2012 IL App (1st) 100681-U

SIXTH DIVISION
August 17, 2012

No. 1-10-0681

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 08 CR 5967
	)	
JAMIE QUEZADA,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 ***Held*:** Defendant's second degree murder conviction is affirmed over defendant's contentions that: (1) the trial court erred in denying defense counsel's proposed jury instruction that defendant did not have a duty to retreat; (2) he was denied a fair trial because the State engaged in prosecutorial misconduct during closing argument; (3) his sentence was excessive; and (4) the automatic transfer provision of the Illinois Juvenile Court Act is unconstitutional.

¶ 2 After a jury trial defendant Jamie Quezada was found guilty of second degree murder and

sentenced to 15 years' imprisonment. Defendant appeals, arguing that: (1) the trial court erred in denying defense counsel's proposed jury instruction that defendant did not have a duty to retreat because the evidence showed he was not the initial aggressor; (2) he was denied a fair trial because the State engaged in prosecutorial misconduct during its closing argument; (3) his sentence was excessive; and (4) the automatic transfer provision of the Illinois Juvenile Court Act of 1987 (the Act) (705 ILCS 405/5-130 (West 2008)) is unconstitutional because it violates federal and state due process. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested on February 29, 2008, in connection with a shooting that took place on the same date near the intersection of Artesian Avenue and 42nd Street in Chicago. As a result of the shooting, Rogelio Calderone was killed. Defendant was charged by grand jury indictment with six counts of first degree murder, two counts of attempt to commit first degree murder and one count of aggravated discharge of a firearm.

¶ 5 At trial, Carlos Gamez testified that about 7:30 a.m. on February 29, 2008, he drove Calderone to Kelly High School. Calderone sat in the passenger seat of Gamez's car. As Gamez drove to school, he stopped at the intersection of Artesian and 42nd Street. There, Gamez saw defendant, defendant's girlfriend Yolanda Ornelas and another person. Gamez knew that defendant was a member of the Satan Disciples street gang. Gamez and Calderone were members of the Two-Six street gang.

¶ 6 At the intersection, Calderone exited Gamez's car and approached defendant. Gamez exited the car after Calderone and followed behind him. As Gamez did so, he saw defendant

point a handgun and fire in their direction. Gamez and Calderone ran back to Gamez's car. As they did so, Gamez heard Calderone say "I'm hit." Gamez pulled Calderone into the front passenger seat of the car and drove him to a fire station near 4200 South Sacramento Avenue. Later that day, Gamez met with members of the Chicago police department and told them that defendant was the shooter. On the same day, Gamez identified defendant from a lineup as the shooter. Gamez also identified Ornelas from a photo array and told detectives she was with defendant at the time of the shooting.

¶ 7 Asahel Cortez testified that he was a member of the Satan Disciples street gang and that he was with defendant at the time of the shooting. Cortez said he called defendant on the morning of the day in question and agreed to meet him near the intersection of Fairfield Avenue and 42nd Street. Cortez told defendant to be careful because rival gang members were in the neighborhood. Cortez met defendant and Ornelas near the intersection of Fairfield and 42nd Street. From there, the group walked to Kelly High School. As the group walked, Cortez saw a car containing Two-Six street gang members drive past them and the occupants of the car display rival gang hand symbols. The group then walked to Claudio Rodriguez's house. Rodriguez was also a member of the Satan Disciples street gang.

¶ 8 At Rodriguez's house, Cortez and Ornelas stayed in the living room while defendant and Rodriguez went to a bedroom inside the house. Rodriguez then asked the group to leave his house. Cortez, defendant and Ornelas left Rodriguez's house and walked toward Cortez's girlfriend's house. As the group walked near the intersection of Artesian and 42nd Street, Cortez saw a car stop in front of them. Cortez said Calderone exited the car and walked toward the

group as if "he was going to do something, like aggressively." Cortez said Calderone did not have a weapon in his hands. As Cortez bent down to pick up a stick, he heard gunshots and saw Calderone run back toward the car. Cortez said he did not see where the shots came from and did not see defendant with a gun.

¶ 9 After the shooting, the group returned to Rodriguez's house. There, Cortez heard defendant tell Rodriguez that the Two-Six "jumped down on him" and that he shot at them. Cortez then went to Kelly High School where he was apprehended by police. Cortez acknowledged that he lied to police and told them that Calderone was armed with a handgun. He also acknowledged at trial that he lied to police and told them that Calderone said "Disciple killer" after he exited the car. Cortez further acknowledged that he testified before the grand jury that when defendant retrieved his gun, Calderone and Gamez ran toward Gamez's car and defendant fired in their direction.

¶ 10 On cross-examination, Cortez said that Two-Six gang members would threaten Satan Disciples gang members in school on a daily basis. He also said he was present when Two-Six gang members threatened defendant. Cortez called defendant on the morning of the shooting because he was concerned about defendant's safety. Cortez said he was scared when Calderone exited the car.

¶ 11 Rodriguez testified that on the morning of the shooting, he was at his house at 4238 South Artesian Avenue. Rodriguez acknowledged that he kept a loaded handgun inside his house and that he had previously told defendant about the gun. At about 8:30 a.m., defendant, Ornelas and Cortez arrived at Rodriguez's house. Ornelas and Cortez stayed in the living room of the house

while defendant accompanied Rodriguez to a bedroom. There, defendant told Rodriguez that Two-Six gang members were in the neighborhood and asked to borrow Rodriguez's handgun. Rodriguez gave the gun to defendant and asked the group to leave.

¶ 12 Rodriguez said that a few minutes after the group left his house, they returned. Defendant told Rodriguez that he shot Calderone because "[Calderone] jumped out on him [and] tried to beat him up." Defendant then gave the gun to Rodriguez and left with Cortez and Ornelas. Rodriguez ultimately gave the gun to police.

¶ 13 On cross-examination, Rodriguez acknowledged that Two Six gang members would call him on the telephone and threaten him. Rodriguez said he procured a gun because he was worried about his safety.

¶ 14 Ornelas testified that she was with defendant and Cortez on the day of the shooting. Ornelas said she walked with defendant and Cortez to Rodriguez's house but did not go inside the house. Cortez and defendant went inside the house. After the group left Rodriguez's house, they walked toward Cortez's girlfriend's house. As they did so, Ornelas saw a car stop at the intersection of Artesian and 42nd Street. Gamez and Calderone exited the car and approached the group "aggressively." Ornelas said she heard someone say "Satan Disciple killer." She said Cortez then told defendant to shoot. Ornelas looked at defendant and heard gunshots. She said she did not see a gun in defendant's hand. Ornelas acknowledged that she told police after the shooting that although she did not see defendant shooting, "you figure [what] someone is doing if their hand is up and you hear gunshots[.]" Ornelas also acknowledged that she lied to police and told them that Cortez was the shooter. She said she lied to police because she had been dating

defendant for four years. She said that she told police that Gamez and Calderone were running back to the car when defendant started shooting. Ornelas said neither Gamez nor Calderone had a weapon at the time of the shooting. She also said that she could not remember if either Gamez or Calderone reached inside their pockets or waistbands before defendant started shooting.

¶ 15 On cross-examination, Ornelas acknowledged that she talked to Detective Gehrke after the shooting and told him that Gamez "walked around the car and acted like he had something in his waist." She also told Detective Gehrke that Calderone reached for his pocket after he exited the car. Ornelas said that she saw Two-Six gang members harass and threaten defendant "all the time."

¶ 16 After the State rested its case-in-chief, the court held a jury instruction conference with the parties. Defense counsel asked that the jury be given Illinois Pattern Jury Instruction 24-25.09X (Illinois Pattern Jury Instructions, Criminal, No. 24-25.09X (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 24-25.09X) (a non-initial aggressor has no duty to retreat)). The State objected on the grounds that this instruction only "contemplates a self-defense mutual combat situation" and that there was no evidence in the record of mutual combat between Calderone and defendant. The court agreed with the State and denied defense counsel's request. The court noted:

> "[t]here is no evidence whatsoever at this juncture that there was any force, that means physical contact or forcible behavior, other than aggressive walking, to substantiate or to indicate the use of this instruction.
>
> It certainly doesn't obviate the self-defense period. I don't think the duty to

retreat is appropriate in this case. There was never any mutual contact."

¶ 17 In defendant's case-in-chief, the parties stipulated that if called, Detective Gehrke of the Chicago police department would testify that he interviewed Gamez in connection with the shooting and that Gamez told him that Calderone did not exit the car before defendant shot him.

¶ 18 Defendant testified that at the time of the shooting, he was 16 years old, a member of the Satan Disciples street gang and enrolled in Kelly High School. The Two-Six street gang was the predominant gang in the school. Defendant said that he was often threatened by Two-Six street gang members, including Calderone, who would say "Satan Disciple killer" to defendant. Defendant also said he was afraid of Calderone because Calderone was bigger than he.

¶ 19 On the date in question, defendant was with Ornelas at the intersection of Fairfield Avenue and 42nd Street. He saw a car drive past them and the occupants of the car "flash" Two-Six gang hand symbols. Defendant and Ornelas ran into a gangway and hid for about five minutes. Cortez arrived near the intersection a few minutes later and the group went to Rodriguez's house. Defendant borrowed a gun from Rodriguez and left the house with Cortez and Ornelas. As the group walked to Cortez's girlfriend's house, defendant saw a car stop at the intersection of Artesian and 42nd Street. Calderone exited the car, said "SD killer" and walked "aggressively" toward the group. Defendant said Calderone's hands were inside the pocket of his hooded sweatshirt as he approached the group. Gamez exited the car after Calderone and also approached defendant. Defendant fired about four shots in the direction of Gamez and Calderone. Defendant said Calderone was about five feet away at the time defendant fired the shots. After the shooting, defendant, Cortez and Ornelas went to Rodriguez's house.

¶ 20 On cross-examination, defendant said that the area around Artesian Avenue and 42nd Street was considered Satan Disciple territory. Defendant acknowledged that Calderone never hit him in school or threatened him with a weapon. Defendant denied that he went to Rodriguez's house to borrow a gun. He said he did not know that Rodriguez owned a gun until Rodriguez offered it to him for protection. Defendant also said that it was not until he fired the fourth shot that Calderone turned and ran toward the car. Defendant acknowledged that he spoke to police on the day of the shooting and did not tell them that he was afraid of Calderone because Calderone repeatedly threatened him. Defendant also acknowledged that he told police he was not armed at the time of the shooting.

¶ 21 Before closing arguments, the court admonished the jurors that "what the lawyers say during these closing arguments is not evidence and should not be considered by you as evidence." The court also admonished the jurors that after they heard the arguments, it would instruct them on the law that applies to the case.

¶ 22 During closing argument, the State argued that defendant should be found guilty of first degree murder. In doing so, the State said defendant "added to the outrageous violence that's on the streets of Chicago" by shooting at Calderone four times. The State recounted the evidence presented against defendant and argued that he failed to show by a preponderance of the evidence that mitigating factors were present to reduce the offense to second degree murder.

¶ 23 Defense counsel argued that defendant was acting in self-defense and that his use of force was justified. In doing so, counsel said:

"[W]hen I say look at these facts, you have to look at them in the light at the time

> they occurred and where they occurred. This wasn't Iowa. [The State] was so right when [they] said that in [their] opening statement. This is Chicago. This is Chicago, and it is a sad commentary, I suppose, on the way high schools are and the way things are now, but why did he have the gun? Because he was being threatened."

Counsel said defendant's actions were justified given that the shooting started after the victim "gets out of the car and comes after [defendant]."

¶ 24 In the alternative, defense counsel argued that even if defendant was not justified in his use of force, the evidence presented established the presence of mitigating factors to reduce the offense to second degree murder. Specifically, counsel argued that at the time of the killing defendant unreasonably believed that he was justified in the use of deadly force and that he acted under a sudden and intense passion resulting from serious provocation by the victim.

¶ 25 In rebuttal, the State told the jury that they "can't consider" defendant's age, appearance and demeanor, only "what he did." The State said that because of defendant's actions, Calderone was "literally reduced *** to a bag of bones in a hole somewhere." Defense counsel's objection to this remark was overruled. The State continued and said "[w]e are in Chicago. I guess that means blame the dead guy. That's the Chicago way." The State then argued that defendant was not acting in self-defense and said:

> "Self-defense to take a human life is force meets force. Someone is beating my brains out, I pull my gun out and shoot to save my life. Someone is beating me with a bat, I do the same thing. We are engaged in mortal combat, I

pull a knife and I stab them."

Defense counsel objected on the grounds that the State's argument misstated the law of self-defense. The court overruled the objection and admonished the jury "Mere arguments, folks. You will receive the law in the form of the instructions." The State continued:

"Are you kidding me? You get to blast away at someone when they get out of a car four times and call it self-defense?

Well, if that's the case, you better build a wall around this city and you better roll up the sidewalks at 6:00 o'clock every night because if you find that this is a justifiable use of force, blasting at someone with a handgun because they get out of a car and speed walk towards you, that's not logical. It is not reasonable, and under the law, that's not what happened here. This isn't a self-defense case, and it is not a second degree case."

¶ 26 The State then argued that defense counsel's claim that defendant was pushed to the brink by the victim's threats was not reasonable. The State said:

"[Defendant] told you that for like two years every day people said [Satan Disciple Killer]. It doesn't mean anything. It doesn't have these ominous overtones they would like you to believe. All it means is that it is a sign of disrespect.

* * *

So what [has the defense] shown was the big difference on February 29th? What reason have you been given to reduce this from first degree murder based on

anything you have heard?

He told you he might have gotten shoved a couple times in school. For example, that is like high school stuff. I got shoved in the locker as some guy passed me in the hallway. It happens every day. He called me some name. He got called names by many dozens, by his count, by many people probably hundreds of times.

So what was the difference on February 29th? Maybe he got fed up with it. Maybe he got angry. Maybe he got frustrated. Maybe he wanted to show off for his girlfriend."

Defense counsel's objection to these remarks was overruled. The State said that after the shooting defendant "goes and gets rid of the gun and walks around like nothing happen[ed]" because: "[h]e knew he was cradled in the bosom of the street gang at 42nd and Artesian. They all have guns, whole bunch of them. Think they are not going to protect their own?" The State then recounted the evidence and why it did not support defendant's argument that he was acting in self-defense.

¶ 27 After being instructed, the jury found defendant guilty of second degree murder. Within 10 days of the verdict, the State filed a petition for defendant to be sentenced as an adult under the Unified Code of Corrections (Code of Corrections) (730 ILCS 5/1-1-1 *et seq.* (West 2008)). In the petition, the State contended that: defendant committed the offense in an aggressive manner; defendant had a history of gang involvement; there were no facilities available to the Juvenile Court for the treatment and rehabilitation of defendant; the security of the public

required sentencing under the Code of Corrections; and defendant possessed a deadly weapon when he committed the offense.

¶ 28 At the hearing on the State's petition, Detective Daniel Stanek testified that defendant was 16 years old when he was arrested. Stanek said defendant was a member of the Satan Disciples street gang and armed with a handgun at the time of the offense. Stanek acknowledged defendant had no previous felony convictions.

¶ 29 Father David Kelly testified on defendant's behalf and detailed the various programs defendant was involved in while he was incarcerated at the Juvenile Detention Center (JDC). Kelly also testified to defendant's good character. The court received numerous documents, including defendant's grade and behavior reports, certificates of achievement and letters of recommendation from Father Kelly and JDC counselors and teachers.

¶ 30 In granting the State's petition and finding that defendant should be sentenced as an adult, the court noted that defendant committed the offense of second degree murder in an "aggressive and premeditated" manner. The court also noted that defendant was a threat to the security of the public because he was a member of a gang, armed himself with a gun and committed a "very violent offense." The court further noted that defendant was almost 19 years old and that the JDC had limited resources. The case then proceeded to a sentencing hearing.

¶ 31 Before the sentencing hearing commenced, the court noted that it would consider defendant's grades and behavior at the JDC during sentencing. At the hearing, aggravating and mitigating factors were presented. In aggravation, the State introduced two citations defendant received at the JDC. One citation was for fighting and the other for possession of contraband.

The State also introduced the victim impact statements of Genesis Garcia Herrera, the victim's sister, and Leticia Rivera, the victim's mother. The State then pointed out that defendant had a supportive family and opportunities in life, but "chose to *** take a human life."

¶ 32 In mitigation, defense counsel discussed the contents of some of the letters written by defendant's teachers and argued that defendant would make the most of a second chance. Counsel also argued that defendant had no prior criminal history and that his conduct was the result of circumstances that were unlikely to reoccur. Defendant then made a statement in allocution. Defendant said that he thinks about the victim and the victim's family every day. He said he was sorry for what happened and asked to be "bless[ed]" with a second chance. Defendant also said he stopped being in a gang and encourages his peers at the JDC to do the same.

¶ 33 In announcing sentence, the court noted that it had reviewed "the presentence investigation [report] in it's entirety" and "the letters submitted by the defense counsel." The court also noted that it had "consider[ed] all the factors in aggravation and mitigation provided by the Illinois Criminal Code *** as well as the arguments of the attorneys and the evidence in the original trial[.]" The court further noted that if it "mentioned certain factors and [did not] mention certain factors, that doesn't mean that [it] didn't consider all of the factors that are relevant in this case because there are quite a few[.]" The court then recounted the facts of the case, including that defendant armed himself with a handgun and shot the victim twice. The court pointed out that the shooting occurred in broad daylight and that at the time of the shooting, defendant should have been in school. The court noted that defendant was raised by a supportive

family and had opportunities other than joining a gang. The court then sentenced defendant to 15 years' imprisonment. After imposing sentence, the court admonished defendant "it's your behavior and the testimony that I heard here today [that] shortened your sentence[.]"

¶ 34 ANALYSIS

¶ 35 On appeal, defendant first contends that the trial court erred when it denied his request that the jury be given IPI Criminal 4th No. 24-25.09X–a non-initial aggressor has no duty to retreat. Defendant claims that he was entitled to this instruction because the evidence showed that the victim was the initial aggressor and that he did not provoke the confrontation.

¶ 36 The State initially responds that defendant has forfeited review of this issue because he failed to raise it in his motion for a new trial. See *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007) ("Generally, a defendant forfeits review of any supposed jury instruction error if he does not object to the instruction or offer an alternative at trial and does not raise the issue in a posttrial motion").

¶ 37 In his reply brief, defendant first claims that he did not forfeit review of this issue because he tendered the jury instruction at trial and the propriety of the jury instruction was fully litigated in the trial court. He maintains that although he did not raise the issue in his motion for a new trial the purpose of the forfeiture rule was satisfied as the trial court was given the opportunity to correct the error. See *People v Anderson*, 407 Ill. App. 3d 662, 667 (2011) (the purpose of the forfeiture rule is to ensure that the trial court is given the opportunity to correct any errors before they are raised on appeal). In the alternative, defendant argues we should review the propriety of the jury instructions for plain error.

¶ 38 While we agree with defendant that the trial court had the opportunity to address this issue, we refuse to carve out an exception to the well-settled forfeiture rule that requires both an objection to the proposed instruction at trial and an inclusion of the issue in a timely filed posttrial motion. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005), and cases cited therein. Accordingly, defendant has waived this issue for review absent plain error.

¶ 39 Under the plain error exception to the waiver rule, a reviewing court may consider a forfeited error when the evidence is closely balanced or the error is so fundamental and of such magnitude that the accused was denied his right to a fair trial. *People v. Harvey*, 211 Ill. 2d 368, 387 (2004). The first step in plain error review however is to determine whether error occurred. *Piatkowski*, 225 Ill. 2d at 565. Here, we believe it did not.

¶ 40 The evidence presented at trial does not support defendant's argument that he was entitled to have the jury instructed with IPI Criminal 4th No. 24-25.09X. The function of jury instructions is to provide the jury with accurate legal principles that apply to the evidence so they may reach a correct conclusion. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). It is appropriate for the trial court to instruct the jury on defense theories supported by the evidence at trial, even if that evidence is only slight. See *People v. Davis*, 213 Ill. 2d 459, 478 (2004) (citing *People v. Everette*, 141 Ill. 2d 147, 156 (1991)). Although slight evidence on a given theory of a case will justify the giving of an instruction, a defendant is not entitled to an instruction based on the merest factual reference or witness's comment. *Everette*, 141 Ill. 2d at 157. Typically, issues concerning jury instructions are reviewed for an abuse of discretion. *People v. Gomez*, 402 Ill. App. 3d 945, 957 (2010). However, we review *de novo* whether jury instructions accurately

conveyed the applicable law. *People v. Parker*, 223 Ill. 2d 494, 501 (2006). In doing so, we determine whether the instructions "taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Parker*, 223 Ill. 2d at 501.

¶ 41 Here, we find no error in the instructions given. At trial, defendant argued that he was justified in killing the victim because he was acting in self-defense. Defendant alternatively argued that, even if he was not justified in his use of force, the evidence presented established the presence of two mitigating factors to reduce the offense to second degree murder: (1) at the time of the killing he unreasonably believed that he was justified in the use of deadly force; and (2) he acted under a sudden and intense passion resulting from serious provocation by the victim. The jury was instructed on the justifiable use of force and second degree murder based on both mitigating factors: unreasonable belief and sudden and intense passion resulting from serious provocation. See IPI Criminal 4th Nos. 24-25.06, 7.06B, 7.05, 7.03 (4th ed. 2000). Defendant does not take issue with these instructions. Rather, he contends that the trial court erred in not also instructing the jury with IPI Criminal 4th No. 24-25.09X.

¶ 42 IPI Criminal 4th No. 24-25.09X provides: "A person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor." No. 24-25.09X (4th ed. 2000). Here, the trial court tendered IPI 24-25.06 to the jury but denied defendant's request to also tender IPI Criminal 4th No. 24-25.09X after finding that the instruction was not "appropriate in this case" because "[t]here was never any mutual contact [sic]." Defendant argues that "the plain language of the instruction says nothing about such a requirement, nor is there any language indicating that it does not apply to a situation

where an aggressor has not yet made physical contact[.]"

¶ 43 Contrary to defendant's argument, the plain language of IPI Criminal 4th No. 24-25.09X clearly contemplates a mutual combat situation. As mentioned, the instruction provides: "A person who has not initially provoked *the use of force against himself* has no duty to attempt to escape the danger before using force against the aggressor" (emphasis added). For guidance, the committee note references *People v. Miller*, 259 Ill. App. 3d 257 (1994) and *People v. Hughes*, 46 Ill. App. 3d 490 (1977). *Miller* and *Hughes* stand for the proposition that a non-initial aggressor instruction, in its form at that time, was only appropriate when the defendant has first been assaulted. In its present form, the instruction now similarly provides that it should be given when the defendant uses force in response to "the use of force against himself." Accordingly, IPI Criminal 4th No. 24-25.09X clearly envisions a situation where a defendant is using force in response to the receipt of force *i.e.* mutual combat. As a result, we cannot say that the trial court erred in finding that this instruction applies only to mutual combat situations.

¶ 44 We likewise cannot say that the trial court erred in finding that there was no evidence presented at trial of mutual combat to entitle defendant to the requested instruction. The record clearly shows there was no use of force against defendant. Per defendant's own testimony he shot the victim from a distance of about five feet as the victim "aggressively" approached him. Defendant's testimony was corroborated by Gamez, Cortez and Ornelas. There was no evidence that the victim made physical contact with defendant, was armed at the time of the shooting or otherwise engaged defendant in an altercation. In light of this evidence, the trial court did not abuse its discretion in refusing to instruct the jury with IPI Criminal 4th No. 24-25.09X.

Because there was no error there can be no plain error to excuse defendant's forfeiture of this issue. *Piatkowski*, 225 Ill. 2d at 565.

¶ 45 Defendant next contends that he was denied his right to a fair trial by the State's improper remarks during closing argument. He claims the State misstated the law of self-defense, mischaracterized the facts, invoked disturbing imagery and made irrelevant societal exhortations. Defendant maintains that the cumulative effect of these comments resulted in substantial prejudice to him and undermined the reliability of his trial. In setting forth this argument, defendant acknowledges that he failed to preserve this issue for review because he did not raise it in his motion for a new trial, but he asserts that this court should review the issue as a matter of plain error.

¶ 46 To preserve an issue for review based on improper closing argument, a defendant must make a timely objection at trial and include the issue in a written posttrial motion. *People v. Wood*, 341 Ill. App. 3d 599, 612 (2003). Here, while defendant objected to some of the now complained-of remarks, he failed to raise them in his motion for a new trial. As a result, he has waived this issue for review absent plain error. However, before determining whether there was plain error to invoke the exception to the waiver rule, we must first determine whether error occurred. *Piatkowski*, 225 Ill. 2d at 565. For the reasons which follow, we find that it did not.

¶ 47 It is well-settled that prosecutors have wide latitude in the content of their closing arguments. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). The prosecutor may comment on the evidence and on any fair and reasonable inferences arising therefrom, even if the suggested inferences reflect negatively on the defendant. *Perry*, 224 Ill. 2d at 347 (citing *People v.*

Nicholas, 218 Ill. 2d 104, 121 (2005)). Additionally, a prosecutor's comments in rebuttal argument will not be deemed improper if they were invited by defense counsel's closing argument. *People v. Averett*, 381 Ill. App. 3d 1001, 1007 (2008). However, a prosecutor may not use closing argument simply to " 'inflame the passions or develop the prejudices of the jury without throwing any light upon the issues.' " *People v. Wheeler*, 226 Ill. 2d 92, 128-29 (2007) (quoting *People v. Halteman*, 10 Ill. 2d 74, 84 (1956)). It is also improper for a prosecutor to utilize closing argument to forge an "us-versus-them" mentality that is inconsistent with the criminal trial principle that a jury fulfills a nonpartisan role, under the presumption that a defendant is innocent until proven guilty. *People v. Johnson*, 208 Ill. 2d 53, 80 (2003).

¶ 48 When reviewing the propriety of the State's closing argument, a reviewing court will consider the argument in its entirety rather than focusing on selected phrases or remarks. *People v. Evans*, 209 Ill. 2d 194, 225 (2004). We will not find reversible error unless the defendant demonstrates that the improper remarks were so prejudicial that justice was denied or that the verdict would have been different had the remarks not been made. *People v. Herrero*, 324 Ill. App. 3d 876, 889 (2001) (Quinn, P.J., specially concurring); *People v. Johnson*, 218 Ill. 2d 125, 141 (2005).

¶ 49 After considering the prosecutor's closing argument in its entirety, we disagree with defendant's contention that it resulted in substantial prejudice to him or undermined the reliability of his trial such that it constituted error. We first note that before closing arguments, the trial court instructed the jury that "what the lawyers say during these closing arguments is not evidence and should not considered by you as evidence." The court also told the jury that it

would instruct them on the law that applied to the case after closing arguments. See *Nicholas*, 218 Ill. 2d at 122-23 (reference to the defendant as "pure evil" did not require new trial where the comment was not repeated and where the trial court preemptively cautioned the jury to disregard argument not based on the evidence); *People v. Johnson*, 119 Ill. 2d 119, 139-40 (1987) (the State's description of the defendant as an "animal" who "butchered" four people did not warrant reversal where the trial court had specifically instructed the jury to disregard any statements made during closing arguments that were not based on the evidence).

¶ 50 Defendant first argues that the State misstated the law of self-defense when it told the jury in rebuttal that "self defense to take a human life is force meets force. Someone is beating my brains out, I pull my gun out and shoot to save my life." Contrary to defendant's argument, at no point did the State indicate that it was giving a legal definition of self-defense to the jury. Rather, by providing examples to the jury of when the use of deadly force would be justified, the State was responding to defense counsel's closing argument that defendant was acting in self-defense. See *Averett*, 381 Ill. App. 3d at 1007 (a prosecutor's comments in rebuttal argument will not be deemed improper if they were invited by defense counsel's closing argument). This aside, the jury was properly instructed on the law of self-defense, thereby curing any potential error that may have resulted from this remark. *People v. Hampton*, 387 Ill. App. 3d 206, 221 (2008) (citing *People v. Simms*, 192 Ill. 2d 348, 396-97 (2000)).

¶ 51 We find the same result holds true for defendant's contention that the State misled the jury by telling them that they could not consider defendant's age, appearance or demeanor, only "what he did." We note that during closing argument defense counsel repeatedly characterized

defendant as a "16-year-old child," a "young boy" and "this boy." The thrust of counsel's argument was obviously to gain the sympathy of the jury for his young client. The State was free to respond to these comments and redirect the jury's attention from defendant's appearance to the facts of the case. See *People v. Jackson*, 391 Ill. App. 3d 11, 44 (2009) ("[c]ommenting on a defendant's appearance during closing argument is implicitly recognized as falling within the bounds of legitimate argument"); *People v. Byron*, 164 Ill. 2d 279, 296-97 (1995) (comment made during closing argument that the defendant grew a beard, put on glasses and "[l]ooks like the county jail librarian because that's not what a murder is suppose[d] to look like" did not substantially prejudice the defendant warranting reversal).

¶ 52 In addition, at the end of closing arguments, the jury received its instructions, including IPI Criminal 4th No. 1.02, which provides:

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.
>
> You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness." IPI Criminal 4th No. 1.02 (4th ed. 2000).

A cornerstone of our jury system is the ability of a properly instructed jury to follow instructions

on the law. *People v. Sutton*, 353 Ill. App. 3d 487, 505 (2004). Jurors are presumed to follow the instructions given by the trial court. *Sutton*, 353 Ill. App. 3d at 505. We see no reason to depart from that presumption here.

¶ 53 Defendant next argues that in addition to misstating the law, the State also manufactured facts. Specifically, he claims that there was no evidence to support the State's rebuttal argument that defendant "got fed up" with the victim's threats, "got angry," "got frustrated" or "[m]aybe he wanted to show off for his girlfriend." Defendant also claims the record does not support the State's comments that after the shooting he "walk[ed] around like nothing happen[ed]" and was "cradled in the bosom of the street gang[.]" We believe these remarks were proper given that they were invited by defense counsel's closing argument that defendant was continuously threatened in school, scared of the victim and obtained the gun for protection. *Averett*, 381 Ill. App. 3d at 1007. The State may comment on the merits, likelihood and strength of the defendant's case. See *People v. Hooper*, 133 Ill. 2d 469, 489 (1989). In addition, the State may comment on the evidence and any fair and reasonable inferences arising therefrom, even if the inferences reflect negatively on the defendant. *Perry*, 224 Ill. 2d at 347.

¶ 54 Defendant further argues that the State's comment that defendant reduced the victim to a "bag of bones in a hole somewhere" was calculated to inflame the passions and prejudices of the jury without shedding light on the issue in the case. The State may make unfavorable comments about the defendant and denounce his conduct. *Sutton*, 353 Ill. App. 3d 504. However, we agree with defendant that this was not an appropriate comment in that it was inflammatory and did not shed light on any issue. Nevertheless, this remark was not so prejudicial that it rose to the level

of reversible error. In *Johnson*, our supreme court noted that calling a defendant an "animal" is improper because the term is inflammatory and prejudicial but nevertheless concluded that it did not warrant reversal because the remark was "isolated" and "not dwelled upon further by the prosecutor." *Johnson*, 119 Ill. 2d at 139-40. Similarly, in this case, the State's description of the victim was isolated and not dwelled upon such that it would amount to reversible error.

¶ 55 Defendant finally argues that the State used its closing argument to merge the prosecutor's position with the jury and the community by asking the jurors not to "blame the dead guy" and condemning the "Chicago way" and "big city" violence. Defendant points to the State's comment that:

> "You get to blast away at someone when they get out of a car four times and call it self-defense?
>
> Well, if that's the case, you better build a wall around this city and you better roll up the sidewalks at 6:00 o'clock every night because if you find that this is a justifiable use of force, blasting at someone with a handgun because they get out of a car and speed walk towards you, that's not logical. It is not reasonable, and under the law, that's not what happened here."

We note that this comment is in direct response to defendant's theory of the case that he was acting in self-defense. As mentioned, the State may comment on the merits, likelihood and strength of the defendant's case. See *Hooper*, 133 Ill. 2d at 489. In addition, the record shows these comments were invited by defense counsel's closing argument that:

> "This wasn't Iowa. *** This is Chicago. This is Chicago, and it is a sad

> commentary, I suppose, on the way high schools are and the way things are now, but why did he have the gun?"

We will not deem these comments improper where they were invited by defense counsel's closing argument. *Averett*, 381 Ill. App. 3d at 1007.

¶ 56 Further, based on the totality of the record, the State's comments taken as a whole were not of such character so as to jeopardize the integrity of the judicial process and deny defendant a fair trial. *Johnson*, 218 Ill 2d at 141. The jury was properly instructed to disregard any arguments that were not based on the evidence; and, thus, even if we were to assume that any of the complained-of remarks were improper, they did not constitute plain error. *People v. Mendez*, 318 Ill. App. 3d 1145, 1152-53 (2001).

¶ 57 Defendant next contends that the trial court abused its discretion when it sentenced him as an adult. He claims that the court did not properly weigh the relevant statutory factors enumerated in section 5-130 of the Act when reaching its decision. 705 ILCS 405/5-130 (West 2008). The State responds that the court was without discretion to sentence defendant as a juvenile and was required to sentence defendant as an adult pursuant to our supreme court's recent decision in *People v. King*, 241 Ill. 2d 374 (2011). We agree with the State that this issue is controlled by the *King* decision and therefore affirm the trial court's decision to sentence defendant as an adult. *People v. Toney*, 2011 IL App (1st) 090933, ¶ 32.

¶ 58 Generally, a trial court's decision to sentence a juvenile as an adult pursuant to the Act is subject to review for an abuse of discretion. *People Vasquez*, 327 Ill. App. 3d 580, 587 (2001). However, where, as here, the Act mandates that the defendant be sentenced as an adult, the trial

court need not hold a hearing and we need not consider whether the court properly exercised its discretion. *Toney*, 2011 IL App (1st) 090933, ¶ 35.

¶ 59 Under section 5-130 of the Act, if the minor was at least 15 years of age at the time of the offense and is charged with first degree murder, such "charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State." 705 ILCS 405/5-130(1)(a) (West 2008). Also, if a minor is convicted of any offense "covered by" section 5-130(1)(a), then that minor shall be directly sentenced as an adult. *Toney*, 2011 Il App (1st) 090933 ¶ 48; *King*, 241 Ill. 2d at 378; 705 ILCS 405/5-130(1)(c)(i) (West 2008). However, if the minor is convicted of an offense "not covered by" section 5-130(1)(a), then that minor must be sentenced under the Act as a juvenile unless the State timely requests a hearing to determine if the minor should be sentenced as an adult. 705 ILCS 405/5-130(1)(c)(ii) (West 2008). At that hearing, the trial court must consider six specific statutory concerns, "among other factors," to determine whether the minor may be sentenced as an adult or a juvenile under the Act. *Toney*, 2011 IL App (1st) 090933, ¶ 38.

¶ 60 In *King*, our supreme court addressed this statutory sentencing framework. In *King*, the minor defendant was 15 years old at the time of the 2002 beating death of the victim, an incident for which the defendant was initially charged with five counts of first degree murder. *King*, 241 Ill. 2d at 376. The defendant entered a negotiated plea to an added charge of attempt to commit murder in exchange for dismissal of the murder charges and a 15-year prison sentence. *King*, 241 Ill. 2d at 376. The trial court entered a judgment pursuant to the plea agreement. *King*, 241 Ill. 2d at 376.

¶ 61 On appeal, the defendant argued that his sentence was void because the State never requested, and the trial court never held, a hearing pursuant to section 5-130(c)(ii) of the Act to determine whether he should be sentenced as an adult. *King*, 241 Ill. 2d at 376-77. Our supreme court ultimately held that "an offense 'covered by' section 5-130(1)(a) includes both charges 'specified in' that section and 'all other charges arising out of the same incident,' that section 5-130(1)(c)(ii) did not require the State to request a hearing to determine whether [the] defendant should be sentenced as an adult, and that he was properly sentenced as an adult without a hearing pursuant to section 5-130(1)(c)(i)." *King*, 241 Ill. 2d at 378.

¶ 62 Here, defendant was properly "prosecuted under the criminal laws of this State" because he was at least 15 years old at the time of the offense and was charged with first degree murder. 705 ILCS 405/5-130(1)(a) (West 2008). However, defendant was ultimately found guilty of second degree murder. Within 10 days of that judgment, the State, acting under the assumption that it was required to seek a hearing to determine if defendant should be sentenced as an adult, filed a petition requesting a hearing on the matter. See *Toney* 2011 IL App (1st) 090933, ¶ 43. The trial court, acting under the same assumption, held a hearing on the matter and granted the State's petition. However, as we explained in *Toney*, the defendant should have been directly sentenced as an adult and was not entitled to a hearing on that issue because his second degree murder conviction was "covered by" section 5-130(1)(a) of the Act. *Toney*, 2011 IL App (1st) 090933, ¶¶ 43-48.

¶ 63 In *Toney*, this court found that a defendant's conviction for second degree murder is a conviction for an offense "covered by" section 5-130(1)(a) of the Act and thus required that the

defendant be directly sentenced as an adult. *Toney*, 2011 IL App (1st) 090933, ¶ 48. In reaching this conclusion, we relied on our supreme court's holding in *King* that an offense " ' "covered by" section 5-130(1)(a) include[s both charges] "specified in" that section as well as those arising out of the same incident.' " *Toney*, 2011 IL App (1st) 090933, ¶ 44 (quoting *King*, 241 Ill. 2d at 386). In *Toney*, we reasoned that although the defendant was convicted of second degree murder and that charge is not specifically listed in section 5-130(1)(a), that offense was nevertheless "covered by" section 5-130(1)(a) because it arose out of the same incident as the first degree murder charges which are covered by that section. *Toney*, 2011 IL App (1st) 090933, ¶ 48.

¶ 64 Here, as in *Toney*, defendant was charged and tried for first degree murder but was convicted of second degree murder. The trier of fact necessarily found that the State proved all of the elements of first degree murder beyond a reasonable doubt, and defendant was found guilty of second degree murder because the trier of fact also found that defendant showed by a preponderance of the evidence the existence of a mitigating circumstance. "Because both the offense for which defendant was charged and the offense for which he was convicted arose out of the exact same incident, we find that defendant was convicted of an offense 'covered by' section 5-130(1)(a) of the [Juvenile Court] Act and should have been directly sentenced as an adult pursuant to section 5-130(1)(c)(i) of the Act." *Toney*, 2011 IL App (1st) 090933, ¶ 48; 705 ILCS 405/5-130(1)(c)(i) (West 2008).

¶ 65 In reaching this conclusion, we reject defendant's argument that *King* is distinguishable from the case at bar because in *King* the defendant was formally charged with both first degree murder and attempt to commit murder, while here defendant was never formally charged with

second degree murder. Defendant claims that he was thus not convicted of an offense "covered by" section 5-130(1)(a).

¶ 66 Contrary to defendant's argument, our supreme court made clear that, for purposes of section 5-130(1)(c)(i) of the Act, " '[o]ffenses "covered by" section 5-130(1)(a) include those "specified in" that section as well as those arising out of the same incident.' " *Toney*, 2011 IL App (1st) 090933, ¶ 51 (quoting, *King*, 241 Ill. 2d at 386). The court in *King* did not limit its holding only to *charges* arising out of the same incident. *Toney*, 2011 IL App (1st) 090933, ¶ 51. In addition, because second degree murder is a lesser mitigated offense of first degree murder the State was not required to separately charge defendant with second degree murder in order to obtain a conviction for that offense. See *Toney*, 2011 IL App (1st) 090933, ¶ 51. Therefore, here, as in *Toney*, "defendant was both charged with an offense (first degree murder) 'covered by' section 5-130(1)(a) and convicted of a lesser mitigated version of that same charged offense (second degree murder), section 5-130(1)(c)(i) of the Act applied, and he was properly sentenced as an adult." *Toney*, 2011 IL App (1st) 090933, ¶ 51.

¶ 67 We briefly note that, even if we did not find that the decisions in *Toney* and *King* controlled in this matter, we would still find that the trial court properly exercised its discretion in sentencing defendant as an adult.

¶ 68 In determining whether to sentence defendant as an adult, the trial court was required to consider a number of statutory factors, including: (a) whether there is evidence that the offense was committed in an aggressive and premeditated manner; (b) the age of the minor; (c) the previous history of the minor; (d) whether there are facilities particularly available to the Juvenile

Court or the Department of Corrections, Juvenile Division, for the treatment and rehabilitation of the minor; (e) whether the best interest of the minor and the security of the public require sentencing under Chapter V of the Unified Code of Corrections; and (f) whether the minor possessed a deadly weapon when committing the offense. See *Vasquez*, 327 Ill. App. 3d at 586; see also 705 ILCS 405/5-130(1)(c)(2) (West 2008). Not all of these statutory factors must be resolved against the minor to justify treating him as an adult. *Vasquez*, 327 Ill. App. 3d at 587. If the record shows the trial court considered all the factors and its determination is not an abuse of discretion, then the ruling will be affirmed on appeal. *Vasquez*, 327 Ill. App. 3d at 587.

¶ 69 Here, the record shows that at the hearing on this issue, the trial court first considered the nature of defendant's offense and noted that it was committed in an "aggressive and premeditated manner." The court then discussed defendant's positive achievements at the JDC but noted that defendant was almost 19 years old and that the JDC had limited resources. The court further noted that although defendant did not have a criminal history, he was a member of a gang, armed himself with a gun and committed a "very violent offense." Based on this, the court found that defendant posed a threat to the security of the public and determined that he should be sentenced as an adult. While each factor does not conclusively weigh in favor of an adult sentence, that is not required. *Vasquez*, 327 Ill. App. 3d at 586-87. Given the record before us and the evidence presented at the trial and at the hearing, we cannot say that the trial court abused its discretion in reaching this conclusion. See *Toney*, 2011 IL App (1st) 090933, ¶ 56.

¶ 70 Defendant next contends that his 15-year sentence was excessive. Defendant does not dispute that his sentence falls within the permissible statutory range for the offense of second-

degree murder. See 720 ILCS 5/9-2 (West 2008); 730 ILCS 5/5-4.5-30(a) (West 2008). Rather, defendant claims the trial court abused its discretion in sentencing him to a 15-year term given his young age, lack of prior criminal history, potential for rehabilitation and the nature of the offense.

¶ 71 It is well settled that the trial court has broad discretion in imposing a sentence and the trial court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court will defer to the trial court's judgment because it had the opportunity to observe the proceedings and was in a superior position to determine the appropriate sentence. *Stacey*, 193 Ill. 2d at 209. Where, as here, the sentence imposed by the trial court falls within the statutory range permissible for the offense of which the defendant is convicted, a reviewing court may disturb that sentence only if the trial court abused its discretion. *Stacey*, 193 Ill. 2d at 209. A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d at 209-10.

¶ 72 Here, we find no abuse of discretion by the trial court in its sentencing determination. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). The record clearly shows the court's consideration of the evidence in mitigation and aggravation, including the evidence contained in the presentence investigation report, defendant's family history, his age, the nature of his offense and his accomplishments at the JDC. The court then sentenced defendant to a term five years below the maximum term prescribed by statute (730 ILCS 5/5-4.5-30(a) (West 2008)). In doing so, the court noted that it was defendant's behavior and the testimony of Father Kelly that

shortened his sentence.

¶ 73 Defendant now essentially asks us to reweigh the factors in mitigation and aggravation and find his sentence was excessive. However, it is not our prerogative to revisit those factors and independently conclude that the sentence is excessive. *People v. Coleman*, 166 Ill. 2d 247, 261-62 (1995); *People v. Burke*, 164 Ill. App. 3d 889, 900-02 (1987). We will not substitute our judgment for that of the trial court merely because we would have weighed the sentencing factors differently. *Toney*, 2011 IL App (1st) 090933, ¶ 59 (citing *Stacey*, 193 Ill. 2d at 209).

¶ 74 Defendant finally contends that the automatic transfer provision of the Act (705 ILCS 405/5-130 (West 2008)) is unconstitutional because it violates federal and state due process. He claims that the statute subjects 15- and 16-year-old juvenile defendants to automatic transfers from juvenile court to adult court without a hearing in violation of the principles enunciated by the United States Supreme Court in *Kent v. United States*, 383 U.S. 541 (1966); *Roper v. Simmons*, 543 U.S. 551 (2005); and *Graham v. Florida*, 130 S. Ct. 2011 (2010).

¶ 75 We note, as pointed out by the State, that our supreme court has rejected essentially the same challenges to the constitutionality of the automatic transfer provision. See *People v. P.H.*, 145 Ill. 2d 209, 229-36 (1991); and *People v. J.S.*, 103 Ill. 2d 395, 403-07 (1984). Defendant asserts that we should not follow *P.H.* and *J.S.* because those cases were decided before *Graham* and *Roper*. However, we have repeatedly rejected this same argument concerning the effect of the decisions in *Graham* and *Roper* on *J.S.* and *P.H.* See *People v. Patterson*, 2012 IL App (1st) 101573, ¶ 25; *People v. Jackson*, 2012 IL App (1st) 100398, ¶¶ 14-24; *People v. Salas*, 2011 IL App (1st) 091880, ¶¶ 54-80; *People v. Sanders*, 2012 IL App (1st) 102040, ¶¶ 33-35. All of

these decisions held that *Graham* and *Roper* did not affect the continuing vitality of *J.S.* and *P.H.* or the constitutionality of the automatic transfer provision of the Act. *Patterson*, 2012 IL App (1st) 101573, ¶ 25. We see no reason to depart from those decisions here and we continue to follow *J.S.* and *P.H.* Accordingly, we reject defendant's challenge to the constitutionality of the Act's automatic transfer provision.

¶ 76 CONCLUSION

¶ 77 For the reasons stated, we affirm the judgment of the trial court.

¶ 78 Affirmed.