MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Montel Ray Brooks,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 3, 2021

Court of Appeals Case No. 21A-CR-83

Appeal from the Lake Superior Court

The Honorable Jamise Y. Perkins, Judge Pro Tempore

Trial Court Cause No. 45G02-1801-MR-1

Kirsch, Judge.

[1] Montel Ray Brooks ("Brooks") was convicted after a jury trial of murder,[1] a felony, and an enhancement for the use of a firearm in the offense.[2] He was sentenced to fifty-five years executed, which included a ten-year enhancement for the use of a firearm in the commission of the offense. Brooks appeals and raises the following restated issues for our review:

I. Whether the trial court abused its discretion when it admitted certain testimony into evidence at trial; and

II. Whether the trial court abused its discretion when it denied Brooks's motion for mistrial.

[2] We affirm.

Facts and Procedural

[3] In the early morning hours of January 5, 2018, Djuan Washington ("Washington") went to the duplex where his friend, Brooks, lived, which was located in Gary, Indiana. *Tr. Vol. 4* at 148-50. When he arrived, Brooks let him into the residence, and there were others present, including Mario Brooks ("Mario"), who was Brooks's brother, and Louis Watson ("Watson"), who was a friend of Brooks. *Id*. at 151. The living room of Brooks's residence contained a red couch with a table and chair on one side of the sofa and a locked door blocked by a white, plastic lawn chair on the other. *Tr. Vol. 3* at 26, 172-74;

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[1] *See* Ind. Code § 35-42-1-1.

[2] *See* Ind. Code § 35-50-2-11.

State's Ex. 8. When Washington entered the residence, he smelled "PCP" and knew that Brooks had been smoking PCP because Washington knew Brooks to use PCP. *Tr. Vol. 4* at 152-53. Mario was drinking vodka, and he would later testify that he was "drunk" to the extent that it was "possible" that his memory could have been off as to what happened during certain portions of the night. *Tr. Vol. 3* at 108, 175. Once there, Washington only smoked marijuana, and he would later testify that marijuana does not cause him memory loss like drinking an excessive amount of alcohol. *Tr. Vol. 4* at 167-68.

[4] That night, Watson had a black "AR-looking" assault rifle in his possession, which was later identified as an AR-15, and he intermittently aimed it out of Brooks's window until Brooks loudly told him to sit down and stop. *Id*. at 154-55. Brooks also loudly told Watson to give him the AR-15, and Watson refused. *Id*. at 158. The men calmed down and began taking turns playing video games. *Id*. at 157. Brooks sat toward the end of the couch in a spot closest to the table while Washington sat in a chair near the table. *Id*. at 158. Watson sat on the other end of the couch, and Mario was sitting in the middle of the couch. *Id*. at 158-59. At some point, they stopped playing video games against each other, and Brooks stood up from the couch and left the living room. *Id*. at 157-59. He returned and walked back toward the others from the hallway, carrying an AK-47 that had a wooden stock. *Id*. at 159, 170. Washington later testified that the AK-47 was "very distinguishable" from Watson's black AR-15 because the guns had different tips and the AK-47 had a different stock. *Id*. at 159. Brooks fired the AK-47 striking Watson nine times,

and the nine spent casings that police would later recover from the scene matched the AK-47. *Id*. at 61-62, 136, 187. Watson died as a result of these gunshot wounds. *Tr. Vol. 2* at 224.

[5] Washington saw Brooks fire the first shot, and then Washington ran outside and away from the residence. *Tr. Vol. 4* at 160. When Brooks began shooting, Mario, who had been sitting on the couch next to Watson, dropped to the floor until the shooting stopped. *Tr. Vol. 3* at 119, 124. As Washington ran away, he saw Brooks exit the duplex without the AK-47, and Washington feared for his life. *Tr. Vol. 4* at 163; *State's Ex. 24*. Mario exited the duplex last and called 911, and while still on the 911 call, he returned to the residence. *Tr. Vol. 3* at 127-31. When the police arrived at the scene, an officer found a cell phone near the exterior of the duplex that was logged into Brooks's Facebook account. *Tr. Vol. 4* at 78. Mario told the police that he had touched Watson after the shooting, and his clothing had blood on it, including blood on the back of his t-shirt, that would later test as at least one trillion times more likely as originating from Watson than an unknown individual. *Tr. Vol. 3* at 133; *Tr. Vol. 4* at 103-05, 201. Mario also stated that Watson's blood was on his clothing because he was sitting next to Watson at the time of the shooting. *Tr. Vol. 3* at 133.

[6] While speaking to the police at the scene, Mario identified Brooks as the shooter to Detective Jeremy Ogden ("Detective Ogden"), who had been a member of the Lake County Sheriff's Department for twenty-one years. *Tr. Vol. 4* at 195, 200. In an interview with police later that day, Mario again identified Brooks as the shooter three times. *Id*. at 207. He told police that he,

Watson, and Brooks had been in the duplex that night, and he would later add that Washington was also present. *Id*. at 207-08. Additionally, the morning after the shooting, and after his interview with police, Mario told Washington that he had also witnessed Brooks shoot Watson. *Id*. at 170.

[7] On January 5, 2018, the State charged Brooks with one count of murder. *Appellant's App. Vol.* 2 at 22. The State also sought an enhancement to the murder charge for the use of a firearm in the commission of the offense. *Id*. at 23. A jury trial commenced on November 9, 2020. *Id*. at 220. At trial, Washington testified that only he, Brooks, Watson, and Mario were present at the duplex the night of the shooting. *Tr. Vol. 4* at 151. Mario testified that two unknown individuals were also in the duplex at the time of the shooting and that they exited into the back alleyway "or something," avoiding the camera that was recording the front area outside of Brooks's duplex. *Tr. Vol. 3* at 117, 171. Mario also claimed at trial that he did not see the shooter and that, when he spoke to police after the shooting, he was concerned that he would be "in trouble" because someone would be blamed for the murder. *Id*. at 160, 164. Mario also testified that he was more afraid of being labeled "a snitch in the streets" than being in trouble for lying. *Id*. at 161-65.

[8] Detective Ogden testified that Mario had told police that he touched Watson's body and had told the dispatcher in the 911 call that he had been inside the duplex and touched Watson's body. *Tr. Vol. 4* at 201-02. Detective Ogden also testified that the surveillance video of the outside of the duplex showed an individual passing back and forth from the inside of the duplex, who was

identified as Mario, and that there was a red substance on the front exterior door that appeared to be blood. *Id*. at 202-03. The State then asked Detective Ogden, "in your investigative experience is there an explanation for how this blood could have got [sic] to the exterior of the home?" *Id*. at 203. Brooks objected, arguing, "[s]peculation." *Id*. The State responded, "he's testifying to investigative technique. And while it may be an inference, I don't believe it's speculation. I'm not asking him a hypothetica1 here." *Id*. The trial court asked the State to repeat the question, and the State again asked Detective Ogden, "Given the information availab1e, what is the best investigative explanation for this blood on the door?" *Id*. The trial court overruled the objection, and Detective Ogden began, "Mario indicated that he had blood on his hands, and there's also . . ." *Id*. at 203-04. Brooks again objected, arguing that, at the time Detective Ogden first saw the blood on the door, he was not aware that Mario touched Watson's body and did not learn such information until Mario's recorded interview. *Id*. at 204. Brooks reiterated that he was objecting because "[t]his is all speculative as to whose blood may be on there." *Id*. The State responded:

> Judge, before any officer arrived on the scene, Mario . . . indicated that he had gone back in the home and checked . . . Watson on a 911 call. It was made available and known to officers that he had gone back in and interacted with . . . Watson. Additionally, an investigative role does not cease when they leave the scene, and Detective Ogden has worked this case continuously from when it was filed. His cumulative knowledge of the case only increases and improves as he goes through that process. I'm asking him now for an investigative conclusion

> based on the culmination of the case, not from an in-the-moment impression.

Id. The trial court again overruled the objection. *Id*. at 205. The State repeated its question, "what is your best investigative – I'll say explanation . . . for why there's blood on the exterior of that door," to which Detective Ogden answered, "[t]ransference of blood by Mario." *Id*. Detective Ogden also testified that Mario had transferred other instances of blood located on the floor near the front door, reasoning that Mario was the only person who had been in contact with Watson's body. *Id*. at 205-06. On cross-examination, Detective Ogden agreed with Brooks's attorney that it was possible that anyone could have transferred the blood to the floor in front of the door. *Id*. at 222. As to both the floor and the door where blood was found, Detective Ogden agreed with Brooks's attorney that he could not definitively state either that Mario had transferred the red substance to the door or that the substance was Watson's blood. *Id*. at 223-24, 229.

[9] Additionally, during direct examination by the State, Detective Ogden was asked about pursuing additional leads after speaking to Washington and Mario, and the State inquired as to whether the information from those two sent Detective Ogden "down any other roads." *Id*. at 213. Detective Ogden responded, "Well, I mean, I always tried to speak with [Brooks] and went to his home to try to take him into custody." *Id*. At that time, Brooks objected and requested a mistrial, alleging that the answer gave the perception that Brooks had exercised his constitutional right not to "testify." *Id*. at 213-14. The trial

court denied the request for a mistrial, stating that, based on the testimony given, the jury only knew that Detective Ogden had attempted to locate Brooks to arrest him and was not able to do so. *Id*. at 219. Later, the State questioned Detective Ogden about whether Mario, Washington, or Brooks were injured during the shooting and asked, "Did any of those three ever complain of an injury?" *Tr. Vol. 5* at 10. Before Detective Ogden answered the question, Brooks objected and requested a mistrial, arguing that the State was commenting on Brooks's right not to "testify." *Id*. The trial court denied the motion, reasoning that the State's question was not commenting on Brook's right to remain silent. *Id*. at 19.

[10] At the conclusion of the trial, the jury found Brooks guilty of murder and guilty of the enhancement for using a firearm in the commission of the crime. *Id*. at 70, 75-76. The trial court sentenced Brooks to fifty-five years for his murder conviction, which was enhanced by ten years based on the use of a firearm in the commission of the murder. *Appellant's App. Vol. 3* at 30-31. Brooks now appeals.

Discussion and Decision

I. Admission of Testimony

[11] Brooks first argues that the trial court abused its discretion when it admitted certain testimony by Detective Ogden. The admission and exclusion of evidence rests within the sound discretion of the trial court, and we review the exclusion of evidence only for an abuse of that discretion. *Griffith v. State*, 31

N.E.3d 965, 969 (Ind. 2015). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. *Barnhart v. State*, 15 N.E.3d 138, 143 (Ind. Ct. App. 2014). The trial court's ruling will be sustained on any reasonable basis apparent in the record, whether or not relied on by the parties or the trial court. *Washburn v. State*, 121 N.E.3d 657, 661 (Ind. Ct. App. 2019) (citing *Jeter v. State*, 888 N.E.2d 1257, 1267 (Ind. 2008), *cert. denied,* 555 U.S. 1055 (2008)), *trans. denied*.

[12] Brooks argues that it was an abuse of discretion to admit testimony of Detective Ogden regarding his opinion that blood present on the front door of the residence was transferred there by Mario. Brooks specifically contends that the testimony of Detective Ogden regarding the transference of blood was merely speculative and that the detective was not qualified as an expert to testify about blood transference. Brooks asserts that the State asked Detective Ogden to use his specialized knowledge to render an opinion as to how blood got on the door, but that there was not a sufficient foundation to establish that the detective had such specialized knowledge. Brooks further maintains that there was no foundational explanation as to how the opinion would aid the jury or determine a fact in issue. He also argues that the admission of the challenged testimony was not harmless error because there was no substantial independent evidence of his guilt, and the inconsistencies in Mario's testimony combined with the presence of blood on Mario's body and his admission that he touched

the rifles, lends credence to the belief that Mario was the shooter, and Detective Ogden's testimony bolstered Mario's claim that he was an innocent bystander.

[13] Brooks specifically argues that Detective Ogden failed to meet the standard for the admission of expert scientific testimony under Indiana Evidence Rule 702. That rule provides:

> (a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.

In adopting this rule, our Supreme Court did not intend to interpose an unnecessarily burdensome procedure or methodology for trial courts to apply when considering the admissibility of expert testimony. *Taylor v. State*, 101 N.E.3d 865, 870 (Ind. Ct. App. 2018) (citing *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 460 (Ind. 2001)). "Rather, the rule was meant 'to liberalize, rather than to constrict, the admission of reliable scientific evidence.'" *Id*. (quoting *Manuilov*, 742 N.E.2d at 460). In construing the rule, only one of these characteristics -- knowledge, skill, experience, training, or education -- is necessary to qualify an individual as an expert. *Lyons v. State,* 976 N.E.2d 137, 141-42 (Ind. Ct. App. 2012).

[14] Our Supreme Court has determined that the "specialized knowledge" set forth in Evidence Rule 702(a) is not necessarily scientific knowledge, and it need not be proven reliable by means of "scientific principles." *Malinski v. State,* 794 N.E.2d 1071, 1084 (Ind. 2003). Rather, such evidence is governed only by the requirements of Evidence Rule 702(a), and any weaknesses or problems in the testimony go only to the weight of the testimony, not to its admissibility, and should be exposed through cross-examination and the presentation of contrary evidence. *Turner v. State,* 953 N.E.2d 1039, 1050 (Ind. 2011).

[15] Here, Detective Ogden testified that the surveillance video of the outside of the duplex showed an individual, identified as Mario, passing back and forth from the inside of the duplex and that there was a red substance on the front exterior door that appeared to be blood. *Id*. at 202-03. The State then asked Detective Ogden, "in your investigative experience is there an explanation for how this blood could have got [sic] to the exterior of the home?" *Id*. at 203. After Brooks objected, the State explained that Detective Ogden "has worked this case continuously from when it was filed. His cumulative knowledge of the case only increases and improves as he goes through that process. I'm asking him now for an investigative conclusion based on the culmination of the case, not from an in-the-moment impression." *Id*. at 204. The trial court overruled the objection, and the State repeated its question, "what is your best investigative – I'll say explanation . . . for why there's blood on the exterior of that door," to which Detective Ogden answered, "[t]ransference of blood by Mario." *Id*. at 205.

[16] Detective Ogden was testifying to specialized knowledge about how a blood-like substance could have ended up on the door of the duplex based on his training, education, and experience as a police officer with twenty-one years investigating crimes. His testimony was not based on any scientific principles or rules. Rather, Detective Ogden was testifying about his investigative conclusion, based on his investigation of the murder and cumulative knowledge of the case and evidence, as to why there was blood on the front door of Brooks's duplex. Detective Ogden had specialized knowledge as to the case and the available evidence, and he had experience as a police officer investigating crimes for twenty-one years that went beyond the knowledge generally held by lay observers. Mario testified that he had Watson's blood on his person from the shooting, and Watson's blood was later found on Mario's clothing. *Tr. Vol. 3* at 133; *Tr. Vol. 4* at 103-05; *State's Exs. 83-90*. In testifying to his opinion as to how the blood ended up on the front door, Detective Ogden was merely connecting the evidence of which person had blood on his person and who had returned through the front door after the shooting.

[17] We also note that Brooks was free to cross-examine Detective Ogden regarding his opinion as to how the purported blood had gotten on the front door or to present contrary evidence to contradict the challenged testimony. Any weaknesses or problems in Detective Ogden's testimony go only to the weight of the testimony, not to its admissibility, and should be exposed through cross-examination and the presentation of contrary evidence. *Turner*, 953 N.E.2d at 1050. On cross-examination, Detective Ogden agreed that it was possible that

he was incorrect about how the blood arrived on the door and clarified that the blood had not been tested for DNA. *Tr. Vol. 4* at 222, 224, 229. The trial court thus did not clearly abuse its discretion in admitting the challenged testimony of Detective Ogden.

[18] "Even if a trial court errs in its evidentiary ruling, 'we will not overturn the conviction if the error is harmless.'" *Griffith*, 31 N.E.3d at 969 (quoting *Appleton v. State,* 740 N.E.2d 122, 124 (Ind. 2001) (citations omitted)). "An error is harmless if 'the probable impact of the evidence upon the jury is sufficiently minor so as not to affect a party's substantial rights.'" *Id.* (quoting *Appleton*, 740 N.E.2d at 124). In the present case, any potential error was harmless. Eyewitness testimony from Washington identified Brooks as the shooter of the AK-47, Washington testified that Mario told him that Mario had also seen Brooks shoot Watson, and Mario initially also told police that Brooks was the shooter. *Tr. Vol. 4* at 157, 159-60, 170, 187, 207. Additionally, the evidence showed that Watson was shot nine times and nine spent shell casings were found at the scene that had been shot from the AK-47 found at the scene. *Id*. at 61-62, 136, 187. Contrary to Brooks's claim that the evidence pointed to Mario as the shooter, Mario had blood on the back of his clothing, *State's Ex. 85*, which is consistent with Mario's testimony that he dropped from the couch to the ground when the shooting began, as opposed to Mario having fired some of the shots with his back facing Watson. *Tr. Vol. 3* at 124. Additionally, Brooks has not established how Detective Ogden's testimony prejudiced him because the challenged testimony that Mario transferred blood to the front door does

not foreclose Brooks's theory that Mario was more likely the shooter. The testimony that Mario transferred blood to the door, alone, does not make it any more or less likely that he was the shooter. Because eyewitness and corroborating evidence identified Brooks as the shooter, he suffered no prejudice from any potential error, and any error in the admission of the testimony was harmless.

II. Denial of Mistrial

[19] Brooks next argues that the trial court abused its discretion when it denied his motion for mistrial. "'A mistrial is an extreme remedy invoked only when no other curative measure can rectify the situation.'" *Smith v. State*, 140 N.E.3d 363, 373 (Ind. Ct. App. 2020) (quoting *Hollowell v. State*, 707 N.E.2d 1014, 1024 (Ind. Ct. App. 1999)), *trans. denied*. We review a trial court's denial of a motion for mistrial only for an abuse of discretion, and its decision is afforded great deference on appeal because the trial court is in the best position to assess all of the circumstances and their impact on the jury. *Id*. (citing *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001)). "A mistrial is appropriate only where the questioned conduct is so prejudicial and inflammatory that the defendant was placed in a position of grave peril to which he should not have been subjected." *Id*. The gravity of the peril to the defendant is measured by the conduct's probable persuasive effect on the jury. *Id*.

[20] Brooks asserts that it was an abuse of discretion when the trial court denied his request for a mistrial because the State violated his right to remain silent based

on certain questions posed to Detective Ogden at trial. He claims that in two different instances at trial the State asked questions that sought to admit evidence of his silence and violated his Fifth Amendment right against self-incrimination. Brooks further argues that this was not harmless error because, absent the State's reference to his silence, it is clear that the jury would not have convicted him. This is because the State sought to elicit the evidence of his silence, there were frequent references to his silence, the other evidence of guilt was not overwhelming, and the trial court did not take any curative measures.

[21] The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person shall be compelled in any criminal case to be a witness against himself. U.S. Const. amend. V; *Cameron v. State*, 22 N.E.3d 588, 592 (Ind. Ct. App. 2014). "[A] witness who desires the protection of the privilege must claim it at the time he relies on it." *Salinas v. Texas*, 570 U.S. 178, 183 (2013) (plurality opinion) (quotation and ellipsis omitted); *Nichols v. State*, 55 N.E.3d 854, 860 (Ind. Ct. App. 2016), *trans. denied*. "[N]o ritualistic formula is necessary in order to invoke the privilege" against self-incrimination. *Quinn v. United States*, 349 U.S. 155, 164 (1955). Rather, the witness must only put the interrogating official "on notice [that he] intends to rely on the privilege." *Salinas*, 570 U.S. at 183. "[W]hile the use of post-*Miranda,* post-arrest silence by the prosecution against a defendant is generally forbidden, pre-arrest silence may be used to impeach the credibility of a defendant who chooses to testify on his own behalf." *T.J.C. v. State*, 829 N.E.2d 203, 211 (Ind. Ct. App. 2005), *trans. denied*.

[22] Brooks contends that there were two instances that warranted a mistrial because the State's questions violated his right against self-incrimination. The first occurred when Detective Ogden was asked about pursuing additional leads after speaking to Washington and Mario, and the State inquired as to whether the information from those two sent Detective Ogden "down any other roads." *Tr. Vol. 4* at 213. Detective Ogden responded, "Well, I mean, I always tried to speak with [Brooks] and went to his home to try to take him into custody." *Id*. In the second instance, the State engaged in a series of questions about whether Mario, Washington, or Brooks were injured during the shooting and asked, "Did any of those three ever complain of an injury?" *Tr. Vol. 5* at 10. Before Detective Ogden answered the question, Brooks objected and requested a mistrial, arguing that the State was commenting on Brooks's right not to "testify." *Id*.

[23] However, neither of challenged instances establish that a conversation ever occurred pre-arrest or post-arrest, let alone that Brooks ever invoked his right against self-incrimination. *See Davis-Martin v. State*, 116 N.E.3d 1178, 1193 (Ind. Ct. App. 2019) (holding that Davis-Martin did not invoke the privilege against self-incrimination when he told his mother on the phone that he was not going to the police station to talk to the police), *trans. denied*; *Nichols*, 55 N.E.3d at 860 (holding that evidence that the defendant did not accept a police officer's invitation to attend an interview did not violate the defendant's Fifth Amendment privilege against self-incrimination because the defendant did not invoke the privilege); *Owens v. State*, 937 N.E.2d 880, 891-92 (Ind. Ct. App.

2010) (concluding that even under cases holding that a defendant's pre-arrest, pre-Miranda silence is protected by the Fifth Amendment, evidence that the defendant did not respond to a police officer's efforts to make contact with him did not support a finding that he invoked his right to remain silent), *trans. denied*. The first challenged instance did not reflect that Brooks refused to talk with police as they attempted to contact him; it merely showed that the police were unable to locate Brooks. There could have been many reasons why the police had failed to find Brooks for a conversation, and a failure by the police to locate Brooks does not show that he invoked his right to remain silent. As to the second instance, there was no evidence elicited from the State's question regarding whether Mario, Washington, or Brooks ever complained of injury. The challenged question did not mention an interview with police, let alone a custodial interrogation. A question about whether a complaint of injury ever occurred is not a statement that Brooks was interviewed post-arrest or evidence that he refused to talk to police. We, therefore, conclude that the trial court did not abuse its discretion when it denied Brooks's motions for mistrial.

[24] Even if we were to find that the trial court erred in allowing the challenged statements to be admitted and in denying the request for a mistrial, such error was harmless. To the extent that Brooks argues that the challenged instances were violations of *Doyle v. Ohio,* 426 U.S. 610 (1976), we engage in harmless error analysis. In *Doyle*, the United States Supreme Court held that it is improper to use, for impeachment purposes, a defendant's silence at the time of arrest and after receiving *Miranda* warnings. "An error of this type is harmless

only when the court, after assessing the record to determine the probable impact of the improper evidence on the jury, can conclude beyond a reasonable doubt that the error did not influence the jury's verdict." *Weedman v. State*, 21 N.E.3d 873, 887 (Ind. Ct. App. 2014), *trans. denied*. In analyzing whether a violation is harmless beyond a reasonable doubt, we examine five factors: (1) the use to which the prosecution puts the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence indicative of guilt; (4) the intensity and frequency of the reference; and (5) the availability to the trial court of an opportunity to grant a motion for mistrial or give a curative instruction. *Id*. (citing *Kubsch v. State,* 784 N.E.2d 905, 914-15 (Ind. 2003)).

[25] Here, the five factors weigh in favor of harmlessness. As to factors one and two, the State was the party who pursued the line of questioning but did so to undermine Mario's claim that others had been present at the shooting and to show that the police had spoken with all of the witnesses. *Tr. Vol. 4* at 213; *Tr. Vol. 5* at 9-10. Any alleged reference to Brooks's silence was not to impeach him or directly show that he was the shooter.

[26] Factor three, the quantum of evidence indicative of Brooks's guilt, strongly supports harmlessness. Eyewitness testimony from Washington identified Brooks as the shooter of the AK-47, Washington testified that Mario told him that Mario had also seen Brooks shoot Watson, and Mario initially also told police that Brooks was the shooter. *Tr. Vol. 4* at 157, 159-60, 170, 187, 207. Additionally, the evidence showed that Watson was shot nine times and nine spent shell casings were found at the scene that had been shot from the AK-47

found at the scene. *Id*. at 61-62, 136, 187. Contrary to Brooks's claim that Washington's memory was unreliable because of smoking PCP, Washington testified that he had not smoked PCP that night and that the marijuana he smoked did not affect his memory. *Id*. at 167-68. Further, even though Mario recanted his identification of Brooks as the shooter and changed his story at trial, the jury was able to judge Mario's credibility in light of his fears of being labeled a snitch. *Tr. Vol. 3* at 188. Additionally, surveillance video footage was shown that undermined Mario's claim that others had been present in the duplex the night of the shooting. *State's Ex. 24*. Therefore, the quantum of evidence in favor of guilt show that any impermissible mentioning of the right to remain silent did not impact the jury.

[27] As to factor four, the intensity and frequency of the challenged references was minimal. Although there were two instances, Brooks concedes that the answer to the first question was unsolicited by the State, *Appellant's Br*. at 25, and was in response to a question about whether the information from Washington and Mario sent Detective Ogden "down any other roads." *Tr. Vol. 4* at 213. As to the State's question about whether any of the three men ever complained of injury, the State immediately ended its questioning of Detective Ogden after the motion for mistrial was denied. *Tr. Vol. 5* at 19. We do not find the intensity and frequency of these references to weigh on the side of reversible error.

[28] As to factor five, the availability to the trial court of an opportunity to grant a motion for mistrial or give a curative instruction, Brooks had the opportunity to, and did move for a mistrial, which the trial court denied. However, Brooks

did not request that the trial court give an admonishment to the jury, so the trial court only had an opportunity to sua sponte issue an admonishment. Considering the totality of these five factors, we conclude that any possible error was harmless.

[29] Affirmed.

Altice, J., and Weissmann, J., concur.