Criminal law -- Murder -- Self-defense -- Evidence -- Silence of defendant -- Pre-*Miranda* -- Ineffective assistance of counsel -- Prosecutor's statements about defendant's pre-arrest, pre-*Miranda* silence in opening and closing arguments and state's presentation of testimony about that silence during its case-in-chief were improper comments on defendant's right to remain silent where silence was offered as substantive evidence of guilt, not impeachment purposes -- Discussion of admissibility of both pre- and post-arrest, pre-*Miranda* silence -- Even if there was argument that state had been trying to impeach defendant, impeachment was improper because defendant's silence was ambiguous and therefore not inconsistent with defendant's trial testimony that he shot victims while defending himself -- Although issue was not preserved for appellate review, defendant is entitled to relief because defense counsel's failure to respond to trial court's request for authority regarding admissibility of the evidence or to further object to such evidence and argument constituted ineffective assistance of counsel on the face of the record

RONALD E. HOWARD, DOC #917501, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D17-4947. Opinion filed January 15, 2020. Appeal from the Circuit Court for Sarasota County; Debra Johnes Riva, Judge. Counsel: Howard L. Dimmig, II, Public Defender, and Steven L. Bolotin, Assistant Public Defender, Bartow, for Appellant. Ashley Moody, Attorney General, Tallahassee, and Cynthia Richards, Assistant Attorney General, Tampa, for Appellee.

(SALARIO, Judge.) Ronald Howard appeals from his judgment and sentences on two counts of first-degree murder and one count of felon in possession of a firearm. We agree with him that the State improperly presented evidence of his prearrest, pre-*Miranda*[1] silence and argued that it proved his guilt. And although Mr. Howard's lawyer failed to object when the evidence was introduced and the argument was made, this is one of those rare cases in which the record on its face shows that the failure constitutes ineffective assistance of counsel. We reverse and remand for a new trial or other appropriate proceedings.

I.

On June 15, 2015, Sarasota police responded to a report of shots fired in a residential neighborhood. They found the bodies of two men near a home. Both had been shot with a revolver that the police found on the ground in front of the home. One of the men was J.C., who lived in the home with his wife and son. He was shot in the cheek and neck and died at the scene. The other was C.S., who lived in the neighborhood. He was shot in the temple. He was taken to the hospital, where he died.

The police encountered Mr. Howard, a neighbor of J.C.'s, sitting in a chair in front of the house. The police spoke with him briefly before entering the home. After investigating inside the home, the police came back outside and spoke with him again. At some point thereafter -- the trial testimony was uncertain as to when -- Mr. Howard was placed under arrest and was charged with the first-degree murders of J.C. and C.S., as well as with being a felon in possession of a firearm.

The case was tried in December 2017. Although there was no dispute that Mr. Howard fired the shots that killed J.C. and C.S., there were no eyewitnesses and thus was no direct evidence of the events that led to the shooting. The State's theory was that Mr. Howard had grown increasingly frustrated because J.C. parked trucks that he used for his landscaping business near Mr. Howard's house, making noise and blocking his driveway. In the State's telling, tensions over the trucks reached a boiling point. Mr. Howard and J.C. got into a heated confrontation, in which C.S. also became embroiled. Mr. Howard got a gun from his house and fatally shot both victims.

Mr. Howard's version of events was starkly different. He said that J.C. brought the gun and instigated the confrontation. According to Mr. Howard, J.C. was enraged with him because J.C. was involved in an extramarital affair and believed that Mr. Howard was going to disclose the affair to J.C.'s wife. During the confrontation, J.C. placed the gun to Mr. Howard's head. C.S. told J.C. to put the gun away. While J.C. was distracted, Mr. Howard went for J.C.'s gun. As the two men struggled, the gun went off, shooting C.S. in the head. Mr. Howard wrestled the gun away and shot J.C. in self-defense as J.C. was charging at him.

During opening statements, the prosecutor told the jury that when the police approached Mr. Howard at J.C.'s home and asked Mr. Howard what had happened, Mr. Howard remained silent. Mr. Howard objected that the statement was an impermissible comment on his constitutional right to remain silent. The prosecutor responded that it was not impermissible because Mr. Howard, at that time, had been neither arrested nor given *Miranda*warnings. The court asked the parties to present authorities on the issue and told the State not to address Mr. Howard's prearrest silence until it had ruled. But the trial court neither received the authorities it asked for nor ruled on the objection.

The State began its case-in-chief, calling as its first witness one of the responding police officers -- who testified that he arrived at J.C.'s house and saw Mr. Howard seated on a chair in front of the carport. He stated that Mr. Howard appeared "very detached and emotionless." At the time, the officer did not regard Mr. Howard as a suspect; he was just trying to find out what happened. But Mr. Howard "only would indicate that he wasn't shot" and otherwise "refused to answer any questions." The prosecutor asked whether Mr. Howard told the officer "that he had been engaged in a struggle for his life and that he had acted in self-defense," and the officer said no. After discussing the officer's inspection of J.C.'s home, the prosecutor asked about the officer's conversation with Mr. Howard after the officer left the house. The officer testified that Mr. Howard stated that "they were going to shoot me too, or they would shoot me too, something to that effect" but otherwise "refused" to answer any questions.

Through police officers, the State then introduced recordings of calls Mr. Howard made to his girlfriend and brother while in jail. Mr. Howard did not admit to premeditated murder during any of these calls, but he did make statements in them that may fairly be interpreted as showing a consciousness of guilt. In one call, for example, Mr. Howard told his girlfriend that the police had accused him of murder and that he did not know or remember what had happened but that "nothing called for me to do two murders." He also complained about the work trucks J.C. parked near his house, stating "[t]hat shit will make you crazy, whatever kind of gas coming out, carbon monoxide or whatever and it will make you violent." In addition, the State introduced a recording of the police attempting to get a buccal swab from Mr. Howard pursuant to a warrant. Mr. Howard told the officers that his lawyer told him not to cooperate with any request they made, and a physical struggle ensued. During the struggle, Mr. Howard told the police "I don't know why y'all goin through dis, I'm already so court with dat, which y'all got me for. I'm not, I don't even need a public defender. I'm guilty, so what?"

J.C.'s son testified that he had seen Mr. Howard in possession of the gun before the shooting. And J.C.'s wife testified that Mr. Howard shot her husband but was unable to relate whether she saw the events leading to the shooting and, if so, what they were, and she was thus unable to tell the jury anything either way about premeditation or self-defense. The State also put on forensic evidence establishing that the shots to J.C.'s cheek and C.S.'s temple were delivered at very close range, while the shot to J.C.'s neck was delivered from three feet or more away.

In addition to cross-examination of the State's witnesses, the defense case consisted of testimony from J.C.'s paramour, who testified that there was indeed an extramarital affair between the two, and the testimony of Mr. Howard. Mr. Howard testified that J.C. had become enraged and put the revolver to Mr. Howard's head because he believed that Mr. Howard was going to tell his wife about the affair, and that during the ensuing confrontation, C.S. was accidentally shot, and that after Mr. Howard obtained possession of the gun, J.C. was shot in self-defense. Although the State cross-examined Mr. Howard at length, it never tried to impeach him with his silence at the scene of the shootings.

During closing argument, the State heavily emphasized the officer's testimony about Mr. Howard's prearrest silence. In its initial closing, the prosecutor argued as follows:

> The defendant sat in that chair and he said nothing about self-defense. [The officer] came up to him and said, What happened? He didn't respond. *Now common sense tells you that if you have just shot and killed two people because your life was threatened and endangered that you would say, oh, my God, they tried to kill me. I had to shoot them. I had no choice. It was self-defense. He sat there in that chair and didn't say a peep about what happened.* [Another officer] came up to him and said, Hey, what happened. Same response. Wouldn't even make eye contact with [one officer]. *Why*

> *wouldn't you say I had to shoot them in self-defense? Because at that point he knew he was guilty*and he stated that over and over again from the interview room.

(Emphasis added.) When in response defense counsel argued that Mr. Howard was in shock after the events and did not understand what was going on, the State argued as follows in rebuttal:

> Self-defense is not a sophisticated legal concept. *There's no reason, if Mr. Howard actually acted in self-defense, that he couldn't explain himself while he sat in that wicker chair. All he had to do was say I had to protect myself; I had to shoot them, it was self-defense.* So to say that he did not understand or he was in shock, it beggars belief, and I'm asking you to use your common sense.

(Emphasis added.)

The jury found Mr. Howard guilty as charged. The trial court sentenced him to life in prison on counts one and two and fifteen years with a three-year minimum mandatory on count three. This is Mr. Howard's timely appeal.

II.

Mr. Howard argues that the prosecutor's statements about his prearrest, pre-*Miranda* silence in opening and closing and the State's presentation of testimony about that silence during its case-in-chief were improper comments on his right to remain silent. Because Mr. Howard neither obtained a ruling on his objection to the statements in the opening nor made any objection as the testimony was offered and closing argument was made, this issue is not preserved for our review in this appeal.[2] *See Hendrix v. State*, 767 So. 2d 493, 494 (Fla. 2d DCA 2000) (holding that the defendant failed to preserve the prosecutor's improper comment on silence by failing to object); *see also Carratelli v. State*, 832 So. 2d 850, 856 (Fla. 4th DCA 2002) ("A plethora of Florida cases support the notion that a party must obtain a ruling from the trial court in order to preserve an issue for appellate review."). Mr. Howard argues that we should reverse nonetheless because his counsel was ineffective for not objecting. We first address whether the testimony and argument about it constitute improper comment and, concluding that they do, then consider the ineffective assistance argument.

A.

Article 1, section 9 of the Florida Constitution contains a privilege against self-incrimination that confers a right to remain silent in the face of official inquiries when speaking might tend to be incriminating. *See generallyCuervo v. State*, 967 So. 2d 155, 160-61 (Fla. 2007). So that a defendant is not penalized for exercising that right, a court conducting a criminal trial "must prohibit all evidence or argument that may be interpreted by the jury as a comment on the defendant's right to remain silent." *Knight v. State*, 225 So. 3d 661, 681 (Fla. 2017). Evidence or argument will be regarded as an impermissible comment on the right to remain silent if it is "fairly susceptible" of being understood by the jury in that way. *Urbaniak v. State*, 241 So. 3d 963, 965 (Fla. 2d DCA 2018) (quoting *Green v. State*, 27 So. 3d 731, 735 (Fla. 2d DCA 2010)).

When a defendant remains silent during an encounter with the police, the legal bases for evaluating whether such evidence or argument is prohibited differs depending on whether the silence occurred before or after arrest and before or after *Miranda* warnings have been administered. *See generally State v. Hoggins*, 718 So. 2d 761, 765-70 (Fla. 1998). Any evidence or comment on a defendant's post-*Miranda* silence, whether offered as substantive evidence or as impeachment, is prohibited. *See, e.g.*, *State v. DiGuilio*, 491 So. 2d 1129, 1131-32 (Fla. 1986). The idea is that *Miranda* warnings imply that silence does not carry any penalty -- you have the *right* to remain silent, and anything you *say* can and will be used against you -- and that the use of the silence that a defendant maintained in reliance on the *Miranda* warnings would therefore violate due process. *SeeHoggins*, 718 So. 2d at 765 (citing *Doyle v. Ohio*, 426 U.S. 610, 618 (1976)). Reliance on *Miranda* warnings is not a factor -- or at least not as significant a factor -- when a defendant is silent before they have been administered.

There are two key decisions on the admissibility of a defendant's pre-*Miranda* silence from our supreme court that control our analysis here. In *Hoggins*, the court considered a defendant's pre-*Miranda* silence at the time of

or after arrest. There, a defendant facing murder and robbery charges testified to an alibi and offered an innocent explanation for his possession of stolen property. *Id.* at 763-64. During cross-examination, the State impeached him by showing that he did not offer that explanation to the police when they arrested him. *Id.* The State also argued at length about the defendant's failure to explain himself in closing. *Id.* at 764.

After the defendant was convicted, the Fourth District reversed, holding that article 1, section 9 precluded the State's use of the defendant's pre-*Miranda* silence at the time of or after arrest and certified the question whether article 1, section 9 precludes the State from impeaching a testifying defendant with postarrest, pre-*Miranda*silence. *Id.* at 762. The supreme court held that it does. *Id.* Although federal precedents interpret the Fifth Amendment to the United States Constitution to permit the use of pre-*Miranda* silence for impeachment purposes, the court reasoned that state courts can interpret state constitutions more broadly and thus that "states may rely on their own constitutions to prohibit the use of pre-*Miranda* silence."[3] *Id.* at 767. The court held article 1, section 9 precludes the use of postarrest, pre-*Miranda* silence because previous Florida decisions laid a foundation for doing so, it did not want to treat defendants who are aware of their *Miranda* rights differently from those who are not, and it was concerned about providing law enforcement with "an incentive to delay the giving of *Miranda* warnings." *Id.* at 769-70.

The court further held that the defendant's pre-*Miranda* silence was inadmissible for impeachment purposes because it was not inconsistent with his trial testimony. *Id.* at 770-71. It explained that impeachment with silence is the same as impeachment with a prior inconsistent statement under the Florida Evidence Code[4] and, as such, that "inconsistency is a threshold question when dealing with silence that may be used to impeach." *Id.* at 771. It reasoned that silence is generally ambiguous and thus not inconsistent with a defendant's trial testimony but that "the potential for inconsistency increases[ ] when silence persists in the face of accusation." *Id.* Thus, "inconsistency exists only if the prior silence occurred at a time when it would have been natural for the defendant to deny the accusations made against him." *Id.*

In determining whether it is natural to deny an accusation, the court emphasized that there are "numerous reasons that a defendant may remain silent at the time of arrest" -- intimidation, fear, emotion, confusion, a belief that he is not required to answer, and others besides. *Id.* In the case before it, the circumstances of the defendant's arrest were tumultuous, involving a confrontation with the victim while the defendant was handcuffed. For those reasons, the court was "unable to say with any degree of certainty that [the defendant's] failure to offer an explanation at the time of arrest was inconsistent with his exculpatory statement at trial." *Id.* at 771-72.

The *Hoggins* court left open the questions of whether and under what circumstances a defendant's pre-*Miranda*silence *before* arrest might be admissible, while noting that the district courts of appeal had found such silence admissible for impeachment purposes. *Id.* at 770. It took up those questions in *State v. Horwitz*, 191 So. 3d 429 (Fla. 2016). *Horwitz* involved a murder prosecution during which the State, in its case-in-chief, offered evidence that the defendant remained silent when the police arrived at the scene and asked if the defendant needed anything and later if she had been present when the firearm used to commit the murder discharged. *Id.* at 433-34. The defendant did not testify at trial and, as such, her prearrest, pre-*Miranda* silence was only relevant as substantive evidence of guilt. *Id.* at 437. After the defendant was convicted, the Fourth District reversed and held that prearrest, pre-*Miranda* silence is not admissible for that purpose and certified the question to the supreme court. *Id.*

After canvassing the federal and state cases on the subject, the supreme court held that "a defendant's privilege against self-incrimination guaranteed under article I, section 9 . . . is violated when his or her prearrest, pre-*Miranda* silence is used . . . at trial as substantive evidence of the defendant's consciousness of guilt." *Id.* at 442. As it did in *Hoggins*, the court went on to explain that the defendant's silence was also inadmissible under the evidence code. *Id.* at 442. It reasoned that where the defendant's prearrest, pre-*Miranda* silence is not being used for impeachment purposes, it must be relevant to some matter in dispute pursuant to section 90.401 of the evidence code. *Id.* It explained that pre-*Miranda* silence is not relevant as evidence of consciousness of guilt because silence is generally ambiguous. *Id.* at 443. Comparing the use of silence as evidence of consciousness of guilt to its analysis of the use of silence for impeachment purposes in *Hoggins*, the court explained:

> A defendant's silence prior to the time of formal arrest is also ambiguous. For example, before arrest, an individual is just as susceptible to being in fear that his or her story will not be believed, not hearing or understanding the question, having the desire to protect another, being introverted, being in shock, or having prior knowledge of his or her *Miranda* rights.

Id. at 443. As such, the court held that prearrest, pre-*Miranda* silence does not prove a consciousness of guilt and is therefore not relevant as substantive evidence. *Id*.

Taken together, then, *Hoggins* and *Horwitz* establish that (1) a defendant's postarrest, pre-*Miranda* silence may not be used either as substantive evidence or for impeachment purposes and that (2) a defendant's prearrest, pre-*Miranda* silence may not be used as substantive evidence but may be used for impeachment if the silence is inconsistent with the defendant's testimony at trial. *See also Urbaniak*, 241 So. 3d at 966 (explaining that *Hoggins* and *Horwitz* stand for these propositions); *Ferrari v. State*, 260 So. 3d 295, 312 (Fla. 4th DCA 2018) (same). Silence is inconsistent with a defendant's exculpatory trial testimony in circumstances where, giving due consideration to reasons why the defendant's silence may instead be ambiguous, it would have been natural for the defendant to speak to deny an accusation. *Hoggins*, 718 So. 2d at 771-72.

Under these standards, the State's use of Mr. Howard's prearrest, pre-*Miranda* silence was improper. To begin with, Mr. Howard's silence was offered by the State as substantive evidence of his consciousness of guilt, not for impeachment purposes. As *Hoggins* explains, the use of silence to impeach a defendant's testimony at trial is in essence the impeachment of the defendant with a prior inconsistent statement. *Id.* at 770-71. The proper way for the State to have impeached Mr. Howard with his silence would have been for the State to ask him about it and to introduce extrinsic evidence of his silence only if he denied or failed sufficiently to admit his silence. *See* § 90.614(2), Fla. Stat. (2017) ("Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate the witness on it, or the interests of justice otherwise require. If a witness denies making or does not distinctly admit making the prior inconsistent statement, extrinsic evidence of such statement is admissible."); *Dietrich v. State*, 673 So. 2d 93, 94 (Fla. 4th DCA 1996) (reversing conviction where, among other things, extrinsic evidence of prior inconsistent statements was admitted without affording the witness the opportunity to explain or deny the statement). As impeachment material, any evidence of Mr. Howard's silence would have been admissible only to show that his in-court testimony was not credible and not that he was guilty. *See Rockerman v. State*, 773 So. 2d 602, 604 (Fla. 1st DCA 2000) ("[T]he testimony was offered not to show that Mr. Rockerman acted in self-defense, but only to show that Mr. McFarland was not to be believed."); Charles W. Ehrhardt, *Ehrhardt's Florida Evidence*, § 608.4 at 663-64 (2019 ed.) ("The argument is not that the prior statement is true and the testimony in court is false, but that because the witness has made two different statements concerning a material fact, the jury should not place great weight on the in-court testimony.").

Here, the State was not using Mr. Howard's silence for impeachment purposes. The State did not even ask Mr. Howard about his silence in cross-examination. Instead, the State began discussing it in its opening statement. The State's first witness -- the deputy who responded to the scene of the shooting -- testified about it during its case-in-chief, long before Mr. Howard testified. *See Urbaniak*, 241 So. 3d at 966 ("Because the State admitted the deputy's testimony during its case-in-chief, there is no plausible argument in this case that the testimony was offered to impeach Urbaniak's trial testimony."). And the State explicitly argued in closing that Mr. Howard's silence showed that he was conscious of his guilt -- namely, that he did not answer the officer "because at that point *he knew he was guilty*." (Emphasis added.) In sum, the State used Mr. Howard's silence for the purpose that *Horwitz* prohibits -- as substantive evidence of consciousness of guilt -- and its evidence and comments were clearly susceptible of interpretation as a comment on his right to remain silent.

Furthermore, even if there was an argument that the State had been trying to impeach Mr. Howard, on this record it was improper impeachment under *Hoggins* and *Horwitz* because Mr. Howard's silence was not inconsistent with his trial testimony. In considering whether Mr. Howard's silence at the scene is inconsistent with his testimony that he shot J.C. and C.S. while defending himself from J.C., it is important to note that the officer did not testify to what he asked Mr. Howard, other than whether Mr. Howard had been shot and what Mr. Howard understood to have happened. Mr. Howard told the deputy that he had not been shot and something to the effect

of "they would have shot me too," which is consistent with the idea that he shot the victims out of fear for his own safety. Other than that, Mr. Howard remained silent, but we do not know what he was asked to say -- only that he "refused" to answer other questions.

Thus, this is not a case where, as *Hoggins* put it, "silence persist[ed] in the face of accusation." 718 So. 2d at 771. In fact, there does not appear to have been any accusation at all. The officer testified that he did not consider Mr. Howard a suspect, and there was no testimony that he asked Mr. Howard anything that implied an accusation. Nor is this a case where other circumstances suggest that a rational person in Mr. Howard's shoes would naturally have spoken further in addition to what Mr. Howard said. We have no idea from our record what exactly the officer asked Mr. Howard. The officer's testimony about Mr. Howard's appearance is consistent with Mr. Howard's own testimony that he was in shock, and what Mr. Howard said at least implied that he had fired the shots in self-defense. On the record we have, then, Mr. Howard's silence is just as consistent with motivations like shock, fear of being disbelieved, or prior experience with the *Miranda* warnings as was the silence in *Horwitz*.[5] The silence here was ambiguous and therefore not inconsistent with Mr. Howard's testimony at trial.

In conclusion, then, the State improperly introduced evidence of and commented in opening and closing upon Mr. Howard's prearrest, pre-*Miranda* silence. Because he did not preserve this issue for review, however, we must now consider whether he can obtain relief from the State's conduct in this appeal.

B.

Mr. Howard argues that his counsel's failure to provide the court with the authorities it requested and to object to the State's introduction of evidence and comment upon his silence violated his Sixth Amendment right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Claims of ineffective assistance are not usually considered on a direct appeal from a judgment and sentence because the questions of whether the deficient performance and prejudice prongs of *Strickland* have been met require factual development. *See, e.g.*, *Jassan v. State*, 749 So. 2d 511, 512 (Fla. 2d DCA 1999) ("[W]e determine that these issues should be raised by an appropriate motion for post-conviction relief. Upon a proper record, the reviewing court, be it trial or appellate, can ascertain whether counsel's performance was deficient and resulted in a prejudice . . . ."). But we do not require further factual development of an ineffectiveness claim in a postconviction court when such proceedings would do no more than waste judicial resources. *See Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987). For instance, we will address an ineffective assistance claim on direct appeal in the rare circumstance when counsel's deficient performance is "obvious on the face of the appellate record," "a tactical explanation" for counsel's performance "is inconceivable," and "the prejudice caused by the conduct is indisputable." *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002).

That Mr. Howard's trial counsel rendered deficient performance is obvious. *Horwitz* and *Hoggins* were on the books when this case was tried. The trial court's request for authority on whether Mr. Howard's prearrest, pre-*Miranda* silence was inadmissible should have prompted counsel to find those decisions. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance . . . ."). As a result of counsel's failure to do so, the State was improperly permitted to present extensive evidence and argument bearing on his right to remain silent. This constitutes deficient performance. *See Floyd v. State*, 159 So. 3d 987, 989-90 (Fla. 1st DCA 2015) (holding that trial counsel was deficient for failing to object to questioning that "clearly constituted comments on the [defendant]'s right to remain silent" (quoting *Floyd v. State*, 129 So. 3d 1214, 1215 (Fla. 1st DCA 2014))). And in view of the extent of the State's evidence and argument on Mr. Howard's prearrest, pre-*Miranda* silence and counsel's multiple missed opportunities to object, this is one of those rare cases where the deficiency is apparent on the face of the record. *See Eure v. State*, 764 So. 2d 798, 801 (Fla. 2d DCA 2000) (finding ineffectiveness on the face of the record where counsel failed to object to impermissible argument by the State); *Ross v. State*, 726 So. 2d 317, 319 (Fla. 2d DCA 1998) (finding ineffective assistance on the face of the record where defense counsel failed to object to "numerous inappropriate and prejudicial comments during closing arguments").

Indeed, we cannot conceive of a tactical explanation for counsel's failure to provide the authority the court requested or to further object to the State's evidence and argument. We have considered the possibility that counsel perhaps did not want to object out of fear that the jury would perceive that the defense was trying to hide something. But that hypothetical explanation is conclusively belied by our record which reflects not only that counsel objected to the State's discussion of Mr. Howard's prearrest, pre-*Miranda* silence in opening, but also that counsel made scores of other objections throughout the trial to the admission of evidence, to the prosecutor's cross-examination of Mr. Howard, and to the content of the prosecutor's argument. *See Floyd*, 159 So. 3d at 990 (rejecting counsel's explanation for failing to object that he did not want the jury to think he was hiding anything where counsel made other evidentiary objections). We can see no other articulable justification for defense counsel's failure to prevent the State's extensive presentation of evidence and argument on Mr. Howard's silence and note with interest that the State has not identified one either.

That leaves us with the question of prejudice, which exists when there is "a reasonable probability that the results of the proceeding would have been different but for the inadequate performance" of counsel. *Ross*, 726 So. 2d at 318 (citing *Strickland*, 466 U.S. at 694). A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694. As our court has explained, "[t]he benchmark for judging claims of ineffectiveness . . . is whether the conduct of counsel 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *Cabrera v. State*, 766 So. 2d 1131, 1133 (Fla. 2d DCA 2000) (quoting *Downs v. State*, 453 So. 2d 1102, 1106 (Fla. 1984)).

In applying those standards to the State's comment on Mr. Howard's right to remain silent, we observe that Florida courts have routinely explained that comments on the right to remain silent are "high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict." *Khan v. State*, 243 So. 3d 506, 512 (Fla. 2d DCA 2018) (involving comment on postarrest, pre-*Miranda* silence) (quoting *DiGuilio*, 491 So. 2d at 1136-37). Although that observation has been made in the context of our review of a preserved objection to an improper comment under the harmless error standard, it is relevant here because, like the harmless error standard, the prejudice prong of *Strickland* requires consideration of the effect of the error on the factfinding process. The fact that we regard improper comments on silence as "high risk" errors that are less likely than others to be harmless necessarily means that a lawyer's failure to object to such comments is to some extent more likely than other failings of counsel to be prejudicial in the *Strickland*sense.

Although we think it a close call, our record indisputably demonstrates that Mr. Howard was prejudiced by his counsel's failures here. It might be a different story if the State had just made a passing reference to Mr. Howard's prearrest, pre-*Miranda* silence, but here it was a major component of the State's case. It was front-and-center in opening statement, brought out through the State's first witness, and argued extensively in closing. To be sure, the State had other evidence that undermined Mr. Howard's self-defense theory, the most problematic for him being his own statements while in police custody. But Mr. Howard offered an explanation for those statements that a jury might credit, and this was otherwise a case where the State had no eyewitnesses, the physical evidence did not clearly refute Mr. Howard's self-defense theory, and the State thus relied extensively on Mr. Howard's prearrest, pre-*Miranda* silence. There is at least a reasonable probability that without it, Mr. Howard's trial would have ended with a different result. *Cf. Rodriguez v. State*, 761 So. 2d 381, 383 (Fla. 2d DCA 2000) (finding deficient performance and prejudice on the face of the appellate record where counsel failed to object to multiple questions from prosecutor concerning the details of defendant's prior felony convictions); *Gordon v. State*, 469 So. 2d 795, 797-98 (Fla. 4th DCA 1985) (finding deficient performance and prejudice on the face of an appellate record disclosing 104 failures to object to improper questions and comments by prosecutor).

III.

The State's evidence and argument about Mr. Howard's prearrest, pre-*Miranda* silence were improper under supreme court precedent. Mr. Howard has established that his counsel's failure to respond to the trial court's request for authority on that point and his failure to further object to such evidence and argument constituted

ineffective assistance on the face of the record. Accordingly, we reverse Mr. Howard's judgment and sentences and remand for a new trial or such other proceedings as are consistent with this opinion.[6]

Reversed and remanded. (MORRIS and BADALAMENTI, JJ., Concur.)

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[2]Mr. Howard has not argued that the evidence and argument amount to fundamental error, which, if it existed, would permit us to reach the issue regardless of the lack of preservation. *See Fletcher v. State*, 168 So. 3d 186, 208 (Fla. 2015).

[3]The Fifth Amendment contains a privilege against self-incrimination that is textually identical to that in article 1, section 9.

[4]§ 90.608, Fla. Stat. (1997).

[5]In respect of prior experience with the *Miranda* warnings, we note that the trial evidence established that Mr. Howard had prior felony convictions.

[6]Mr. Howard has also argued that the trial court erred in admitting a prior consistent statement of J.C.'s son concerning Mr. Howard's prior possession of the firearm used to shoot J.C. and C.S. For purposes of any new trial, we note that where, as here, a witness's prior consistent statement is "offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication," § 90.801(2)(b), Fla. Stat. (2017), "the statement must have been made before the existence of a reason to falsify arose," *Quiles v. State*, 523 So. 2d 1261, 1263 (Fla. 2d DCA 1988). *See also Taylor v. State*, 855 So. 2d 1, 23 (Fla. 2003). That was not the case on the record here, and the trial court's admission of that evidence was in error. Whether that error is harmless in this case is subject to fair debate and is not a question, in light of our disposition of this appeal, that we need to resolve.