FIFTH DIVISION
June 15, 2018

No. 1-15-2178

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 C2 2032101
	)	
KEVIN DAWSON,	)	
	)	Honorable
Defendant-Appellant.	)	Jeffrey L. Warnick,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where (1) the court did not abuse its discretion in finding the officers' testimony admissible nonhearsay, (2) the prosecutor's remarks during rebuttal closing argument were proper, and (3) defendant's challenge to his sentence is moot.

¶ 2 Following a jury trial, defendant Kevin Dawson was convicted of residential burglary (720 ILCS 5/19-3 (West 2010)) and was sentenced to six years in the Illinois Department of Corrections (IDOC) with an additional two years of mandatory supervised release (MSR). On

appeal, defendant contends (1) the trial court abused its discretion when it allowed the State to introduce hearsay statements, (2) the prosecutor made improper remarks during rebuttal closing argument which denied him a fair trial, and (3) his sentence is excessive. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with residential burglary (720 ILCS 5/19-3 (West 2010)). The complaint alleged that defendant knowingly and without authority entered the apartment of the victim, Tara Halliday (Halliday), through the second floor window of her apartment building with the intent to commit a theft.

¶ 5 The matter proceeded to trial and during opening statements, the State argued the evidence would demonstrate that Kamran Abbasi (Abbasi) observed defendant committing the offense and that defendant was subsequently found several blocks from the scene with the proceeds of the burglary. In its opening statements, the State further connected defendant to the offense by indicating his fingerprints were found outside of Halliday's bedroom window. In response, the defense acknowledged that Abbasi observed an individual climbing up the side of Halliday's apartment. The defense argued, however, that Abbasi could not identify the individual as defendant because he did not observe the individual's face and vaguely described him as "a black man with [a] shaved head and wearing a black jacket."

¶ 6 The State then elicited the following evidence. Abbasi testified that he lived on the 8400 block of North St. Louis Avenue in Skokie, Illinois, and was Halliday's neighbor. According to Abbasi, that day he looked out of his window and noticed defendant attempting to enter the second floor window of Halliday's apartment (the apartment). Abbasi called the police and while on the phone he observed that defendant had entered the apartment through the second floor

window. The next time Abbasi noticed defendant he was fleeing down the alley. Shortly thereafter, the police arrived at the scene and he spoke with them regarding what he observed. Abbasi was later escorted by the officers a few blocks away from the scene to where defendant was standing outside of a police vehicle. Abbasi identified defendant to the police as the offender. On cross-examination, Abbasi stated while he may have informed the police that he observed defendant climb up the gutter of the apartment building to reach the second floor window, now at trial he could not recall making that statement.

¶ 7 Sergeant Michael Hartnett (Hartnett) of the Skokie police department testified that he was dispatched to a burglary in progress. Over defense counsel's objection, Hartnett testified that when he arrived at the apartment, an officer informed him that Abbasi had observed defendant climb up the gutter of the apartment building and into a window on the second floor. Hartnett further testified that he called an evidence technician to process the scene for evidence. Hartnett subsequently spoke to Abbasi, who provided him with a description of the individual he observed climb into the second floor window. Hartnett then proceeded to search for the offender and noticed defendant, who matched the description provided by Abbasi, a few blocks away. Hartnett pulled over and spoke to defendant, who stated his name was Albert Dawson and stated his address was that of the apartment building in question. Hartnett then directed an officer to bring Abbasi to his location, where Abbasi identified defendant as the offender. Hartnett subsequently left defendant with Officer Santana-Escobedo[1] (Santana-Escobedo), who had arrived to assist in the matter, and he returned to the scene of the burglary to speak to the first floor resident, Ellroy Dawson (Ellroy). Hartnett described the offender to Ellroy, who identified

[1] Santana-Escobedo's first name, and the first names of the officers hereinafter referred to, are not included in the record. The parties did not elicit testimony of the officers' first names, and the first names do not appear in the police reports.

him as his cousin, Kevin Dawson.[2] Ellroy further revealed defendant did not reside with him, but has stayed at his apartment once in a while.

¶ 8 On cross-examination, Hartnett testified that Abbasi related to him that defendant climbed up the gutter. He further testified that Abbasi provided him with a description of defendant, but Abbasi's statement did not include any description of defendant's face, pants, or shoes.

¶ 9 Santana-Escobedo of the Skokie police department testified consistently with Hartnett. She further testified that while she was with defendant, she noticed he was shivering from the cold, so she permitted him to sit in her police vehicle. However, prior to allowing defendant to sit in the vehicle, Santana-Escobedo conducted a safety pat-down, during which time she discovered a women's undergarment in defendant's back pocket. Unaware of the proceeds of the burglary, she returned the item to defendant.

¶ 10 Detective Dewey (Dewey) of the Skokie police department testified he was the evidence technician who processed the scene of the burglary. Over defense counsel's objection, Dewey testified that upon arriving at the apartment, Hartnett informed him a witness had observed an individual climb up the downspout of the apartment building onto the roof of the first floor and into the window of the second floor. Dewey inspected the scene for evidence and found three fingerprints on the exterior surface of the second floor window, which he lifted and forwarded to the Illinois State Police Crime Lab. On cross-examination, Dewey testified he did not process the gutter for fingerprints because the surface of the gutter was grainy and unsuitable for lifting fingerprints.

¶ 11 The State next presented the expert witness testimony of John Onstwedder III, a latent fingerprint analyst assigned to the latent fingerprint unit of the Forensic Science Center in

[2] We observe that Ellroy testified at trial that he is defendant's uncle.

Chicago. He was tasked with comparing the three fingerprints lifted from the second floor window of the apartment with fingerprints collected from defendant. He opined that the fingerprints lifted from the window matched those of defendant.

¶ 12 Halliday testified that on the day of the burglary, she resided on the second floor of the apartment building with her husband, Scott Stringer (Stringer), and their three children. She examined her apartment after being informed that someone had broken in, but nothing appeared to be missing. The police returned several hours after completing their investigation with a pair of women's underwear which Halliday identified as belonging to her. Halliday denied ever granting defendant permission to enter her apartment or bedroom. On cross-examination, Halliday acknowledged that while defendant and Stringer were friends, defendant had never been invited into their apartment. The State then rested its case.

¶ 13 Defendant moved for a mistrial, arguing that the conversation between Abbasi and the officers was inadmissible hearsay which prejudiced defendant by bolstering Abbasi's testimony, especially as to details Abbasi did not specifically testify to. The trial court denied defendant's motion, finding that the testimony of the officers was not presented to prove the statements were true, but rather to explain the officers' course of conduct, and therefore was not hearsay. Moreover, after defense counsel objected, the trial court had admonished the jury of the limited use of the testimony.

¶ 14 Defendant then presented the testimony of Ellroy, defendant's uncle, who stated that he resided on the first floor of the apartment building. Ellroy testified that on the day of the burglary, defendant and Stringer walked up to the second floor, but he did not know if they entered the apartment. He further testified that defendant resided with him and defendant occasionally spent some time with Stringer in the second floor apartment. On cross-examination,

Ellroy testified defendant had a key to his apartment and he observed defendant in his apartment earlier in the day, but did not know where he was at the time of the burglary. He further testified he did not remember his conversation with Hartnett, and denied he informed Hartnett that defendant did not reside with him.

¶ 15 In rebuttal, the State recalled Hartnett who reiterated that on the day of the burglary, Ellroy informed him that defendant was homeless and sometimes stayed with him.

¶ 16 During closing arguments, the State asserted it proved the elements of residential burglary beyond a reasonable doubt where Abbasi observed defendant climb into the apartment, defendant was in possession of the proceeds of the burglary, his fingerprints were discovered on the point of entry, and Halliday did not authorize defendant to enter her apartment. In response, the defense argued defendant was not the individual Abbasi observed enter through the window. The defense further explained that defendant's fingerprints were left on the window after Stringer invited him into the apartment and defendant subsequently opened the window.

¶ 17 In rebuttal, the State argued that defendant's theory of the case presented two implausible possibilities. First, Abbasi may have observed an individual with the same appearance and fingerprints as defendant. Alternatively, a different individual with different fingerprints entered through the window, but only defendant's fingerprints, left during a prior invited visit, were preserved and discovered on the window. The State further argued its evidence was independently corroborated, whereas defendant's story, that Stringer invited him into the apartment, was not corroborated because Stringer did not testify. Defense counsel objected to both of the State's arguments, contending the State improperly misstated the defense as a theory that two individuals had identical fingerprints. Defendant further argued the State improperly shifted the burden of proof to him by suggesting that he was required to subpoena Stringer in

order to prove his innocence. The trial court overruled both objections. After jury instructions and deliberations, the jury found defendant guilty of residential burglary. Defendant filed a posttrial motion, which was denied, and the trial court sentenced defendant to six years in the IDOC, with two years of MSR. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant raises three contentions on appeal: (1) the trial court erred by allowing the jury to consider hearsay evidence, through the testimony of Hartnett and Dewey, that Abbasi observed defendant climb up a gutter to reach the second floor window; (2) the prosecutor made improper remarks during closing arguments which denied him a fair trial; and (3) his sentence is excessive. We address each in turn.

¶ 20 A. Forfeiture of Defendant's Hearsay Challenge

¶ 21 Prior to addressing the merits of defendant's claims, we address the State's argument that defendant forfeited review of his challenge to the hearsay testimony in two ways. First, defendant failed to raise his challenge to Hartnett's testimony in his posttrial motion. Second, defendant invited admission of this testimony when he elicited the same evidence from Abbasi.

¶ 22 While defendant did not properly preserve his challenge to Hartnett's testimony, we nonetheless will review his contention under the plain-error doctrine. See *People v. Scott*, 401 Ill. App. 3d 585, 599 (2010). Illinois Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error rule "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) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). Defendant carries the burden of persuasion under both prongs of the plain-error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). However, "[t]he first step of plain-error review is to determine whether any error occurred." *Id.* Therefore, we will review the issue to determine if there was any error before considering it under the plain-error doctrine. For the reasons set forth in more detail below, we find no error here where Hartnett's statement was not elicited for its truth.

¶ 23 We further observe that in *People v. Holmes*, 2016 IL App (1st) 132357, ¶¶ 90-91, this court held that when defense counsel elicited a prior consistent statement regarding the defendant's mental illness from the defendant's psychiatrist during cross-examination, the defendant forfeited contesting its admission on appeal. The court noted that "[w]hen a party procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, that party cannot contest the admission on appeal." *Id*. In this case defense counsel introduced the complained-of details during his opening statement and while cross-examining Abbasi. Defendant cannot now claim he was prejudiced by the same testimony he procured. See *id*; *People v. Taylor*, 357 Ill. App. 3d 220, 227 (2005). Nevertheless, we will review defendant's hearsay challenge.

¶ 24 B. Hearsay Testimony

¶ 25 Defendant first argues the trial court abused its discretion by allowing the State to elicit hearsay testimony through Hartnett and Dewey, over defendant's objection, that Abbasi had observed defendant climb up the gutter of the apartment building. Defendant contends the

testimony constitutes hearsay within hearsay because both Hartnett and Dewey testified to statements made to them by other officers regarding their conversations with Abbasi. Defendant further argues this hearsay was highly prejudicial because (1) the State failed to elicit such testimony from Abbasi, and (2) this evidence was directly related to the essence of the dispute, namely the element of entering the apartment without authority. In response, the State contends the statements testified to were not hearsay because they were not offered for their truth, but rather to explain the course of the officers' conduct during the investigation.

¶ 26 Generally, evidentiary rulings are within the trial court's sound discretion and will not be disturbed on review unless the trial court has abused that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Defendant, however, contends the hearsay question in this case should be reviewed *de novo*. Defendant relies on *People v. Risper*, 2015 IL App (1st) 130993, ¶¶ 31-34, which states that *de novo* review is appropriate if the trial court applied an erroneous rule of law and the factors that would typically warrant a deferential standard are not present. The court in *Risper* indicated that the factors typically warranting a deferential standard include whether the credibility of the witnesses is at issue, whether any relevant facts are in dispute, or whether the trial court's ruling was related to a balancing of probity versus prejudice. *Id*. ¶ 33.

¶ 27 In this case, whether the trial court properly admitted the hearsay testimony is not a pure issue of law, and all three factors described in *Risper* are present. See *id*. The fact that Abbasi observed defendant climb the gutter of the apartment building is in dispute, which places Abbasi's credibility at issue. Furthermore, defendant argues the repeated hearsay is more prejudicial than probative. Thus, we review the admission of the testimony for an abuse of discretion. See *id*. A trial court abuses its discretion only when its decision is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the view adopted by the trial court.

Caffey, 205 Ill. 2d at 89. For the reasons that follow, we find that the trial court did not abuse its discretion because the complained-of testimony was properly admitted to explain the course of the officer's investigation and therefore not hearsay. See *People v. Jones*, 153 Ill. 2d 155, 159-61 (1992); *People v. Peoples*, 377 Ill. App. 3d 978, 984 (2007).

¶ 28 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Oct. 15, 2015). It is well settled that statements offered for reasons other than their truth are not considered hearsay. *People v. Cox*, 377 Ill. App. 3d 690, 701-02 (2007). Officers, for example, may testify about certain conversations, including the substance of those conversations, to establish the course of their investigation rather than to prove the truth of the matter asserted, so long as the testimony does not go to the very essence of the dispute. *Jones*, 153 Ill. 2d at 159-61.

¶ 29 Defendant asserts the testimony of Hartnett and Dewey was hearsay within hearsay. Hartnett testified that when he first arrived at the scene another officer informed him "that the witness had told him that he had seen a subject climb up the east side of the building up the gutter onto the roof." Dewey similarly testified that Hartnett "informed me that a witness had explained to him that [he] had seen an individual climbing up a downspout."

¶ 30 We find *People v. Temple*, 2014 IL App (1st) 111653, ¶¶ 58, 60, and *Jones*, to be instructive. In *Temple*, an officer testified that after a witness reported a shooting, he received a description of the offender's vehicle and the name of the suspect from a police radio dispatch. *Temple*, 2014 IL App (1st) 111653, ¶¶ 2, 14, 60. The officer further testified that he obtained the last known whereabouts of the suspect, proceeded to that location, and observed a vehicle matching the description. *Id*. ¶ 60. The reviewing court found the testimony was properly admitted to describe police procedure because it was necessary to explain why the officer

proceeded to the specific location and was able to identify the vehicle involved in the shooting. *Id*. In *Jones*, officers testified they were investigating an armed robbery wherein the defendant stole the victim's vehicle. *Jones*, 153 Ill. 2d at 158-59. The officers further testified that they later responded to an automobile stripping where they observed the defendant and an accomplice stripping the victim's vehicle. *Id*. at 159. While not specifically testifying that the accomplice provided the officers with the defendant's name, the officers' testimony made clear that the accomplice was the source of this information. *Id*. The reviewing court found the officers' testimony about their conversation with the accomplice was not hearsay because it was not introduced to prove the defendant's guilt in the underlying case, but rather to demonstrate to the jury how the officers came to suspect the defendant in the armed robbery. *Id*. at 160-61.

¶ 31 Similarly, in this case, the State did not introduce the testimony of Hartnett or Dewey to establish defendant used the gutter in the burglary. See *Temple*, 2014 IL App (1st) 111653, ¶ 60; *Jones*, 153 Ill. 2d at 159-61. Instead, their testimony was utilized to demonstrate to the jury how Dewey knew to examine the gutter for evidence which was necessary for his explanation that the surface of the gutter was unsuitable for lifting fingerprints. See *Temple*, 2014 IL App (1st) 111653, ¶¶ 58, 60; *People v. Cameron*, 189 Ill. App. 3d 998, 1004 (1989) (stating that in criminal cases, an investigating officer " 'should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct.' " (quoting McCormick's Handbook of the Law of Evidence § 249, 734 (Edward W. Cleary ed., 3d ed. 1984))).

¶ 32 We acknowledge that defendant argues the admission of Abbasi's statement through Hartnett's and Dewey's testimony of their conversations with the officers who spoke to Abbasi constitutes hearsay within hearsay. Hearsay included within hearsay is not excluded under the

hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. Ill. R. Evid. 805 (eff. Jan. 1, 2011). Here, the evidence submitted by the trial court is consistent with Rule 805 because the statements made by Abbasi to the police officers and those officers' statements to Hartnett and Dewey were admitted to explain the course of the officers' investigation and Dewey's collection of fingerprint evidence. See *Temple*, 2014 IL App (1st) 111653, ¶¶ 58, 60. The statements were not introduced to establish defendant climbed the gutter, and therefore were not hearsay. See Ill. R. Evid. 805 (eff. Jan 1, 2011); *Temple*, 2014 IL App (1st) 111653, ¶¶ 58, 60.

¶ 33 Furthermore, we cannot say that the testimony provided by the State was effectively being offered for its truth by relating directly to the essence of the dispute—that defendant entered the apartment without authority. The cases relied on by defendant are inapposite. In *People v. Cordero*, 244 Ill. App. 3d 390, 392 (1993), the court found that a police dispatch stating a vehicle was reported stolen was inadmissible hearsay because it was essential to the charge of unlawful possession of a stolen vehicle and was thus offered for its truth. In *People v. Warlick*, 302 Ill. App. 3d 595, 600 (1998), the court found an officer's testimony that he received a "burglary in progress" call was offered for its truth and inadmissible hearsay because it was essential to proving that the burglary actually occurred, which was a matter in controversy at trial.

¶ 34 Here, in contrast, the testimony that defendant climbed the gutter is not essential to proving residential burglary, as it is merely one of many factors which may contribute to proving unauthorized entry. See *id*; *Cordero*, 244 Ill. App. 3d at 392. If offered for its truth, the testimony would only demonstrate that defendant was trespassing or attempting to access his uncle's roof. The testimony is particularly nonessential and any alleged error is harmless in light of the

overwhelming evidence of defendant's guilt, including Abbasi's observation of defendant attempting to enter the second floor window and his later identification of defendant, Hartnett's testimony that defendant provided a false name, Halliday's testimony that she did not authorize defendant to enter her apartment, defendant being in possession of the proceeds of the burglary, and defendant's fingerprints on the exterior of the second floor window. See *People v. Pineda*, 349 Ill. App. 3d 815, 821-22 (2004). Additionally, the State declined to comment on the testimony during closing arguments or rebuttal. See *People v. Irwin*, 2017 IL App (1st) 150054, ¶ 33 (noting that repeating the complained-of testimony was not reversible error in part because the State did not refer to the statement during closing or rebuttal argument). The testimony is therefore not related to the essence of the dispute such that it is effectively offered for its truth. See *Jones*, 153 Ill. 2d at 159-60; *Warlick*, 302 Ill. App. 3d at 600. Moreover, following Hartnett's testimony, the trial court immediately admonished the jury that the statement was not offered to prove the truth of the matter asserted but rather "to establish the course of conduct [of] the police thereafter." We must presume the jury followed the court's limiting instruction. *People v. Simms*, 143 Ill. 2d 154, 174 (1991).[3] Finally, it is evident the jury did not consider the testimony for its truth because during deliberations the jury asked the court to "clarify what the witness saw the defendant use to climb up to the roof." We therefore conclude the trial court did not abuse its discretion when it allowed these portions of the officers' testimony. See Ill. R. Evid. 801(c) (eff. Oct. 15, 2015); *Jones*, 153 Ill. 2d at 159-61; *Temple*, 2014 IL App (1st) 111653, ¶¶ 58, 60.

[3] Defendant maintains the trial court erred in not providing a limiting instruction after overruling the objection to Dewey's testimony and requests plain-error review. Defendant, however, failed to present an argument under either prong of the plain-error rule, thereby forfeiting review under the doctrine. See *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010); *People v. Nieves*, 192 Ill. 2d 487, 503 (2000).

¶ 35 C. Prosecutorial Misconduct

¶ 36 Defendant argues the prosecutor engaged in reversible misconduct by (1) misstating his theory of defense, and (2) shifting the burden of proof to him.

¶ 37 Initially, both parties acknowledge an apparent conflict in our supreme court's rulings regarding our standard of review. Compare *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) with *Caffey*, 205 Ill. 2d at 89, and *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (reviewing a prosecutor's comments for an abuse of discretion). We observe that 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 as our conclusion is the same under either standard.

¶ 38 A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Closing arguments must be reviewed in their entirety, and the challenged remarks must be viewed in context by examining the closing arguments of both the State and the defendant. *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008). Improper closing arguments constitute reversible error only when "it is impossible to determine whether the jury's verdict was caused by the comments or the evidence." *Caffey*, 205 Ill. 2d at 131.

¶ 39 Defendant first contends the prosecutor engaged in misconduct by improperly misstating his theory of defense. Specifically, defendant asserts his theory of defense was that he was not the individual Abbasi observed attempting to enter the second floor window, and his fingerprints

were left on the window during a previous invited visit to the apartment. Defendant, however, argues that in rebuttal closing the prosecutor distorted his theory to have the jury believe he was asserting that both he and the actual offender had identical fingerprints. According to defendant, the prosecutor's comments improperly accused defense counsel of attempting to create reasonable doubt by confusion, misrepresentation or deception. Defendant further argues the remarks were personal attacks on defense counsel, and had the comments not been made, the jury may have reached a different verdict. In response, the State contends the prosecutor's comments were in response to defendant's argument that the individual Abbasi observed attempting to enter the apartment was not defendant. The remarks were therefore proper comments on the merits, likelihood, and strength of defendant's theory of defense.

¶ 40 Defendant acknowledges that he has forfeited this issue by failing to include it in his posttrial motion, but requests that we review the issue for plain error. As previously stated, the first step in plain-error review is to determine whether any error occurred. *Lewis*, 234 Ill. 2d at 43. For the reasons set forth below, we find the prosecutor's comments were proper.

¶ 41 Generally, it is improper for a prosecutor to personally attack defense counsel (*People v. Beringer*, 151 Ill. App. 3d 558, 562-64 (1987)) or accuse defense counsel of attempting to create reasonable doubt by confusion, misrepresentation, or deception (*People v. Johnson*, 208 Ill. 2d 53, 82 (2003)). A prosecutor may, however, respond to comments by defense counsel which clearly invite a response (*People v. Giraud*, 2011 IL App (1st) 091261, ¶ 43; *Gonzalez*, 388 Ill. App. 3d at 590), comment on the persuasiveness of the defendant's theory of the case and the evidence presented to support that theory (*People v. Herrera*, 257 Ill. App. 3d 602, 619 (1994)), or comment on the merit, likelihood, and strength of the defendant's case (*id*.).

¶ 42 In *Herrera*, for example, the prosecutor stated during rebuttal that defense counsel

discussed the Bill of Rights, the Constitution, and Judeo-Christian beliefs because the law and the facts were not on his side and "when you have nothing, you just argue." *Id*. at 613. The prosecutor further asserted that defense counsel was attempting to divert the jury's attention from the evidence. *Id*. The reviewing court upheld the prosecutor's statements over defendant's argument that the comments disparaged his attorney. *Id*. at 618-19. The court found that the remarks were proper comments on the persuasiveness, merit, likelihood, and strength of the defendant's theory of the case. *Id*. at 619. The court further held the comments were not meant as an attack on the ethics or tactics of defense counsel, and therefore did not result in substantial prejudice or constitute a material factor in defendant's conviction. *Id*.

¶ 43 In this case, defense counsel argued during closing that defendant was not the individual Abbasi observed attempting to enter the apartment and emphasized that Abbasi did not see defendant's face or identify him in court. Defense counsel further argued that defendant's fingerprints were left on the exterior of the second floor window during a previous invited visit. The prosecutor responded with the following statements during rebuttal:

> "If we were to go along with counsel's argument, someone who is dressed exactly like the defendant, a male, black, with a bald head, went through that second-floor window, a person dressed just like him, at the very moment that Mr. Abbasi is looking out his living room window at [Halliday's] house. And not only that, either for the first time in history known to analysts and experts, there's [*sic*] fingerprints belonging–the same fingerprints belonging to a completely different guy on the outside of the very same second-floor window."

Defense counsel then objected to the characterization of the defense, the trial court overruled the objection, and the prosecutor continued her "either/or" argument:

> "There's another person with the same fingerprints as this defendant who dressed the same, looked the same on that same second-floor window that was entered to go into Ms. Halliday's apartment, her second-floor bedroom, or, or that that [*sic*] very window that that person went to enter had the defendant's fingerprints from some other time because he's so unlucky, and that those fingerprints lasted on that window and were preserved in such a fashion that an evidence technician only collected fingerprints belonging to the defendant, but not the real bad guy."

¶ 44 We conclude these remarks were not improper. In this case, as in *Herrera*, the statements by the prosecutor did not actually attack the integrity of defense counsel. See *id*. at 613, 619. Viewed in context, it is evident that the prosecutor's "either/or" comparison was invited by defense counsel's argument that the individual Abbasi observed was not defendant. See *People v. Ramos*, 396 Ill. App. 3d 869, 875-77 (2009); *Gonzalez*, 388 Ill. App. 3d at 590-91. The prosecutor's argument challenged the plausibility that defendant's fingerprints, which were allegedly left at some prior time, survived to the exclusion of the true offender's fingerprints. The remarks were therefore proper comments on the strength of defendant's theory of his defense and did not result in prejudice or deprive defendant of a fair trial. See *Herrera*, 257 Ill. App. 3d at 619; *People v. Hooper*, 133 Ill. 2d 469, 488-89 (1989) (upholding the prosecutor's comment that defendant's story that he was coerced was a "ridiculous, absurd, obscene, defense," and stating that the remarks were a comment on the strength of the defense).

¶ 45 Defendant next contends the prosecutor improperly shifted the burden of proof to him when she inquired during rebuttal closing argument, "where is [Stringer]? Mr. Ellroy Dawson was subpoenaed to be in court. Where was [Stringer]?" According to defendant, the comments suggested to the jury that he must present exculpatory evidence of his innocence to be acquitted.

In response, the State argues that the prosecutor's comments were merely suggestive that the State's evidence was independently corroborated, contrary to the evidence provided by defendant. The State further contends that where Stringer did not testify at trial, the comments were in response to defendant's argument that Stringer had invited him into the apartment on a prior occasion and he left his fingerprints on the window during this invited visit.

¶ 46 Defendant relies on *People v. Beasley*, 384 Ill. App. 3d 1039, 1048 (2008), to support his argument that the prosecutor's comment on Stringer's absence at the trial shifted the burden of proof to him. In *Beasley*, the prosecutor improperly shifted the burden of proof by arguing it was "unconscionable" for defendant not to submit certain evidence for fingerprint analysis, suggesting the analysis would prove his innocence. *Id*. The court found that the prosecutor's comments implied the defendant had an obligation to present evidence to create reasonable doubt of his guilt. *Id*.

¶ 47 The State, in contrast, relies on *People v. Depner*, 89 Ill. App. 3d 689, 693-94 (1980), and *People v. Sayles*, 130 Ill. App. 3d 882, 890-91 (1985), to support the proposition that the State may properly comment on the defendant's failure to call an alibi witness. In this case, however, Stringer was not an alibi witness in the strict sense. An alibi witness testifies that a defendant was somewhere other than the scene of the offense at the time the offense was committed. *People v. Mullins*, 242 Ill. 2d 1, 24 n.6 (2011) (quoting *Black's Law Dictionary* 84 (9th ed. 2009)). Here, defendant's theory of the case did not include the assertion that he had been invited to the apartment, or that he was with Stringer, at the time of the offense. Instead, defendant asserts that his fingerprints were left on the window on some prior occasion when he was an invited guest. Therefore, assuming *arguendo* that Stringer had testified for defendant, he at most could have confirmed that he had invited defendant into the apartment on at least one

occasion prior to the burglary. As Stringer would not have testified to defendant's whereabouts during the burglary, the *Depner* and *Sayles* cases are inapposite. See *id*.

¶ 48 Regardless, the prosecutor's comments were not improper. See *Giraud*, 2011 IL App (1st) 091261, ¶¶ 43-47; *People v. Kliner*, 185 Ill. 2d 81, 153 (1998). Generally, a defendant may not challenge an alleged error where the defendant invited or procured the same. See *People v. Hanson*, 238 Ill. 2d 74, 115-17 (2010) (the defendant forfeited his challenge to the circuit court's jury instructions where he failed to object at trial and affirmatively contributed to the instruction's content); *People v. Bush*, 214 Ill. 2d 318, 332-33 (2005) (the defendant forfeited his challenge to the adequacy of the foundation for an expert's opinion where the defendant stipulated to the expert's qualifications and to the admission of his conclusion); *People v. Payne*, 98 Ill. 2d 45, 49-52 (1983) (defense counsel opened the door to admitting into evidence a previously suppressed weapon by questioning a responding officer regarding his search of the defendant's apartment; counsel acknowledged that his purpose was to establish a foundation for arguing that the weapon was not recovered during the search). Specifically, while it is ordinarily error for a prosecutor to comment on a defendant's failure to produce a witness, such comments are appropriate where an alibi witness is interjected into the case by a defendant (*Caffey*, 205 Ill. 2d at 105; *People v. Kubat*, 94 Ill. 2d 437, 497-98 (1983); *People v. Brown*, 222 Ill. App. 3d 703, 718-19 (1991)) or where the defense's comments invite a response (*Giraud*, 2011 IL App (1st) 091261, ¶ 43). Further, while a defendant is never required to prove his innocence, when he chooses to present a defense the prosecutor may comment on the persuasiveness of his theory of the case and the strength of the evidence presented to support that theory. *Herrera*, 257 Ill. App. 3d at 619. Additionally, " '[i]f other evidence tends to prove the guilt of a defendant and he fails to bring in evidence within his control in explanation or refutation, his omission to do so is a

circumstance entitled to some weight in the minds of the jury, and, as such, is a legitimate subject of comment by the prosecution.' " *Giraud,* 2011 IL App (1st) 091261, ¶ 47 (quoting *People v. Williams,* 40 Ill. 2d 522, 529 (1968)).

¶ 49 We find *Giraud* to be instructive. In *Giraud,* during closing argument defense counsel attacked the reliability of the defendant's confession based on his symptoms from diabetes. *Id.* ¶¶ 11-12, 44. According to the defendant's testimony, he was required to take medication after breakfast, but he did not have any meals on the day of his confession and he did not take his medication. *Id.* ¶ 11. The defendant also indicated he had previously been hospitalized due to his condition and referenced his doctors who had intimate knowledge of his symptoms. *Id.* ¶ 45. Defense counsel later argued that individuals who suffer from diabetes have issues with their vision and sometimes become blind, and emphasized that the police confiscated the defendant's glasses prior to him giving a written confession. *Id.* ¶ 44. In rebuttal closing argument, the prosecutor acknowledged the burden was on the State and the defendant did not have to present any witnesses. *Id.* ¶ 45. The prosecutor then commented on the defendant's power to subpoena witnesses and his failure to call his doctors to corroborate his condition and symptoms. *Id.* ¶ 45. The prosecutor contended that if the defendant's confession was the result of his condition, then he should "back it up." *Id.*

¶ 50 On appeal, this court found that the prosecutor did not shift the burden of proof to the defendant and acknowledged that the prosecutor explained to the jury that the burden of proof was on the State. *Id.* ¶ 46. The court further held the jury may consider, and a prosecutor may comment on, the fact that a witness who can provide insight into a vital matter is not produced at trial. *Id.* ¶ 47. The court concluded that the prosecutor had merely commented on the evidence presented at trial and the reasonable inferences that could be drawn from it. *Id.*

¶ 51 Here, the record reveals that during closing arguments, defense counsel argued that defendant's fingerprints on the exterior of the window did not prove he entered the apartment without permission. Rather, according to the defense, defendant's fingerprints were left on the window prior to the burglary after defendant was invited into the apartment by Stringer. The defense supported its theory with Ellroy's testimony that defendant and Stringer were friends, and he had observed defendant enter the apartment as an invitee numerous times. Further, the defense suggested it was possible that after defendant was invited into the apartment, he opened the window because the apartment was hot.

¶ 52 In rebuttal closing argument, the prosecutor argued that while defendant was not required to prove his innocence, he did choose to present a defense, and the jury should meticulously examine it. The prosecutor then noted that unlike the State's evidence, defendant's invited-guest theory of defense was not corroborated. She attacked the credibility of Ellroy, who remembered observing defendant walk upstairs with Stringer on the day of the burglary and on prior occasions but answered "I don't remember" to numerous other questions. The prosecutor further acknowledged that Ellroy had a motive to lie because he is defendant's uncle, and contended that he was not telling the truth. She then briefly inquired "where is [Stringer]?" and again argued that contrary to the evidence presented by defendant, the State's evidence was independently corroborated in numerous ways. The prosecutor concluded this portion of her argument by detailing the State's corroborating evidence. Following closing arguments, the trial court admonished the jury that the State had the burden of proving defendant guilty beyond a reasonable doubt and that defendant was not required to prove his innocence.

¶ 53 We are not persuaded that the State's comments, which were couched between arguments regarding defendant's uncorroborated invited-guest theory, suggested that defendant was

required to present evidence as in *Beasley*. See *Beasley*, 384 Ill. App. 3d at 1048. In this case, as in *Giraud*, defendant introduced evidence of a witness who could have provided insight into a vital matter and, while he was not required to do so, failed to produce the witness to corroborate his defense. See *id*. ¶¶ 45, 47. As we previously stated, while a defendant is never required to prove his innocence, when he does choose to present a defense the prosecutor may comment on the evidence presented to support his theory. *Herrera*, 257 Ill. App. 3d at 619. Defendant's theory in this case was that Stringer invited him into the apartment. He supported this defense with the testimony of Ellroy, who had a motive to lie for his nephew. Further, Ellroy's testimony was directly contradicted by Halliday, who testified defendant had never been invited into the apartment. Evidence of Stringer's invitation to defendant to enter the apartment was therefore a legitimate subject of comment by the prosecution where this theory of defense had no foundation and was not corroborated. See *Giraud*, 2011 IL App (1st) 091261, ¶ 47. We conclude that, as in *Giraud*, the prosecutor's remarks regarding the absence of a corroborating witness introduced by defendant were merely comments on the evidence presented at trial and the reasonable inferences that could be drawn from it. See *id*. Specifically, the remarks were proper comments invited by defendant's theory of the case, which lacked a foundation or corroborating evidence. See *id*. ¶¶ 43-47.

¶ 54 Even if the comments were improper, they do not warrant reversal unless they caused substantial prejudice to defendant. *Johnson*, 208 Ill. 2d at 115. Improper comments can be corrected by proper jury instructions from the trial court, even when the objection to the comment is not sustained. *Id*. at 116. Our supreme court in *Kliner* recognized that the trial court's instruction that the State has the burden of proof and the defendant is not required to prove his innocence made it clear to the jury that the prosecutor could not shift the burden of

proof to the defendant. *Kliner*, 185 Ill. 2d at 153. Moreover, in finding the prosecutor did not shift the burden of proof to the defendant in *Giraud*, the court acknowledged that the prosecutor related to the jury that the burden of proof is on the State. *Giraud*, 2011 IL App (1st) 091261, ¶ 46. Here, as in *Kliner* and *Giraud*, we find any alleged error was mitigated when the trial court instructed the jury that the State had the burden of proving defendant guilty beyond a reasonable doubt and that defendant was not required to prove his innocence, and when the prosecutor recited the same principles prior to making the challenged comments. *Kliner*, 185 Ill. 2d at 153; *Giraud*, 2011 IL App (1st) 091261, ¶ 46.

¶ 55 After reviewing both of the challenged comments in their proper context, we cannot agree with defendant's contention that the prosecutor engaged in prejudicial misconduct such that the jury would have reached a different verdict had the comments not been made. Any alleged errors were mitigated when the trial court advised the jury that the State had the burden of proof and defendant was not required to prove his innocence. See *Johnson*, 208 Ill. 2d at 116; *Kliner*, 185 Ill. 2d at 153. Moreover, as previously discussed, the evidence against defendant was compelling and sufficient to prove his guilt beyond a reasonable doubt of residential burglary. Since the trial court instructed the jury that the State had the burden of proof and defendant was not required to prove his innocence and the prosecutor further stated defendant is not required to prove his innocence, and in light of the evidence presented, we do not believe that the comments denied defendant a fair trial. See *Johnson*, 208 Ill. 2d at 116; *Kliner*, 185 Ill. 2d at 153.

¶ 56 D. Defendant's Sentence

¶ 57 Finally, defendant argues that his six-year sentence is excessive. Although not raised by the parties, we observe that a challenge to the validity of an imposed sentence becomes moot once the entire sentence has been served. *People v. Melton*, 2013 IL App (1st) 060039, ¶ 28. In

this case, defendant was arrested on March 21, 2010, and was sentenced on July 29, 2015, to six years in the IDOC with two years of MSR. At sentencing, he was credited with 1,955 days served, and thus only had 235 days remaining on his sentence, plus the two years of MSR. Defendant therefore completed serving his sentence, including the MSR, on March 20, 2018. His challenge to the length of his sentence is therefore moot. *Id*.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 60 Affirmed.