked to the police, sir.

[Counsel for Mr. Braddy]: Objection.

[Counsel for the State]: But you never told this story –

THE COURT: If somebody objects, it's necessary to just stop, please. And you do know that.

(Counsel approached the bench and the following ensued.)

[Counsel for Mr. Braddy]: Your Honor –

THE COURT: Why do you do that? Defense counsel objects, and you keep right on going.

[Counsel for the State]: I apologize, Your Honor.

THE COURT: You're a seasoned professional, and you would be angry if somebody did that to you.

[Counsel for Mr. Braddy]: Your Honor, this man has a Fifth Amendment privilege to not talk to the police. He was advised by counsel not to talk to the police, and this man knows it.

I would like the Court to instruct the jury that somebody who is accused of a crime has an absolute privilege, and they do not have to talk to the police and that he would have been advised by a lawyer.

THE COURT: I think there is an instruction that does, in fact, say that.

[Counsel for Mr. Braddy]: Well, I want them instructed now because that was improper questioning.

* * *

THE COURT: Madam Foreman, members of the jury, I'm going to give you an instruction at the end of this trial about a person's right to remain silent and not to talk to the police, and we'll go into more detail at that time. But that right does, in fact, exist.

Counsel for the State later came back to the issue, highlighting in his questioning the fact that Mr. Braddy fled the scene: "And nobody knows about any of your injuries

because you didn't stay around and call 911 and talk to the police, did you?" (That question drew no objection.)

**c. Redirect examination**

Mr. Braddy's counsel returned on redirect to his consultation with a lawyer:

> [Counsel for Mr. Braddy]: Now, before you turned yourself in, you consulted a lawyer, right?
>
> [Mr. Braddy]: Yes, sir.
>
> [Counsel for Mr. Braddy]: And were you given advice about how to behave when you turned yourself in to the police?
>
> [Mr. Braddy]: Yes, sir.
>
> [Counsel for Mr. Braddy]: And were you told by that lawyer not to give a statement?
>
> [Mr. Braddy]: Yes, sir.
>
> [Counsel for Mr. Braddy]: Was that your choice or the lawyer's choice?
>
> [Mr. Braddy]: It was the lawyer's choice.
>
> [Counsel for Mr. Braddy]: Was that because you didn't act in self-defense that you didn't talk to the police?
>
> [Mr. Braddy]: I didn't talk to the police because I was following my lawyer's instructions.

**d. Recross-examination**

The State then revisited the issue of Mr. Braddy's inconsistencies when counsel suggested on recross-examination that Mr. Braddy had conformed his story after to the evidence the State had compiled:

> [Counsel for the State]: Okay. And you didn't want to give a statement before you got the discovery from the State because you didn't know what evidence I had, did you?
>
> [Counsel for Mr. Braddy]: Objection, Your Honor.
>
> THE COURT: Objection sustained.
>
> [Counsel for the State]: But now that you know everything that the State has for evidence, you could come in and make up any story that you want to try to fit through all the little pieces of the evidence, couldn't you?
>
> [Counsel for Mr. Braddy]: Objection.
>
> THE COURT: Objection sustained.
>
> [Counsel for the State]: Who else did you tell that this was self-defense?
>
> [Mr. Braddy]: I told no one, sir. I haven't talked to anyone.

The State also re-raised the contention that Mr. Braddy "told no one" about what happened, or raised the issue of self-defense, and these questions met no objection from Mr. Braddy's counsel:

> [Counsel for the State]: Who else did you tell that this was self-defense?
>
> [Mr. Braddy]: I told no one, sir. I haven't talked to anyone.
>
> [Counsel for the State]: You never told your wife?
>
> [Mr. Braddy]: No, sir.
>
> [Counsel for the State]: You never told a friend?

[Mr. Braddy]: No, sir.

[Counsel for the State]: You never told your pastor?

[Mr. Braddy]: I haven't been talking about my case, sir.

[Counsel for the State]: So you told nobody that this was self-defense.

[Mr. Braddy]: I haven't been talking about my case.

[Counsel for the State]: So there is nobody, other than Tinika Dow, who was at the scene of the shooting. And the victim, obviously. There's nobody else.

[Counsel for Mr. Braddy]: Objection. You have to be more specific.

[Counsel for the State]: When you shot [Mr. Johnson] in the apartment, it was only you and [Ms. Dow] and Mr. Johnson.

[Mr. Braddy]: Yes, sir.

[Counsel for the State]: Okay. And while [Ms. Dow] told [Mr. Graves] what happened and the police what happened and your investigator, on three separate occasions, what happened, you told no one.

[Mr. Braddy]: I haven't spoke to anyone, sir, except my attorney.

At that point, the parties completed their examination of Mr. Braddy, and after some discussion about jury instructions the court called a lunch recess. Upon returning, counsel for Mr. Braddy again requested a mistrial, claiming that the State improperly referred to Mr. Braddy's post-arrest silence and implied that he came up with a defense only after finding out the State's theory against him. The trial court denied the motion.

**e. Closing argument.**

The State's theme in closing argument was that Mr. Braddy made up the story of self-defense to protect himself, and the prosecutor did not get far before Mr. Braddy's counsel objected:

> [Counsel for the State]: Folks, you heard the very first time any human being—not a pastor, not his wife, not a best friend—has ever heard this story, and I will tell you it's a story, was today, on this witness stand three hours ago.
>
> [Counsel for Mr. Braddy]: Objection.
>
> THE COURT: Objection sustained. The jury is instructed to disregard the last comment.
>
> [Counsel for Mr. Braddy]: May we approach?
>
> THE COURT: Come up.
>
> * * *
>
> [Counsel for Mr. Braddy]: Your Honor, I moved for a mistrial earlier with regard to this argument.
>
> [Counsel for the State]: I didn't say anything about any police. I said this was all questions that he admitted to on the stand. He didn't tell a pastor, he didn't tell—
>
> THE COURT: He has no requirement to do any of that.
>
> [Counsel for the State]: No, he doesn't, but he took the stand and put his credibility at issue, and once he does, whether or not he told someone—not the police—whether or not the told a friend, his wife, his pastor become—and those are the three words I—
>
> THE COURT: You need to go back and say he has no requirement to cooperate with anybody, police or anybody.

[Counsel for the State]: I'm happy to say that.

THE COURT: You want me to do this?

[Counsel for Mr. Braddy]: You're instructing him to say that?

THE COURT: Yes. I'll do it if you want.

[Counsel for Mr. Braddy]: I would prefer you do it. And I would ask you to ask him to move on to another subject.

[Counsel for the State]: Your Honor, I don't think – that's not fair -

THE COURT: Will you stop. You're right on the line.

* * *

THE COURT: The jury is instructed to disregard the last comment of the state's attorney. The defendant is under no legal obligation to cooperate with anybody or make a confession to anybody under our system of justice.

Counsel for Mr. Braddy moved again for a mistrial, and claimed that the State's "concoction" theory violated due process and the Fifth and Sixth Amendments. The court again denied the motion. The State continued to press the theme that Mr. Braddy had "concocted" his story, and told it for the first time at trial, throughout closing argument.

**2. The law on post-arrest silence.**

Post-arrest silence is just that: a defendant's exercise of a constitutional right not to incriminate himself. We have explained, though, that this rationale protects against revelation of a defendant's silence *at and after the time of arrest*:

> In *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980), the Supreme Court held that the *use of pre-arrest silence to impeach a defendant's credibility does not violate the Constitution because, where "the failure to speak occurred before the [defendant] was taken into custody and given Miranda warnings," "no governmental action induced [a defendant] to remain silent...*." In Maryland, in *Robeson v. State*, 39 Md. App. 365 (1978)—some two years prior to *Jenkins*—the Court of Special Appeals held that introduction on cross-examination of a defendant's prearrest silence is not unconstitutional, explaining that the appellant's "actions in not communicating with the police [did not] amount to silence in the constitutional sense of that word" because "silence" in that context "is the Fifth Amendment right to remain silent when confronted by one's accusers following an arrest or in a custodial interrogation setting." *Robeson*, 39 Md. App. at 368.

*Lupfer v. State*, 420 Md. 111, 123-24 n.5 (2011) (emphasis added). Although certain "tacit admissions" made before arrest are admissible, they will be barred when made "in the presence of a police officer." *Weitzel v. State*, 384 Md. 451, 456 (2004). The fulcrum, then, is the arrest (with the usual penumbrae for defendants who, for example, have been detained but not administered *Miranda* rights, or perhaps not formally placed under arrest). *See Grier v. State*, 351 Md. 241, 258 (1998) ("'[S]ilence *at the time of arrest* . . . has a significant potential for unfair prejudice.'" (emphasis added) (quoting *United States v. Hale*, 422 U.S. 171, 180 (1975)); *Wills v. State*, 82 Md. App. 669, 676 (1990) ("The arrest itself is governmental action which enshrouds a defendant with the constitutional right to remain silent. A suspect's fears upon arrest, combined with the widespread knowledge of the right to remain silent, will often result in the defendant remaining silent." (quoting *State v. Davis*, 686 P.2d 1143, 1146 (Wash. App. 1984))).

**3. The remarks were admissible.**

Mr. Braddy's arguments fail for at least four reasons. *First*, although his brief characterizes the statements broadly as revealing post-arrest silence, we see almost no instances at trial where the "silence" came at or after the time he turned himself in. *None* of the questions posed by the State specifically raised the point that Mr. Braddy did not talk to the police after his arrest. Indeed, in large part, the questions commented on the fact that he did nothing, *including* going to the police, for days after the incident. So, for example, when counsel for the State cross-examined him with the question, "So 13 days later you got your lawyer and you went right down to the police and told them, with your lawyer, I know what happened; this was self-defense," he plainly posed the question laden with sarcasm, and expected a negative response. His point—visible from the transcript even without the benefit of hearing counsel's tone—was actually that Mr. Braddy *did not* go to the police. And that point has absolutely nothing to do with a post-*Miranda* or post-arrest right to remain silent.

*Second*, to the extent that Mr. Braddy objects to the revelation that he said nothing until he consulted with a lawyer, his own counsel opened the door to that conversation on direct examination, well before counsel for the State even had the opportunity to ask him about it. The defense elicited Mr. Braddy's testimony about waiting before turning himself in, and that he waited in order to raise money for a lawyer. In fact, on direct examination his counsel went into the matter in some detail—he asked Mr. Braddy whether his lawyer

told him not to give a statement, and elicited his testimony that he did not talk to the police because he was "following [his] lawyer's instructions."

Once counsel raised the subject (and went further by exploring Mr. Braddy's specific decision not to speak with police after his lawyer advised him not to), he "opened the door" for the prosecution to respond.[2] And although one cannot open the door widely enough to make incompetent evidence admissible, he *may* open the door to make irrelevant evidence admissible. *Clark v. State*, 332 Md. 77, 85 (1993). That is what Mr. Braddy's counsel did: he put in issue the question of Mr. Braddy's silence, and allowed for the State to walk *through* the door and use *that* silence to attack Mr. Braddy's credibility.

*Third*, to the extent that the State raised any argument about Mr. Braddy concocting a new defense, such an argument has nothing to do with post-arrest silence. And importantly, the two times on recross-examination that the State tried to suggest that Mr. Braddy made up his story to fit the discovery he received from the State, the court *sustained* Mr. Braddy's counsel's objection.

*Fourth*, once counsel for the State started down the "you-told-no-one" road—reiterating that he didn't tell his wife, a friend, or his pastor—counsel for Mr. Braddy *did*

[2] The two doctrines of "opening the door" and "fair response" are often conflated, but this case doesn't raise a distinction between the two that matters. *See Lupfer*, 420 Md. at 132. In *Lupfer*, we noted that in *Grier v. State*, 351 Md. 241 (1998), the Court of Appeals treated the two doctrines as separate and distinct, but we also concluded that "the majority rule seems to be that when the defense has 'opened the door,' the prosecution is entitled to a 'fair response.'" *Lupfer*, 420 Md. at 132 n.12.

*not object*, except to counsel's lack of specificity.[3] Even after Mr. Braddy's testimony was complete, his counsel allowed a break to be called, and only sought a mistrial once the court had moved on, again raising the post-arrest silence theory and the "concoction" theory to which he had not actually objected *during* Mr. Braddy's testimony, or where the court had sustained the objection.

Ultimately, then, none of the statements at issue related to Mr. Braddy's invocation to a police officer or government agent of his right to remain silent, and his own counsel initiated the conversation about his pre-arrest silence before the State even had an opportunity to question him on cross-examination. He failed to object to many of the statements he now challenges, and when he did, the court either sustained his objection or gave a curative instruction. We discern no reversible error in the court's handling of the statements and exchanges Mr. Braddy identifies on appeal.

### B. Any Error In Admitting Witness Testimony About What Mr. Graves Or Detective Bergstrom Said Was Harmless.

Mr. Braddy next challenges the trial court's decision to permit both Mr. Graves and Detective Bergstrom to testify about their conversations with Ms. Dow. Although he goes into great detail about the legal bases on which their testimony was hearsay, we can skip to the next step—we assume for present purposes that the trial court erred in allowing Mr. Graves to testify about what Ms. Dow told him:

[3] The same is true of counsel for the State's question on cross-examination in which he highlighted that Mr. Braddy didn't call 911—the defense never objected.

> She said that he knocked on the door, and her friend was in the shower, and he came in and whatever happened, that they had a few words. The next thing you know, she heard a gunshot. When she heard the gunshot, she was still trying to explain to me what was going on.

We will make the same assumption regarding Sergeant Bergstrom's testimony about their conversation:

> She said she received a knock at the door, looked through her peephole, saw that it was [Mr. Braddy]. She opened the door. [Mr. Braddy] gave her a hug, noticed someone was in the shower, yelled for that person to get out of the shower. She said at that point she became nervous and ran back to her bedroom. It was a bedroom that didn't have a door. She was in the bedroom. She said she got scared. She heard a gunshot. She saw [Mr. Braddy] dragging someone down the hall.

Even if the trial court erroneously admitted both statements, any error was harmless because it could not have contributed to the jury's verdict of voluntary manslaughter, which by definition meant that Mr. Braddy acted in "imperfect self-defense." That doctrine recognizes "certain errors in judgment as extenuating factors" that justify a lesser level of culpability than murder, in this instance the subjective belief that one's life is in danger. *Cunningham v. State*, 58 Md. App. 249, 253 (1984). But what makes the defense *im*perfect is that while the belief might be honestly held, still the jury does not deem it to be *objectively* reasonable—if it were, then the (self-)defense would be "perfect" and the result would be acquittal. So here, the jury could not, as a legal matter, have considered Mr. Braddy's account to be objectively reasonable—if it had, he would have been acquitted on

the voluntary manslaughter charge as well. And as such, the jury did not believe Mr. Brady's perception—that he was in fear for his life—to be reasonable.

Moreover, the statements by Mr. Graves and Detective Bergstrom could not have changed this outcome, since they offered no insight into Mr. Braddy's state of mind. Ms. Dow wasn't in the room when the altercation took place, and neither witness's testimony suggests that she told them so. Indeed, the witnesses specifically corroborated that she was *not* present, and so their testimony was harmless in the true sense of the word, *i.e*., unable to have any effect on the jury's decision about Mr. Braddy's perception of what was unfolding.

Mr. Braddy incorrectly frames the question by pitting Ms. Dow's story against his. It's true that a trial court can't allow prior consistent statements where they affect the credibility of a witness upon whom the State's case hinges. *McCray v. State*, 122 Md. App. 598, 610-11 (1998). But even Mr. Braddy concedes that in *McCray*, "the only evidence of the defendant's involvement in the crime" was the testimony of an accomplice and a second witness who testified about what the accomplice said. Not so here, where Mr. Braddy admitted to shooting Mr. Johnson, and Ms. Dow never suggested that she was there when it happened. Their two stories don't contradict each other. Ms. Dow never saw what happened between the two men, so the hearsay statements admitted through other witnesses weren't really consistent *or* inconsistent with Mr. Braddy's testimony in the final analysis—they did not affect her credibility as it related to Mr. Braddy's perceptions, and

thus could not have affected the jury's conclusion that Mr. Braddy acted in imperfect self-defense.

**JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**