IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0509

CITY OF KALISPELL,

Plaintiff and Appellee,

v.

MICHELLE SQUIER RAVE,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Heidi J. Ulbricht, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
MICHAEL MARCHESINI
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
michael.marchesini@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
CHRISTINE HUTCHISON
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOHNNA PREBLE
Kalispell City Attorney
312 1st Avenue East
Kalispell, MT 59901

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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INTRODUCTION

The City concedes its series of questions to Officer Fetveit about Michelle invoking *Miranda* instead of telling her side of the story was improper. Rightly so. But the City seeks to excuse this improper questioning on the grounds that it only spanned three minutes, the Municipal Court scolded the prosecutor about it, the prosecutor did not bring it up in closing argument, and Michelle was guilty anyway so it did not matter.

The prosecutor's questioning implied to the jury that because Michelle lawyered up instead of talking to police, she had a guilty conscience and something to hide. This was a due process violation that demanded a mistrial. The City exaggerates the strength of the evidence against Michelle and the effectiveness of the so-called cautionary instruction. At the same time, it downplays the prejudicial impact of highlighting Michelle's post-*Miranda* silence for the jury.

I. The repeated questioning about Michelle invoking *Miranda* instead of telling Fetveit her side of the story clearly implied her guilt to the jury, in violation of due process.

A. This created a common-sense inference of guilt.

The City claims that because it never explicitly told the jury Michelle's post-*Miranda* silence was proof of her guilt, a mistrial was not warranted.[1] The City did not need to be explicit, because the implication of its questioning was obvious.

Fetveit testified he advised Michelle of her *Miranda* rights and she responded that "she didn't want to speak to me." The prosecutor's very next question was, "But you gave her the opportunity to tell her side of the story again?" Fetveit said yes. (Trial Rec. at 2:34:48.) Even after the Municipal Court sustained defense counsel's objection to this line of questioning, the prosecutor could not resist asking Fetveit, "We

[1] The City takes issue with what it believes are suggestions in the Appellant's opening brief that the prosecutor and/or Fetveit *explicitly* said Michelle's *Miranda* invocation was evidence of her guilt. (Appellee's Br. at 19, 36.) To the contrary, the opening brief asserts the City *im*plicitly, not explicitly, tied Michelle's silence to her guilt. (*See* Appellant's Br. at 9–10, 25 ("The *unspoken* but unmistakable inference from the prosecutor's questioning was that Michelle must be guilty of PFMA because an innocent person who acted in self-defense would have explained her actions to Fetveit 'and would not have remained silent.'" (emphasis added).)

talked about the *Miranda* warning. Did she actually end up making statements to you?" Fetveit answered, "No." (Trial Rec. at 2:35:33.)

The City did not need to spell out for the jury the subtext of this exchange. The common-sense implication of this back-and-forth was that by turning down "the opportunity to tell her side of the story" and instead invoking her *Miranda* rights, Michelle indicated she had something to hide.

The constitution forbids "comment by the prosecution on the accused's silence" after receiving *Miranda* warnings. *Griffin v. California*, 380 U.S. 609, 615 (1965); *accord United States v. Garcia-Morales*, 942 F.3d 474, 476 (9th Cir. 2019) ("[A] prosecutor violates due process by eliciting testimony about a suspect's silence."). The prosecutor went out of her way to elicit testimony on Michelle's post-*Miranda* silence, asking Fetveit eight questions about this, four of which came after the sustained defense objection. The prosecutor did not need to directly say, "Michelle's post-*Miranda* silence is proof she is guilty." Prodding Fetveit to repeatedly comment on Michelle's post-*Miranda* silence and refusal to tell her full side of the story was enough to create an implicit inference of guilt.

B. The improper questioning impeached Michelle's trial testimony.

The City notes Michelle made brief *pre-Miranda* statements to police about the incident, seemingly implying the City thereby did not use her post-*Miranda* silence to impeach a story subsequently offered at trial. (Appellee's Br. at 16, 36.) But there were crucial details that Michelle's trial testimony added to her bare-bones statements to police on the scene. The prosecutor undercut those details by implying to the jury that if they were true, Michelle would have mentioned them to Fetveit in the booking room instead of invoking *Miranda*.

In her pre-*Miranda* statements to police at the scene, Michelle said simply: Landon was being "violent and abusive" that day, their son P.W. had locked him out of the house, Landon had forced his way into the house through the downstairs window, he pushed Michelle to the ground, he tried to choke her, and she ripped his shirt. (Trial Rec. at 2:22:00–2:30:10, 3:05:38–3:06:50, 3:13:10–:30.)

Michelle significantly expounded on this story at trial. She testified P.W. and Landon had left to go for a walk in the afternoon. After a while, P.W. came running back to the house, "hysterical" and screaming to Michelle that Landon had hit him on the head and pushed

him to the ground. When Landon returned and realized P.W. had locked him out, he got angry and started yelling and cursing at Michelle from outside. Landon ran around to the side of the house where there was an unlocked window. Michelle feared he would enter the house and become violent, so she raced downstairs to try and lock the window before Landon got there. When he broke in through the window and tackled her to the ground, he choked her and yelled, "fucking hit me, you'll see what happens." P.W. was present for this, and Michelle was trying to protect him from Landon. Michelle testified Landon's assault caused bruises on her thighs and arms. She asked police to photograph her injuries, but they refused. (Trial Rec. at 3:49:30–3:57:20, 4:06:08–4:07:40.)

The prosecutor implicitly attacked the believability of all these vivid details by informing the jury Michelle invoked her right to remain silent rather than share this story with Fetveit. This occurred before Michelle took the stand, priming the jury to disbelieve Michelle's testimony before she even gave it.

"[T]he State generally may not introduce, elicit, or otherwise reference the post-*Miranda* silence of an accused as evidence of guilt *or*

to impeach or rebut the accused's subsequent account of the charged events." *State v. Trujillo*, 2020 MT 128, ¶ 15, 400 Mont. 124, 464 P.3d 72 (emphasis added). Here, the prosecutor did both. The questioning implied Michelle generally had something to hide when she suspiciously invoked *Miranda*. The prosecutor took advantage of the common-sense notion that an innocent person will openly talk to police, while a guilty person with something to hide will stay silent and lawyer up. More specifically, the prosecutor's questioning preemptively impeached Michelle's detailed account of the incident at trial. This violated Michelle's right to due process.

C. That the prosecutor ceased commenting on Michelle's post-*Miranda* silence after being repeatedly told to stop does not minimize the harm done.

The City says that because the prosecutor did not bring up Michelle's post-*Miranda* silence again in closing argument, there was no harm. There are plenty of ways for a prosecutor to improperly penalize a defendant for invoking *Miranda* without bringing it up in closing argument.

In fact, the case of *Doyle v. Ohio* itself was not premised on the prosecutor's closing argument. In that case, it was the prosecutor's

cross-examination of the defendants about their post-*Miranda* silence that violated their due process rights. *Doyle v. Ohio*, 426 U.S. 610, 613–18 (1976). The government's use of witness examination to highlight a defendant's post-*Miranda* silence may run afoul of due process, regardless of what happens in closing argument. As in *Doyle*, that is what happened here.

It is also no surprise the prosecutor did not bring up Michelle's post-*Miranda* silence again in closing argument. The Municipal Court warned the prosecutor three times mid-trial to stop commenting on this; once in the form of a sustained objection, and twice in the form of explicit admonishments about burden shifting. (Trial Rec. at 2:35:08, 2:38:10–2:41:04, 2:43:42.) Given that the court's two explicit admonishments came *after* the defense had moved for a mistrial, the prosecutor knew she was treading on thin ice and any further commentary about Michelle's post-*Miranda* silence would surely push the court to grant a mistrial. That the prosecutor did not bring this up again in closing argument is simply a testament to the gravity of the improper comments and the stern warnings they triggered.

D. The prosecutor's stated intent in questioning Fetveit did not justify commenting on Michelle's post-*Miranda* silence.

The City claims it was not the prosecutor's intent to highlight Michelle's post-*Miranda* silence. The City claims it was merely trying to lay the foundation for certain voluntary, post-*Miranda* statements Michelle made to Fetveit in which she vented that she hoped his female family members would suffer the same way Landon had made her suffer. (Appellee's Br. at 16, 26.) As the defense argued and the Municipal Court held below, these comments by Michelle were irrelevant, inadmissible, and prejudicial.[2] (Trial Rec. at 2:42:45–2:43:12.) Trying to admit inadmissible evidence is not a justification to comment on a defendant's post-*Miranda* silence.

As defense counsel and the District Court also noted, if the City truly wanted to admit certain post-*Miranda* statements Michelle made in the booking room, the prosecutor could have simply asked Fetveit, "what did she say?", without even mentioning her *Miranda* invocation.

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[2] The City asserts these inadmissible comments about Fetveit's family ultimately "were not admitted." (Appellee's Br. at 26, fn. 5.) That is technically true, but the jury still heard them. The prosecutor was able to play most of the brief video of these statements to the jury before defense counsel could lodge his successful objection. (Trial Rec. at 2:42:45–:55.)

(Trial Rec. at 2:38:52–2:40:12.) Fetveit and Michelle's discussion about *Miranda* was completely irrelevant to laying a foundation for the statements Michelle made to Fetveit in the booking room. The fact the City went out of its way to emphasize her *Miranda* invocation shows it was more interested in her post-*Miranda silence* about the incident than any post-*Miranda statements* she made.

The City claims Michelle did make some post-*Miranda* statements to Fetveit about the incident itself. (Appellee's Br. at 26, fn. 5 (citing City's Ex. 2, Michelle Rave No Contact at 0:00–0:26).) The statement to which the City cites—in which Michelle briefly told Fetveit in the booking room that Landon instigated the assault against her—was never played for the jury. Fetveit did not testify about it. Nor is it evident from the record when this statement occurred in relation to the *Miranda* warning. All the jury heard from Fetveit was that after he read Michelle her *Miranda* rights, she categorically declined to say anything to him about the incident. (Trial Rec. at 2:34:48, 2:35:33.)

II. The City's improper questioning prejudiced the defense and demanded a mistrial.

As an initial point, the City uses an inapplicable prejudice test in a portion of its brief. The City offers an 11-page analysis of the federal harmless error test that governs *Doyle* claims. (Appellee's Br. at 20–31.) To be clear, Michelle's claimed legal error in this case is not a *Doyle* violation per se, but an erroneously denied mistrial motion. (Appellant's Br. at 1 (describing the issue in this case as whether the City's improper questioning "necessitated a mistrial"), 14 (describing the Appellant's argument as, "The prosecutor's repeated, intentional questioning about Michelle's post-*Miranda* silence demanded a mistrial"), 31 (stating in the conclusion, "The Municipal Court erred by denying Michelle's mistrial motion").)

A pure *Doyle* claim requires that the trial court "allow" or "permit" commentary on the defendant's post-*Miranda* silence. *Greer v. Miller*, 483 U.S. 756, 764–65 (1987). The Municipal Court's error here was not that it *allowed* the commentary—such as by overruling defense counsel's objection and letting the questioning persist—but that it failed to properly remedy it with a mistrial. The federal harmless error test for *Doyle* claims does not apply; the state-level mistrial prejudice

analysis does.[3] As discussed in the opening brief, that analysis weighs the strength of the evidence against the defendant, the prejudicial effect of the prosecutor's improper action, and whether a cautionary instruction could have cured that prejudice. (Appellant's Br. at 19–20.)

A. The evidence of Michelle's guilt was not, as the City claims, so overwhelming as to excuse its constitutional violation.

The City claims its constitutionally barred questioning is forgivable because Michelle was clearly guilty anyway. There was enough conflicting evidence that the City cannot prove its improper questioning in no way influenced the verdict.

The City relies heavily on the testimony from Landon's dad, Jon, that Landon was minding his own business and talking to his dad on the phone when Michelle attacked him out of the blue. (Appellee's Br. at 28, 33–34.) As Landon's father, Jon clearly had a motive to testify in

[3] As part of its federal harmless error analysis, the City relies on Ninth Circuit cases that say a short jury deliberation points to harmless error. (Appellee's Br. at 30.) Setting aside that the City is using the wrong test, the hour-long jury deliberation in this case proves nothing. This was a simple, misdemeanor PFMA case in which Michelle acknowledged causing Landon's mild injuries. The only question the jury needed to decide was whether Landon attacked Michelle first. There were only six jurors, not the usual twelve. The fact it took six people a whole hour to decide the simple question of who started a fight does not prove this was a slam-dunk case.

support of his son's story that he was the victim and not the abuser. It was a convenient coincidence that Michelle supposedly decided to assault Landon at the exact moment he was on the phone with his dad, such that his dad could recount for a jury how the assault began.

The Municipal Court instructed the jury it could disregard the testimony of any witness it believed had "an interest in the outcome of the case or any motive, bias or prejudice." (Municipal Court Given Jury Instructions, Instr. 3.) A reasonable jury could have easily rejected Jon's testimony on account of his obvious bias in favor of his son.

The City leans on the testimony from the neighbors, Tammy Watkins and Chris Gendreau, neither of whom actually witnessed the incident. Watkins testified she saw Landon enter the home through the front door at one point during the day but never through the window. (Trial Rec. at 12:04:34.) The City claims this disproves Michelle's account about Landon getting locked out and then breaking in through the window.

Tammy did not testify *when* she saw Landon walk through the door, and there was no dispute Landon had come and gone from the home that day prior to the incident. Tammy also did not claim she was

watching Michelle's house constantly throughout the day, so the fact she did not witness the moment Landon broke in through the window does not mean it did not happen. (*See* Trial Rec. at 11:59:40–12:08:00.)

Gendreau testified that at some point prior to the police arriving, he heard knocking on a door and some scuffling and muffled voices. (Trial Rec. at 11:57:30.) Gendreau said he heard a male voice say, "stop, get off me, I'm not doing this." (Trial Rec. at 11:56:04.) Gendreau did not specify when exactly he heard this or whether this voice came from inside or outside the house. (Trial Rec. at 11:55:20–11:58:20.) Given Michelle's testimony about Landon assaulting P.W. outside the house moments before he assaulted her, it was entirely plausible for the jury to believe Landon said "stop, get off me, I'm not doing this" to P.W., not to Michelle.

The City points to supposed inconsistencies in Michelle's testimony as evidence of her guilt. The City claims Michelle's statement that she closed but did not lock the downstairs window after Landon's assault was not credible, because it would have taken her "an extra two seconds to lock it." (Appellee's Br. at 34–35.) Michelle had just been violently assaulted, and she testified she was trying to console her

"hysterical" son, who had also just been assaulted and just witnessed his father assaulting his mother. (Trial Rec. at 3:56:20–:58, 4:08:30.) That she neglected in the heat of the moment to lock the window after Landon voluntarily left the apartment had no probative value and did not undercut her credibility.

Next, the City repeatedly emphasizes Michelle's supposedly conflicting statements about whether she called 9-1-1. Although Michelle was admittedly combative with the officers when they incorrectly presumed she was the one who *reported* the incident to 9-1-1, her story to them and her trial testimony on this point were mostly consistent. She explained at trial that she *dialed* 9-1-1, but before she could get through to a human operator, she hung up to take another call. (Trial Rec. at 3:58:26–3:59:14.) This was consistent with her statement to police at the scene that she was not the person they believed had called 9-1-1. (*See* Trial Rec. at 4:08:50.)

Regardless, it is unclear what probative value the jury could have gleaned from the back-and-forth about whether Michelle called 9-1-1 after the fight had ended. This was a tangential, immaterial fact that had nothing to do with the central issue in dispute: who was the initial

aggressor of the fight. Slight detail differences about how far into a 9-1-1 call Michelle got after the fight ended were a far cry from material impeachment evidence.

The City also points to Michelle's and Landon's visual appearances as proof of Michelle's guilt: that her "clothes and hair were neat and orderly" and she had no visible injuries, while Landon had a torn shirt, a barely visible scratch, and was crying. (Appellee's Br. at 6, 10, 29, 36.) Michelle's testimony was not that Landon messed up her hair and tore her clothes, it was that he tackled her to the ground and choked her. Michelle's lack of messy hair and torn clothes did not disprove Landon's assault.

The fact Michelle did not have "visible" injuries when police arrived was likewise irrelevant. She testified to and produced pictures of bruising on her arms and legs that Landon had caused. (Defense Exs. A, B, C; Trial Rec. at 4:06:10–4:07:40.) Michelle was wearing long pants and a sweatshirt when the police arrived and arrested her. (*See* Ex. 2 at 2:15–4:00) That the police did not see any injuries was unsurprising, given that the clothes she was wearing would have concealed her injuries.

Michelle did exhibit signs of being abused—she was clearly in an agitated, emotional state when police arrived. Landon's torn shirt, mild scratch, and tears were entirely consistent with Michelle's narrative that he attacked her, she tore his shirt while trying to fend him off, and he faked his tears for the police. Landon himself was not a credible witness, having contradicted himself on points such as whether someone locked him out of the apartment (Trial Rec. at 1:37:50, 1:39:50, 2:54:50), and whether Michelle even assaulted him (Trial Rec. at 2:00:30, 2:01:50). The evidence of Michelle's guilt, apart from her suspicious post-*Miranda* silence, was far from conclusive.

B. The City's improper questioning was not "brief and isolated."

The City downplays the prejudicial impact of its constitutional violation, framing it as a blip in the trial that the jury probably barely noticed. The City claims that because the improper questioning was "brief and isolated," its prejudicial effect was negligible. (Appellee's Br. at 17, 27.)

Had Fetveit let slip a single, unprompted, passing reference to Michelle's post-*Miranda* silence, that would be a "brief and isolated" remark. That is not what happened here. The prosecutor deliberately

drew out Fetveit's testimony about Michelle's post-*Miranda* silence. The prosecutor asked him four questions about this, and then after the defense objected and the court sustained, the prosecutor asked him another four. The prosecutor made sure the jury heard the details—not just a passing remark—about Michelle's *Miranda* invocation and post-*Miranda* silence.

The City asserts this unconstitutional questioning could not have been prejudicial because it took up only "three minutes of a five-hour trial." (Appellee's Br. at 17, 27.) The City did not need to spend hours commenting on Michelle's post-*Miranda* silence to violate her due process right. Constitutional violations are measured by severity, not duration.

Take *State v. Lawrence*, 2016 MT 346, 386 Mont. 86, 385 P.3d 968, as an example. At the end of that two-day jury trial, the prosecutor uttered one sentence in closing argument about how the defendant's presumption of innocence no longer applied. *Lawrence*, ¶ 4.

By the City's rationale, this comment should have been harmless because it probably took up about five seconds of a two-day trial. But by the *Lawrence* Court's rationale, this comment violated the defendant's

constitutional right to a fair trial and demanded reversal for plain error. *Lawrence*, ¶ 23. The City's three-minute-long constitutional violation here was amply long to prejudice Michelle and demand a mistrial.

C. The so-called "cautionary instruction" did not cure the prejudice.

Finally, contrary to the City's assertions, the Municipal Court's scolding of the prosecutor was not a "cautionary instruction" that cured all prejudice. Again, the court did not instruct the jury *at all* about the prosecutor's improper questioning. (Trial Rec. at 2:41:04.) For all we know, the jurors were not even listening when the court admonished the prosecutor immediately upon return from a recess, given that the court never addressed the jurors during this exchange.

The City suggests that because Michelle's counsel acquiesced in the *substance* of the proposed cautionary instruction, she cannot now argue this instruction was ineffective. First of all, counsel agreed this instruction should be given to *the jury*, not in the form of a prosecutorial admonishment. (Trial Rec. at 2:39:45–2:40:30.) Counsel simply did not acquiesce to what the court did.

Second, this is not a claim of instructional error. If it were, then yes, the defense would have waived such claim for appeal by

acquiescing to the substance of the instruction. The question is not whether the proposed instruction misstated the law, it is whether it was sufficient to cure the prejudice from the City's due process violation.

The defense's position was, and is, that the prosecutor's glaringly improper questioning was incurable. That is why defense counsel requested a mistrial rather than a simple cautionary instruction. (Trial Rec. at 2:36:55.)

Only after the Municipal Court denied the mistrial motion did defense counsel agree to plan B: trying to triage the prosecutor's mess with a cautionary instruction. That the language of said "instruction" was inadequate to cure the prejudice of the prosecutor's misconduct is not the defense's fault. *Any* cautionary language would have been inadequate to un-ring the bell in the jurors' minds that Michelle suspiciously invoked *Miranda* instead of telling police her side of the story.

The moment the prosecutor ignored the sustained objection and kept pressing Fetveit for information about Michelle's post-*Miranda* silence, the damage was done. Only a mistrial could have cured it.

CONCLUSION

The prosecutor repeatedly elicited testimony on Michelle's post-*Miranda* silence, even after being told by the Municipal Court to stop. The common-sense implication of this testimony was that Michelle had something to hide, had made up elements of her story for trial, and was guilty. This was a violation of her constitutional right to due process.

The only way to salvage that right was to declare a mistrial. The Municipal Court wrongly denied the defense's mistrial motion, and the District Court wrongly affirmed. This Court should remedy those errors.

Respectfully submitted this 26th day of May, 2023.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Michael Marchesini
MICHAEL MARCHESINI
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,922, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/Michael Marchesini
MICHAEL MARCHESINI

CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-26-2023:

Christine M. Hutchison (Govt Attorney)
215 N. Sanders
Helena MT 59601
Representing: City of Whitefish, City of Kalispell
Service Method: eService

Johnna Justine Preble (Govt Attorney)
201 1st Ave. E.
Kalispell MT 59901
Service Method: eService
E-mail Address: jpreble@kalispell.com

Electronically signed by Kim Harrison on behalf of Michael Marchesini
Dated: 05-26-2023