FIFTH DIVISION
January 27, 2017

No. 1-14-1962

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 11 CR 2881 (02)
RECO HOLMES,	)	
Defendant-Appellant.	)	Honorable Brian Flaherty, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming defendant's convictions for armed robbery and home invasion where (1) the trial court did not err in denying defendant's motion to quash arrest and suppress evidence and (2) statements made by the prosecutor during rebuttal closing argument did not substantially prejudice defendant so as to deny him a right to a fair trial. Defendant's sentence, however, is vacated and the matter remanded to juvenile court in light of *People ex rel. v. Howard*, 2016 IL 120729.

¶ 2 Following a jury trial, defendant Reco Holmes was convicted of armed robbery and home invasion, and sentenced to concurrent terms of 25 years' imprisonment, which included a 15-

year enhancement for defendant's use of a firearm. Defendant, age 16 at the time of the offense, was tried and sentenced as an adult in accordance with the automatic transfer provision set forth in section 5-130 of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-130 (West 2010)). On appeal, defendant maintains that: (1) the trial court erred in denying his motion to quash and suppress evidence; (2) various statements by the prosecutor during closing argument deprived him of a fair trial; (3) the automatic transfer provision of the Act is unconstitutional; (4) the amendment of the automatic transfer provision of the Act which occurred while this matter was pending on appeal applied to him retroactively; and (5) the subsequent amendment of the sentencing guidelines that apply to juveniles is retroactive and requires that this cause be remanded for resentencing in light of the new statutory provisions. Although we find no error committed by the trial court, in light of our supreme court's recent decision in *People ex rel. v. Howard*, 2016 IL 120729, we conclude the amendment to the automatic transfer provision applies retroactively, and thus vacate defendant's sentence and remand to the juvenile court for resentencing.

¶ 3 BACKGROUND

¶ 4 The State charged defendant with numerous offenses, including those relevant to this appeal, armed robbery and home invasion. Both charges were predicated on defendant being armed with a firearm during the robbery. The armed robbery charge alleged that, on January 26, 2011, defendant and two other individuals (Fletcher Wandick (Wandick) and Daviea Ashley (Ashley)), committed a robbery "by use of force or by threatening the imminent use of force" while "armed with a firearm."

¶ 5 At the time of defendant's trial, armed robbery committed with a firearm by an offender who was at least 15 years old was an offense requiring defendant's case to be transferred to adult

court without a hearing. 705 ILCS 405/5-130(1)(a) (West 2010). Defendant's case was so transferred.

¶ 6 Thereafter, defendant filed a motion to quash his arrest and suppress evidence alleging that the police lacked probable cause to arrest him without a warrant and therefore any subsequent statements he made should be suppressed as "fruit of the poisonous tree." Only one individual testified during the suppression hearing, Lieutenant Brad Bailey (Bailey) of the Riverdale Police Department. Bailey testified as follows. On January 26, 2011, he received information regarding a recent home invasion that occurred in the 14000 block of Stewart Avenue at 10:20 p.m. The victim, Willie Lewis (Lewis), reported that four African-American males wearing dark clothing had entered his home, two armed with handguns, and had taken items including a 50-inch television, an Xbox gaming system, and his vehicle (a blue Buick LeSabre). The victim further provided the license plate number of the Buick.

¶ 7 At 10:43 p.m., a few minutes after receiving the information regarding the home invasion, Bailey was traveling down the alley adjacent to the 14200 block of Normal Avenue when he observed a vehicle matching the victim's description and license plate number. Three African-American males wearing dark clothing were removing items from the Buick. The three individuals then observed Bailey and commenced running in the direction of the front entrance of a single family home. Bailey testified he could not view their faces and could not identify them, but did hear the front entrance of the residence closing and the men did not thereafter reappear.

¶ 8 Bailey then observed a fourth African-American male wearing dark clothing, whom he identified as Wandick,[1] near a gold Chrysler which contained a 50-inch television inside. Upon

[1] The record includes two different spellings of Wandick's name. In light of our order in *People v. Wandick*, 2015 IL 123096-U (Unpublished under Supreme Court Rule 23), we apply the spelling as provided

making eye contact with Bailey, Wandick ran into the residence. Bailey called for back-up officers, who arrived around 11:30 p.m.

¶ 9 Bailey and the back-up officers secured the perimeter around the residence. During their search of the exterior of the residence, they discovered two handguns outside a window. After negotiating with the residents inside, at 2:50 a.m. nine adults (five males including defendant and four females) along with three children emerged. The officers placed the nine adults under arrest and escorted them to the police station. At approximately 5:15 a.m. defendant, in the presence of his mother, made an inculpatory statement. At no time did any of the officers have a warrant for defendant's arrest.

¶ 10 Upon considering this evidence, the trial court denied defendant's motion to quash, finding that: (1) the circumstantial evidence established that three men, who had been removing items from the stolen Buick, fled inside the residence and did not thereafter exit the residence; and (2) defendant was among the men who were inside the residence. The trial court thus concluded that the police had probable cause to believe defendant was involved in the home invasion based on the evidence.

¶ 11 The matter then proceeded to trial where the evidence demonstrated that on January 26, 2011, at 10:30 p.m., Lewis returned home where he was confronted by a man with a handgun, who he later identified as Ashley. Lewis' hat was pulled over his eyes by Ashley, who whistled, and moments later a second man was behind Lewis. Ashley and the second individual forced Lewis into his apartment where Lewis was bound face-down on the living room floor. Ashley collected items from the apartment while the second individual held Lewis down and placed the barrel of a handgun at his neck. The second individual, who Lewis identified as having a "young" voice, threatened Lewis that if he were to move, he would shoot him. While Lewis

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therein.

remained bound and blindfolded, he heard a third person enter his apartment and who commenced going through his possessions. After approximately 45 minutes, the three men exited the apartment. Thereafter, Lewis discovered that his vehicle was missing.

¶ 12 Lewis used his neighbor's telephone to contact the police department. Lieutenant Bailey, who was on patrol in the area, received the information regarding the robbery, namely that certain items were taken including Lewis' Buick, a 50-inch television, and an Xbox video gaming system. He was also provided with a description of the suspects, that they were four African-American males wearing dark clothing. Shortly thereafter, Bailey discovered the Buick in the alley adjacent to the 14000 block of Normal and observed three African-American males wearing dark clothing removing items from the vehicle. These three individuals ran from Bailey in the direction of a single family residence and moments later Bailey heard a door slam. Bailey then observed Wandick (whom he described as being an African-American male wearing dark clothing) in a gold Chrysler which had a 50-inch television in the backseat. Upon viewing Bailey, Wandick also ran towards the residence. Bailey called for back-up. Bailey testified he could not identify defendant as one of the individuals who fled, he did not observe any of the individuals enter the residence, and he did not observe defendant with any stolen property.

¶ 13 The responding officers created a perimeter around the house. In doing so, two handguns were discovered in a planter by the front door. A few hours later, the occupants of the residence emerged, five men, four females, and three children. Defendant was among the five men. All of the adults, including defendant, were arrested and taken to the police station.

¶ 14 As defendant was 16 years old, Detective Glen Williams (Williams) notified defendant's mother, Sharon Henderson (Henderson), that her son was in custody. Upon her arrival at the police station, Henderson spoke with her son privately for five minutes. Thereafter, Williams

and his partner read defendant his *Miranda* rights, which defendant and his mother acknowledged in a written "Notification of Rights" form. Defendant and his mother then agreed to speak with the detectives who proceeded to question defendant. At 5:15 a.m. defendant made an inclupatory statement.

¶ 15 According to Williams, defendant made an oral statement, which provided as follows. Wandick informed defendant that he wanted to rob a man (Lewis) from whom he had previously purchased marijuana. Defendant and Ashley agreed to rob Lewis and Wandick provided them with handguns. Defendant and Ashley arrived at Lewis' residence and waited for him to return home. They approached Lewis at his front door. They displayed the handguns and Ashley pulled Lewis' hat over his eyes. After they forced Lewis into his apartment, they bound Lewis' hands and legs together. Ashley began to remove property from Lewis' apartment while defendant restrained Lewis with one foot on the victim's neck and another foot on the victim's back. Defendant also held a handgun to Lewis' head and threatened to kill Lewis if he moved. Shortly thereafter Wandick entered the apartment and began assisting Ashley in removing Lewis' property. When they were finished, all three men left and returned to Wandick's residence, taking Lewis' vehicle. Defendant did not indicate which vehicle he occupied. They parked in the alley behind Wandick's residence and began unloading the vehicle. It was at that point in time when an officer appeared and they all ran into Wandick's residence.

¶ 16 Cook County Assistant State's Attorney Tara Pease-Harkin (ASA) testified that she interviewed defendant the following day. Henderson was in the room as she conducted her interview. According to the ASA, defendant informed her that Wandick asked if he and Ashley would participate in a robbery. The three then drove to Lewis' apartment in Wandick's vehicle and waited for Lewis to arrive home. When he did, defendant and Ashley approached Lewis,

pulled his hat over his eyes, pointed a handgun at him, and forced him into the apartment. Once inside the apartment, they laid the victim face-down on the ground. Defendant restrained Lewis by placing his foot in the middle of the victim's back and threatened to shoot him if he moved. Defendant removed two tire rims, a change jug, and an Xbox from Lewis' apartment. After the robbery, the three men returned to Wandick's residence with Lewis' vehicle. Defendant declined to have a written statement prepared by the ASA.

¶ 17 Henderson, however, testified on defendant's behalf that she did not hear her son make the statements as testified to by Williams and the ASA. According to Henderson, she and defendant participated in three interviews. During the first interview, defendant did not make any of the statements referred to by Williams. Regarding the third interview (the one with the ASA), Henderson further denied hearing her son make the statements as relayed by the ASA. Henderson did not testify as to the second interview.

¶ 18 The evidence further established that Lewis viewed a line-up at the police station where he identified Ashley and Wandick. Defendant was never placed in a line-up and was never identified by Lewis as one of the individuals who robbed him.

¶ 19 The parties stipulated to the forensic evidence. The testimony by various forensic experts indicated that while certain partial fingerprints were recovered from the tire rims and Wandick's Chrysler, these fingerprints were not suitable for comparison. Other fingerprints taken from the tire rims and Lewis' closet door, which were suitable for comparison, were not a match to defendant, Wandick, or Ashley.

¶ 20 After the parties rested, they presented closing arguments. The State asserted the evidence favored a conviction on both the home invasion and armed robbery charges. The defense, however, attacked the sufficiency of the evidence and argued that defendant was merely

"in the wrong place at the wrong time." Defense counsel emphasized that no witness observed defendant at the victim's apartment or outside of Wandick's residence, that there was no fingerprint evidence, and that defendant's statement was not transcribed or recorded. At the conclusion of closing arguments, the jury was instructed and commenced deliberations. The jury ultimately found defendant guilty on both counts for home invasion and armed robbery, each while armed with a firearm. Thereafter, defendant filed a motion for a new trial, which the trial court denied. The trial court sentenced defendant as an adult to 25 years' imprisonment on each count with the sentences to run concurrently. This appeal followed.

¶ 21 ANALYSIS

¶ 22 On appeal, defendant maintains that: (1) the trial court erred in denying his motion to quash and suppress evidence; (2) various statements by the prosecutor during closing argument deprived him of a fair trial; (3) the automatic transfer provision of the Act is unconstitutional; (4) the amendment of the automatic transfer provision of the Act which occurred while this matter was pending on appeal applied to him retroactively; and (5) the subsequent amendment of the sentencing guidelines that apply to juveniles is retroactive and requires that this cause be remanded for resentencing in light of the new statutory provisions. We first turn to consider whether the trial court erred in denying defendant's motion to quash.

¶ 23 Motion to Quash

¶ 24 Defendant first contends that the trial court erred in denying his motion to quash where the evidence established that the police did not have probable cause to believe that he committed an offense and there was no warrant for his arrest. Defendant maintains that because the police lacked probable cause when they arrested him, his subsequent statements should be suppressed as "fruit of the poisonous tree."

¶ 25 In reviewing a trial court's ruling on a motion to suppress, we apply the two-part standard of review adopted by the Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 699 (1996). *People v. Wear*, 229 Ill. 2d 545, 561 (2008). "While we accord great deference to the trial court's factual findings, we will reverse those findings only if they are against the manifest weight of the evidence, we review *de novo* the court's ultimate ruling on a motion to suppress involving probable cause." *People v. Jackson*, 232 Ill. 2d 246, 274 (2009); *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). In reviewing a trial court's ruling on a motion to suppress we may consider evidence adduced at trial as well as at the suppression hearing. *People v. Richardson*, 234 Ill. 2d 233, 252 (2009).

¶ 26 A warrantless arrest will be deemed lawful only when probable cause to arrest has been proven. *People v. Robinson*, 167 Ill. 2d 397, 405 (1995). Probable cause exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the person arrested has committed a crime. *People v. Hopkins*, 235 Ill. 2d 453, 472 (2009). The existence of probable cause to arrest depends upon the totality of the circumstances at the time of the arrest. *People v. Sims*, 192 Ill. 2d 592, 615 (2000).

¶ 27 Whether probable cause exists is governed by commonsense considerations, and the calculation concerns the probability of criminal activity, rather than proof beyond a reasonable doubt. *Hopkins*, 235 Ill. 2d at 472. In determining whether the officer had probable cause, his factual knowledge, based on law enforcement experience, is relevant. *People v. Smith*, 95 Ill. 2d 412, 419-20 (1983). Though a higher standard than reasonable suspicion (*People v. Leggions,* 382 Ill. App. 3d 1129, 1132 (2008)), probable cause does not require evidence sufficient to convict (*People v. Foster,* 119 Ill. 2d 69, 83 (1987)). As our supreme court observed, "In dealing with probable cause, *** as the very name implies, we deal with probabilities. These are not

technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." (Internal quotation marks omitted.) *People v. Cabrera,* 116 Ill. 2d 474, 485 (1987) (quoting *People v. Moody*, 94 Ill. 2d 1, 7-8 (1983)).

¶ 28 Defendant argues that there was not probable cause to arrest because he was not identified by either Lewis or Bailey and he was merely in the wrong place at the wrong time. While it is true that an individual's mere proximity to others suspected of criminal activity does not, without more, give rise to probable cause to arrest, it may provide support for probable cause when combined with other relevant facts and circumstances known to the arresting officer. See *People v. Foster*, 309 Ill. App. 3d 1, 5 (1999) (citing *People v. Lippert*, 89 Ill. 2d 171, 180-81 (1982)). Accordingly, defendant's argument is not dispositive of the issue of whether Bailey had probable cause to arrest him as it fails to take into consideration the other circumstances leading up to his detention.

¶ 29 In this case, the totality of the circumstances indicates the officers had probable cause to arrest defendant during the course of their investigation. Here, the evidence established that Lewis informed the police that four African-American males dressed in dark clothing removed property from his home at gunpoint and stole his vehicle. Lewis also provided the police with a description of his vehicle and its license plate number along with a description of the items taken from his home, including a 50-inch television. Bailey, having received this information, shortly thereafter came across Lewis' vehicle and observed three men dressed in dark clothing removing items from the vehicle. When these men became aware of Bailey's presence they fled into the residence. Bailey then observed Wandick standing adjacent to another vehicle with a 50-inch television inside. Wandick also fled into the residence upon viewing Bailey.

¶ 30 Bailey then called for back-up. Aware that the suspects to the home invasion had been

armed, Bailey (along with the responding police officers) searched the exterior of the residence and discovered two handguns located near the front door. Meanwhile, the occupants of the residence did not immediately exit the premises despite orders to do so by the police. Hours later, the occupants (five males, four females, and three children) exited the home. The nine adults, including defendant who is a minor, were detained and escorted to the police station for questioning. A review of the record indicates sufficient facts under the totality of the circumstances to support the trial court's finding of probable cause. Accordingly, we uphold the trial court's determination denying defendant's motion to quash arrest and suppress evidence.

¶ 31 Defendant, relying on *People v. Haymer*, 154 Ill. App. 3d 760 (1987), maintains that his mere proximity to an offense does not, without more, establish proximate cause. Defendant further acknowledges in his reply brief that the facts of *Haymer* are dissimilar to the facts of the present case, but asserts that *Haymer* is analogous to the case at bar because "the police here were also conducting an illegal 'expedition for evidence.' " While we agree with defendant that the facts of *Haymer* are distinguishable, we cannot agree the police conduct here amounted to an illegal expedition for evidence and our discussion of the facts in this case has already established that there was probable cause to arrest defendant.

¶ 32 Prosecutorial Misconduct

¶ 33 Defendant next argues that the prosecutor's statements during rebuttal closing argument denied him a fair and impartial trial. Specifically, defendant asserts the State improperly argued that (1) defendant's mother told him to tell the truth when they spoke privately, (2) defendant refused to sign a written statement because he knew he was in trouble, and (3) defendant's fingerprints would not have been on the stolen wheel caps even if he carried the wheel. Defendant acknowledges he failed to preserve this issue for our review, but nonetheless claims

that we should review it under the plain-error doctrine.

¶ 34 To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. McCarty*, 223 Ill. 2d 109, 122 (2006). This court can, however, consider unpreserved issues under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error doctrine "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The plain-error rule, however, "is not 'a general savings clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *People v. Herron*, 215 Ill. 2d 167, 177 (2005) (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, our supreme court has held that the plain-error rule is a narrow and limited exception to the general rules of forfeiture. *Herron*, 215 Ill. 2d at 177. It is the defendant who carries the burden of persuasion under both prongs of the plain-error doctrine. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). This court must first consider whether any error occurred. *People v. Boston*, 2016 IL App (1st) 133497, ¶ 56 (citing *Herron*, 215 Ill. 2d at 181-82).

¶ 35 Prior to addressing defendant's arguments we observe that the parties disagree about the proper standard of review. Defendant asserts the proper standard of review in this instance is *de novo*. The State, on the other hand, notes that the standard of review for this issue is unclear, as

our supreme court has applied both the abuse of discretion standard and the *de novo* standard. See *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (utilizing *de novo* standard of review to determine whether claimed improper arguments were so egregious as to warrant a new trial); *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (employing an abuse of discretion standard). While it is not clear if a prosecutor's comments during closing arguments are reviewed *de novo* or for an abuse of discretion (see *People v. Daniel,* 2014 IL App (1st) 121171, ¶ 32; *People v. Maldonado,* 402 Ill. App. 3d 411, 421 (2010); *People v. Johnson,* 385 Ill. App. 3d 585, 603 (2008)), we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this matter would be the same under either standard.

¶ 36 The State is afforded wide latitude in making closing arguments. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas,* 218 Ill. 2d 104, 121 (2005). Comments made during closing argument are not improper if they were invited by the defense and comments made during closing arguments must be viewed in the context of the entire arguments of both parties. *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 43. "The standard of review applied to arguments by counsel is similar to the standard used in deciding whether a plain error was made: comments constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments." *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 82. Thus, reversal is warranted only if the prosecutor's remarks created "substantial prejudice." *Wheeler,* 226 Ill. 2d at 123; *People v. Johnson,* 208 Ill. 2d 53, 64 (2003); *People v. Easley,* 148 Ill. 2d 281, 332 (1992) ("The remarks by the prosecutor, while improper, do not amount to substantial prejudice.").

¶ 37 The first alleged improper remark occurred during rebuttal closing argument when the assistant State's attorney stated the following:

> "But again, I think the one thing she said is on cross-examination when counsel called her she said I told my son to tell the truth. And that's what happened when she went into the room with her son by herself. She goes hay [*sic*], you know, you are with these guys. You got to tell the truth about what happened. And that's what Reco did. He came out and told the truth."

Defendant did not object to this line of argument, but now argues that this constituted a "clear misstatement of the evidence and an improper attempt to get [the prosecutor's] own testimony in front of the jury."

¶ 38 The evidence established that Henderson did not testify that when she spoke privately with defendant she instructed him to tell the truth. The evidence does, however, indicate that Henderson "want[ed] him to be truthful with whatever he is to do." While the evidence presented at trial does not support the prosecutor's rebuttal argument, the jury was admonished numerous times by the trial court that the prosecutor's statements during closing argument were not evidence. Accordingly, any error caused by this remark was cured by the trial court's instruction. See *People v. Herndon*, 2015 IL App (1st) 123375, ¶ 36 (the trial court may cure any errors by giving the jury proper instructions on the law to be applied or by informing the jury that arguments are not evidence). Even if the prosecutor's remark was not cured by the trial court's instruction, the statement did not cause prejudice to defendant.

¶ 39 Defendant contends that the prosecutor again misstated the evidence in this case when he argued that defendant "refused to sign any written statements or be videotaped because he 'knew he was in trouble.' " In order to fully address this claim, we begin by recounting the pertinent

evidence at trial. The ASA's testimony at trial established that defendant agreed to speak with the ASA and provided an oral statement. On cross-examination, the ASA testified she did not prepare a handwritten statement in this case because defendant "didn't want to." The ASA further testified that if a statement were to have been written, she would "do the writing," not the defendant. Comparing the allegedly improper comment with the testimony of the ASA, it is evident that the ASA did not testify that defendant refused to sign a written statement because he knew he was in trouble.

¶ 40 We, however, do not view remarks made in closing argument out of context. In fact, we review the allegedly improper remark in light of all the evidence presented against the defendant as well as within the full context of the entire closing argument. See *People v. Figueroa*, 381 Ill. App. 3d 828, 849 (2008) (citing *People v. Flax*, 255 Ill. App. 3d 103, 109 (1993); *People v. Cisewski*, 118 Ill. 2d 163, 176 (1987)). We further note that the State is entitled to respond to a defendant's closing argument which attacks its case and witnesses, and the defendant cannot claim prejudice when these comments are invited by his own argument. See *Figueroa*, 381 Ill. App. 3d at 849.

¶ 41 With these principles in mind, we turn to examine the arguments set forth by defense counsel in closing. Those statements provided, in pertinent part, as follows:

> "She [the ASA] has taken written statements before. She didn't do it.
>
> * * *
>
> Where is the evidence? Where is the evidence? None was presented in this case. You have a police officer at the police station he has pen and paper.
>
> Reco Holmes can read and write. He never once gave him a blank paper and say sign here. This is what you told us so that you are sure that he actually confessed.

*** Not once did they give them [defendant and Henderson] a piece of paper and a pen and say write down what your confession is so that you are sure that he actually confessed. Never anything.

* * *

Now, I imagine after I'm done talking to you, the prosecutors will come back and talk to you. I imagine they will tell you that well, you don't need a signed statement. You don't know [*sic*] a tape recorded statement. You don't know [*sic*] a videotaped statement. You don't need an undocumented, unsupported statement. Not true. Not true. You need evidence. You need proof to convict an innocent man. Don't believe it when they tell you that."

¶ 42 In rebuttal, the prosecutor argued:

"And then [defense] counsel wants you to say now why isn't there a written statement? Well, now I think Reco and his mom is knowing [*sic*] he is in trouble. You have the police officer come. He has given the statement. He hasn't been let go.

The State's Attorney comes the next morning. He gives another statement still admitting the facts, but saying maybe not his total involvement. He is not going to sign any written statement. He is not going to be videotaped. He knows he is in trouble. And that's what the State's Attorney said.

She asked him if he would sign the statement and he said no. He knew at that time he's been now in the station overnight, over 24 hours, he is not going to be let go. He is not going to sign any written statement and that's what the State's attorney says. And that's the reason why there was no written statement.

There is no conspiracy. There is no hiding any statement in the case. It is Reco.

> Reco stated what happened the first time. Minimized the second. Now if he write [*sic*] it down, he knows he is done. And the State's Attorney offered and he said no. And that's the reason why there was no written statement."

¶ 43 Considering the full context of the closing argument, we cannot say that the prosecutor's comments were in error, particularly where they were invited and even anticipated by defense counsel's argument. See *Figueroa*, 381 Ill. App. 3d at 849. Moreover, a prosecutor may comment on the evidence presented at trial and make reasonable inferences based on the evidence, even if those inferences reflect negatively on the defendant. *Nicholas*, 218 Ill. 2d at 121. Here, the prosecutor's comments were in direct response to defense counsel's arguments and consisted of reasonable inferences made from the evidence presented. Accordingly, we find these comments did not substantially prejudice defendant so as to deny him a fair trial. See *Fountain*, 2016 IL App (1st) 131474, ¶ 82.

¶ 44 The third allegedly improper remark occurred during the State's rebuttal argument when the prosecutor addressed defense counsel's contention that there was no physical evidence, specifically no fingerprint evidence, linking defendant to the robbery. The State observed that the testimony established that there was no evidence that defendant touched the victim's closet or was inside the victim's automobile, and thus, it follows that his fingerprints would not be discovered in those locations. Regarding the suitable fingerprints recovered from the wheel caps the prosecutor argued, "These wheels basically are very expensive wheels that you use in the summertime. You got the wheel. You got the chrome. And then you got the caps that put on the chrome. Well, it is safe to say as an argument that if you are carrying the wheel, are you going to be touching those little caps in there?" Defense counsel then objected, asserting that the stipulation did not support the prosecutor's argument. In response the trial court instructed the

jury, "Ladies and gentlemen, you will have a copy of the stipulation. Remember what the lawyers says [*sic*] is not evidence and you will have a copy of the stipulation." The prosecutor then continued his argument stating, "When you are carrying the wheel, you are carrying the wheel from the outside or from the rims. You are not touching the caps."

¶ 45 Defendant asserts that the prosecutor's statement denied him a fair trial as during this line of argument the prosecutor "offered up his own argument based on facts not in evidence."

¶ 46 During rebuttal, prosecutors are entitled to respond to comments made by the defendant " 'which clearly invite a response.' " *People v. Ramos*, 396 Ill. App. 3d 869, 875 (2009) (quoting *People v. Kliner*, 185 Ill. 2d 81, 154 (1998)). The record establishes that the prosecutor's argument was invited by defense counsel's remarks during closing argument. Defense counsel argued that there was "absolutely" no fingerprint or DNA evidence and that the "Forensic Scientist told you [the jury] by stipulation *** that Reco Holmes didn't commit this crime. That like [*sic*] Reco Holmes wasn't in Mr. Lewis' apartment. That Reco Holmes wasn't in Mr. Lewis' car. How did she do that? Science. Science. She is a scientist." Thus, the prosecutor's argument minimizing the importance of the lack of physical evidence was invited by the defense.

¶ 47 In addition, defendant objected to this line of argument and the jury was immediately instructed that what the lawyers argue is not evidence. Thus, any alleged errors were mitigated when the trial court advised the jury that comments made during closing arguments are not evidence. See *People v. Desantiago*, 365 Ill. App. 3d 855, 868 (2006). Moreover, the trial court further reminded the jurors that they would be provided with the stipulation during deliberations which also assisted in curing any error that could have been imparted by the prosecutor's remarks.

¶ 48 After reviewing these comments in their proper context, we cannot agree with

defendant's contention that the prosecutor engaged in prejudicial misconduct such that defendant was deprived of a fair trial. Any alleged errors were mitigated when the trial court both advised the jury that comments made during closing arguments are not evidence and when the trial court sustained defendant's objections. See *People v. Hampton*, 387 Ill. App. 3d 206, 222-23 (2008). Since the trial court properly sustained objections to one of these comments and instructed the jury that the closing arguments are not evidence, and in light of the evidence presented, we do not believe that the jury would have reached a different verdict had these comments not been made. See *id.*

¶ 49 Automatic Transfer Provision

¶ 50 In his opening brief, defendant asserted that section 5-130 of the Act (705 ILCS 405/5-130 (West 2010)), which required him to be tried as an adult because the State charged him with armed robbery committed with a firearm, violated the Eighth Amendment, the proportionate penalties clause of the Illinois Constitution, and his due process rights. Since defendant filed his opening brief and while this matter was pending on appeal, the Juvenile Transfer Act was amended effective January 1, 2016, pursuant to Public Act 99-258. Under the amendment, certain offenses were no longer considered to be transferable offenses, including armed robbery committed with a firearm. See 705 ILCS 405/5-103(1)(a) (West 2016). Accordingly, defendant now argues in the alternative that because armed robbery committed with a firearm is no longer a transferable offense, and the State did not file a motion for him to be sentenced as an adult, the cause must be remanded for defendant to be sentenced as a juvenile. In response, the State asserts that Public Act 99-258 is intended only to be applied prospectively as it includes a delayed implementation clause. Defendant disagrees and maintains that the amendment applies to cases pending on appeal and, in any event, the amendment is procedural in nature and thus

should be applied retroactively.

¶ 51 We first address the argument defendant set forth in his supplemental brief because, if the amendment to section 5-130 is applicable to him, then he was not eligible for an automatic transfer and we would not need to address the constitutionality of section 5-130 prior to the amendment. See *People v. Scott*, 2016 IL App (1st) 141456, ¶ 37 (citing *People v. White*, 2011 IL 109689, ¶ 148).

¶ 52 In pertinent part, the most current version of the statute provides:

> "The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 16 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, or (iii) aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05 where the minor personally discharged a firearm as defined in Section 2-15.5 of the Criminal Code of 1961 or the Criminal Code of 2012.
>
> These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State." 705 ILC 405/5-130(1)(a) (West 2016).

Public Act 99-258 thus amended section 5-130 by removing certain offenses from the list of offenses for which a juvenile must be automatically tried in adult court. See *id.* Armed robbery committed with a firearm was one of those offenses. See *id.* At the time of defendant's prosecution, however, section 5-130 required that all juveniles 15 years of age and older be tried as adults when they were charged with armed robbery committed with a firearm. 705 ILCS 405/5-130(1)(a) (West 2010).

¶ 53 Defendant maintains that Public Act 99-258 applies retroactively to this case as it was pending on appeal to this court when the act passed. Defendant observes that the amendment to

section 5-130 in Public Act 99-258 did not include language limiting it to prospective application and that it is a procedural amendment that is typically applied retroactively to cases pending on appeal.

¶ 54 Our supreme court recently addressed the issue of whether Public Act 99-258's amendment to section 5-130 applied retroactively in *People ex rel. Alvarez v. Howard*, 2016 IL 120729. In *Howard*, the 15 year old defendant was charged with murder. At the time the defendant was charged, section 5-130 required all juveniles 15 years of age and older to be automatically transferred to adult court when they were charged with first-degree murder. *Id.* ¶ 4. While the charges against the defendant were pending in the trial court, the legislature passed Public Act 99-258, which amended section 5-130 to raise the age of automatic transfer from 15 to 16 years old. *Id.* ¶ 5. Defendant requested the trial court conduct a hearing on whether he should be transferred, which the trial court granted. *Id.* ¶¶ 5, 7. The State then sought leave to file an action for a writ of *mandamus* in the Illinois Supreme Court, requesting a writ compelling the trial court to maintain the action in adult court. *Id.* ¶ 10.

¶ 55 Our supreme court determined that the amendments to section 5-130 as indicated in Public Act 99-258 applied retroactively and thus denied the State's request for the writ. *Id.* ¶¶ 28, 35. In determining the amendments' retroactivity, the court acknowledged that it had adopted the United States Supreme Court's *Landgraf* test which required the court to first look to whether the legislature clearly indicated the temporal reach of the amended statute. *Id.* ¶ 28 (citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)). If a temporal reach was indicated, then that expression of intent controls absent a constitutional issue. *Id.* If there was no intent indicated regarding the amendment's temporal reach, then the court would determine whether the application of the statute "would have a retroactive impact." *Id.* Our supreme court

observed, however, that "an Illinois court will never need to go beyond step one of the *Landgraf* test because the legislature has clearly set forth the temporal reach of every amended statute" as stated in section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2014)). *Id.* ¶ 20. The *Howard* court explained that section 4 has been interpreted to mean that "procedural changes to statutes will be applied retroactively, while substantive changes are prospective only." *Id.*

¶ 56 The *Howard* court then applied section 4 of the Statute on Statutes to the amendments to section 5-130 of the Act. *Id.* ¶¶ 21, 28. The court concluded that "nothing in the text of the amendment itself indicates the statute's temporal reach," and further observed that the amendment did not contain a savings clause despite other portions of Public Act 99-258 containing such clauses. *Id.* ¶ 21. The court then considered whether the amendments to section 5-130 were procedural or substantive and determined, based in part on *People v. Patterson*, 2014 IL 115102, ¶ 104, that the decision to try a defendant in juvenile or adult court was a procedural one. *Howard*, 2016 IL 120729, ¶ 28. As the amendments were procedural, the default legislative intent in section 4 of the Statute on Statutes applied and the amendments were thus retroactive. *Id.*

¶ 57 *Howard* is dispositive to the issue presented here. The amendment to section 5-130 applies retroactively to defendant. We acknowledge, however, that the specific provision at issue in *Howard* involved the age-threshold increase in Public Act 99-258, where as this case involves Public Act 99-258's removal of armed robbery committed with a firearm from the list of automatic-transfer offenses. We further acknowledge that the procedural posture of this case differs from the procedural posture before the court in *Howard*.

¶ 58 Subsequent to our supreme court's disposition in *Howard*, this court had the opportunity to address these specific differences in *Scott*. There, as in the case at bar, the 16 year old

defendant was charged with armed robbery committed with a firearm and his case was transferred to adult court under the previous iteration of section 5-130. *Scott*, 2016 IL App (1st) 141456, ¶¶ 5-6. While the defendant's appeal was pending, section 5-130 was amended by Public Act 99-258, and no longer required the automatic transfer of a juvenile defendant where he or she was charged with armed robbery committed with a firearm. *Id.* ¶ 36. On appeal, the defendant asserted that the amendment was retroactive and thus applied to his case.

¶ 59 The *Scott* court agreed with the defendant, that the amendment retroactively applied to him, as the defendant's contention was supported by the *Howard* decision. *Id.* ¶¶ 41-44. The *Scott* court further observed that while the *Howard* decision considered the age-threshold amendment, it applied to all of the amendments contained in Public Act 99-258's amendment of section 5-130. *Id.* ¶ 45. In addition, the *Scott* court acknowledged the difference in the procedural posture of the matter before it and that of *Howard* and determined that regardless of the procedural posture, the same retroactivity test would apply and therefore "the fact that defendant's case was pending on direct appeal when Public Act 99-258 was passed does not change the controlling effect of *Howard*." *Id.*

¶ 60 In sum, we find *Howard* and *Scott* are dispositive of the issue presented and hold that the amendment to section 5-130 applies retroactively to defendant. Accordingly, we vacate defendant's sentence and remand the matter to juvenile court to provide the State an opportunity to petition to transfer defendant to adult court for sentencing. See *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 36; *People v. Patterson*, 2016 IL App (1st) 101573-B, ¶ 21. As we have so determined, we need not consider defendant's constitutional arguments regarding section 5-130, but observe that our supreme court considered and rejected similar challenges in *Patterson*. See *Patterson*, 2014 IL 115102, ¶¶ 93, 97-98.

¶ 61 Resentencing

¶ 62 As we have determined that the amendment to section 5-130 is retroactive and have vacated defendant's sentence and remanded the matter to the trial court for resentencing, we need not consider defendant's additional argument that this matter be remanded for resentencing pursuant to the recently enacted Public Act 99-69 (eff. Jan. 1, 2016).

¶ 63 CONCLUSION

¶ 64 The procedural amendment to section 5-130 of the Act applies to cases pending on appeal. We vacate the sentence imposed on defendant and remand to the juvenile court where the State may exercise its discretion to decide whether to file a petition to transfer the case to criminal court for sentencing.

¶ 65 Convictions affirmed; sentence vacated; cause remanded.