2014 IL App (1st) 131288-U

FIRST DIVISION
June 30, 2014

No. 1-13-1288

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	Cook County.
Petitioner-Appellee,	)	
	)	
v.	)	No. 12 JD 02408
	)	
JERMAINE M.,	)	
	)	Honorable Lori Wolfson,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held*:** The trial court did not err in denying respondent's motion to suppress the witnesses' in-court and out-of-court identifications, where the state tendered all photographs of respondent prior to the start of trial. The trial court did not err in denying respondent's motion to quash arrest and suppress evidence. Respondent was found guilty of robbery beyond a reasonable doubt, and the state's closing argument was proper as it was based on the evidence and reasonable inferences drawn from it.

¶ 2 The minor respondent, Jermaine M., was tried for robbery, aggravated robbery, and theft from a person, and aggravated battery. The state sought adjudication of Jermaine as a habitual juvenile offender pursuant to 705 ILCS 405/5-815 (West 2012). A jury found Jermaine guilty of

robbery and, and based on this conviction, the trial court found him to be a ward of the court and committed him to the Illinois Department of Juvenile Justice as a habitual juvenile offender until his 21st birthday. He raises numerous issues on appeal. We affirm.

¶ 3 BACKGROUND

¶ 4 I. Trial

¶ 5 In ease of analysis, we summarize the trial evidence chronologically rather than in witness order, before we discuss the pretrial motions. The victims of the June 13, 2012 robbery were Madhave Gautam and Roman Dahal—both students at Sullivan High School in Chicago. When school ended that day, Madhave and Roman walked home together. As they were walking down Bosworth Street near the intersection of North Shore Street, a boy whom they did not know began following two or three feet behind them. The boy then said something and both Madhave and Roman responded that they "didn't have anything." The boy searched Madhave's pockets, then picked Madhave up by his waist and threw him to the ground. From Madhave's position on the ground, he could see the boy, who was then joined by two other boys, surround Roman about three feet away. Madhave observed that it took the other two boys a few seconds to run from their original positions and join the first boy. The two boys had been walking in front of Madhave and Roman with two girls. The two boys were on the sides and the original boy was in the middle. Madhave could see that the boy on the right side wanted to search Roman. In court, Madhave identified Jermaine as being the boy on the right side.

¶ 6 Madhave testified that he turned around to look for help and saw that Roman had been beaten because he was holding his hands in between his nose and eye and his nose appeared to be swollen. Although Madhave did not see which of the boys beat up Roman, he saw the boy on the right, whom he had identified as Jermaine, search Roman's pockets and take his iPod. On

cross-examination, Madhave testified that he was not sure which boy was on the right side. He was not "100% confident" what the other two boys looked like but he remembered that one boy had a Mohawk hairstyle. After taking the iPod, the boys ran off together in the same direction.

¶ 7 Roman similarly testified that he and Madhave were walking home from school when a boy began following them, searched Madhave's pockets, and then pushed Madhave to the ground. Roman testified that he started walking faster at that point because he was afraid that the boy would attack him as well. Roman explained that he was unable to get away because there were two other boys running toward him. Roman identified Jermaine as one of those boys. Roman testified that one boy searched his pockets after he had been beaten and that another boy mentioned a gun. Roman did not know which boy mentioned the gun because he was covering his eye.

¶ 8 On June 15, 2012, Roman went with his father and uncle to report the attack to the dean of students and the school disciplinarian, Steven Saa. Saa's duties included implementing the student code of conduct, dealing with classroom disruptions, providing a safe learning environment, and getting involved in incidents that occurred outside of school. Roman told Saa that he had been robbed and beaten up two days earlier. Saa retrieved footage from the security camera located at the corner of Bosworth and North Shore Streets. In the surveillance video from June 13, 2012, Roman identified himself in a white T-shirt, Madhave in a blue T-shirt, Jermaine in a black vest, and also identified the boy who followed them through the intersection. The video showed the boy hitting Madhave and searching his pockets. Roman explained to Saa that the same boy also attacked him. Roman did not know the names of any of his attackers before the incident.

¶ 9 Saa testified that the video first showed Jermaine and a boy named Ocyrus F. meeting in the intersection. Before shaking hands with Ocyrus, Jermaine pointed toward two other boys who were with them. The video then showed Jermaine walking quickly to catch up with another boy in a blue shirt, not catching up with any girls, while Ocyrus remained closer to the intersection. Ocyrus then followed the two victims after they walked through the intersection. Saa testified that Jermaine and the other boys who were with Ocyrus were out of the camera frame at this time. The video did not show Jermaine hitting the victims or chasing them. Saa explained that his testimony was based, in part, on what Roman explained happened. Saa then reported the incident to Officer Dunn, the school's security officer, and had her view the video.

¶ 10 Saa showed Roman three or four photographs of some boys, indicating he knew the names of the offenders. Saa identified Jermaine, Ocyrus., Thomas Z., and Pierre P. as the offenders. He previously interacted with all four boys as students at the high school. The video was played for the jury and Saa identified the victims and all four offenders, noting that Jermaine had a black vest on and Ocyrus wore a backpack. He further explained that he saw Jermaine's face and also recognized him based on his clothing, height and overall appearance.

¶ 11 On June 15, 2012, police officer Perez was working on the robbery and burglary team with four other officers. The officers were called to come to Sullivan High School. Jermaine was brought to Saa's office. Jermaine asked why he was in Saa's office and Officer Perez explained that he was there because there had been a robbery involving a fellow student. Officer Perez informed Jermaine he was under arrest for the robbery.

¶ 12 After being arrested, Jermaine made two statements. In Saa's office, Jermaine stated: "I just told him, give him what he wants, he has a gun." Officer Perez did not read Jermaine his

Miranda rights and, after Jermaine made this statement, the officer did not pursue other identification procedures such as a physical lineup, voice lineup, or photo array.

¶ 13 Jermaine made a second statement after being transported to the police station. Detective Cox was assigned to investigate the robbery and the arresting officers brought Jermaine to Detective Cox for an interview. While Jermaine was seated next to his mother, Detective Cox advised him of his *Miranda* rights by reading the rights from his Fraternal Order of Police handbook. After each right, Jermaine acknowledged that he understood. Neither Jermaine nor his mother ever requested an attorney or that he remain silent. Jermaine then stated that he was there when the boy was robbed, but that he was trying to help the boy because the boy had been punched in the face. Jermaine also stated that he instructed the victim to give up his property because his friend had a gun. Detective Cox did not respond to Jermaine's statement or have him sign a handwritten document. Instead, Detective Cox memorialized Jermaine's statement in his supplemental report. He did not conduct any line-up, photo array, or voice recognition because Jermaine admitted that he was there and made the gun statement.

¶ 14 Roman testified that he met with prosecutors a few times in the weeks before the trial. He thought they showed him photos on one occasion but could not remember if he was with Madhave at the time. Roman testified that he and Madhave viewed the surveillance footage separately during trial preparation.

¶ 15 Madhave testified that he never spoke to police officers regarding the robbery. Some time before trial, Madhave met with the prosecutors, and they showed him where he would sit in court and explained what would occur during at trial. At some point, the prosecutors showed him photos of "people's faces." Madhave stated his meeting occurred in the courthouse but he could not recall when this took place or how many photos he was shown.

¶ 16 After the state rested, Jermaine renewed his motion to suppress identification and moved for a mistrial, arguing that the state conducted a suggestive identification procedure before trial and it was unconstitutional for the state to show photographs of Jermaine in a suggestive manner where there had been no prior non-suggestive confrontation. The trial court denied Jermaine's motion reasoning that the attorneys would have had the opportunity to argue the weight to be given to any identification and the weight would be left to the jury's discretion. Following closing arguments, the jury found Jermaine guilty of robbery.

¶ 17 II. Pre-Trial Motions and Proceedings

¶ 18 Before the trial, Jermaine moved to suppress the two statements he made after his arrest. In support of his motion, he produced the testimony of Saa, and three police officers, while the state produced the testimony of two other police officers. The trial court found that there was no custodial interrogation when Jermaine made the first statement so the officers were not required to advise Jermaine of his *Miranda* rights, and that Jermaine made a spontaneous statement admitting knowledge of the crime and placing himself at the scene. Regarding Jermaine's second statement, the trial court found that Jermaine had been advised of his rights in the presence of his mother, and he waived his *Miranda* rights with full knowledge of the possible consequences. The trial court specifically found that there was no coercion, threats, promises, or force by any of the officers.

¶ 19 Jermaine then filed a motion to quash arrest and suppress evidence on the basis of lack of probable cause, and a motion to suppress identifications. At the hearing on both motions, Saa testified that the video depicted Jermaine and Ocyrus talking on the street corner. He explained that the video showed Ocyrus follow the victims across the street, showed Jermaine get up and join Ocyrus and then showed them "box[ing] the victim in." Ocyrus attacked the victim and the

second boy "took off running." Jermaine then ran after the second boy. Saa testified that he recognized both Jermaine and Ocyrus immediately, and that Jermaine had a disciplinary history, resulting in frequent interactions with him.

¶ 20 Officer Dunn provided a similar account, stating that after Saa informed her about the robbery, he showed her the security footage. Roman pointed out all of the people involved to her. Officer Dunn stated that the video showed two males meet and greet one another, and then start walking toward Roman. They signaled to two "other guys" and then all four individuals converged on Roman. Officer Dunn identified Ocyrus, Tomas, and Pierre as being three of the four individuals shown in the video, and Saa identified Jermaine. She explained that the individual whom she believed to be Ocyrus hit Roman and Jermaine also ran after Roman's friend.

¶ 21 Police officer Yousef testified that when he arrived at Sullivan High School, Saa provided him with the names of four individuals that had been identified in the video. Roman explained to Yousef that he had been walking with a friend when he was jumped by four individuals. Roman indicated that they went into his pockets and took his phone. One boy in the group struck Roman in the face and another boy said, "Hey, give him what you got, he has a gun."

¶ 22 Before ruling on the motion to quash arrest and suppress evidence, the trial court explained that the knowledge that the police had at the time of Jermaine's arrest was based on the video, the names Saa provided for the individuals on the video, and the statements made by Roman, which corroborated the video. The trial court found that Jermaine and the others shown on the video were the people involved in the attack and robbery, and the aforementioned evidence clearly supported a finding of probable cause to arrest Jermaine.

¶ 23 The trial court denied Jermaine's request to have Madhave and Roman testify at the motion to suppress identification hearing, finding that their testimony was irrelevant because they did not participate in any identification procedures. The court commented that there was no evidence that Saa, the police, or any school administrator had Roman identify Jermaine through any lineup, show up, or photo array. The court denied Jermaine's motion to suppress the identification, finding that there were no impermissibly suggestive techniques used where Roman viewed the video and pointed out the offenders, and Saa provided their names.

¶ 24 III. Post-Trial Motions and Proceedings

¶ 25 After trial, Jermaine filed a motion for judgment notwithstanding the verdict. Jermaine also renewed his argument that the State violated discovery by failing to tender the photographs used during trial preparation and requested an evidentiary hearing on the issue. In response, the State pointed out that it did tender a photograph of the minor to the defense in discovery. The trial court denied Jermaine's post-trial motion.

¶ 26 The court sentenced Jermaine as a habitual juvenile offender and committed him to the Illinois Department of Juvenile Justice until his 21st birthday. Jermaine now appeals.

¶ 27 ANALYSIS

¶ 28 I. Motion to Suppress Witnesses' Identifications

¶ 29 Jermaine contends that the trial court erroneously denied his motion to suppress the witnesses' in-court and out-of-court identifications as well as his motion to reconsider. In particular, Jermaine maintains that two suggestive identification procedures occurred when: (1) Saa showed Roman a video of the incident, told Roman the names of the individuals he believed were involved, and showed Roman photographs of those individuals and (2) shortly before trial the state showed Roman and Madhave photographs of Jermaine and another boy believed to

have participated in the robbery. Jermaine further contends that these suggestive identification procedures tainted the witnesses' in-court identifications where the state failed to show that the identifications were independently reliable.

¶ 30 "A reviewing court will not disturb a trial court's finding in a hearing on a motion to suppress unless the trial court's finding was manifestly erroneous." *People v. Long*, 99 Ill. 2d 219, 231 (1983). A judgment is manifestly erroneous "only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). "We review de novo the trial court's ultimate legal ruling to grant or deny the motion." *People v. Brown*, 2013 IL App (1st) 083158, ¶ 24.

¶ 31 A defendant bears the burden of proving that a pretrial identification was impermissibly suggestive. *People v. Brooks*, 187 Ill. 2d 91, 126 (1999). For identification to be excluded, a defendant must prove that the identification procedures were "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *People v. Blumenshine*, 42 Ill. 2d 508, 511 (1969). In other words, "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012). Thus, even when the police use such a procedure, suppression of the resulting identification is not the inevitable consequence. *Id.* Rather, due process requires courts to assess, on a case-by-case basis, whether improper police conduct created a "substantial likelihood of misidentification." *Id.* A trial court's determination that an identification procedure was not unduly suggestive should not be reversed, unless it is against the manifest weight of the evidence. *People v. Gaston*, 259 Ill. App. 3d 869, 875-76 (1994).

¶ 32 The due process clause stands applies to government action, not action by private individuals. *Hill v. PS Illinois Trust*, 368 Ill. App. 3d 310, 313 (2006). A private actor will not be held to constitutional standards unless "'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" *Id*. (quoting *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 52 (1999)). While the State argues Saa's conduct does not constitute that of a private actor, we disagree and find he was a State actor. *See New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) ("In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the State, not merely as surrogates for the parents of students, and they cannot claim the parents' immunity from the Fourth Amendment strictures.").

¶ 33 We agree with the trial court that the methods used by Saa in assisting Roman in identifying Jermaine were not impermissibly suggestive, as he did not attempt to influence Roman in any way. Saa testified that, when he showed Roman the surveillance video, Roman pointed to himself stating, "That's me walking," and then pointed to Jermaine and Ocyrus stating, "That's them, those those are the boys." Thus, the evidence in the case establishes that the initial identification was made by Roman, not Saa. After Roman identified Jermaine and the other offenders, Saa provided Roman with their names.

¶ 34 In our view, Saa showing Roman the surveillance video served as one of the least possibly suggestive procedures given the circumstances in this case. The video footage featured at least twenty students outside of Sullivan High School on the day of the incident. Some of the students had similar features, while others had distinguishing features. Roman was able to point out Jermaine among a larger group based on his recollection of the incident, rather than on any

impermissible suggestive technique on the part of Saa. After Roman made his initial identification of Jermaine, Saa showed him three or four photographs. Saa showed these photographs to Roman to confirm his identification of Jermaine.

¶ 35 Similarly, there is no merit to Jermaine's allegation that the State conducted any type of suggestive identification procedure. Roman identified Jermaine before he spoke with any police officers or prosecutors. Thus, any photographs the State showed the witnesses were for the purpose of trial preparation, not identification. Furthermore, Roman's and Madhave's testimony about the photographs was ambiguous as to when the State showed them the photographs, how many photographs were shown, and what the photographs depicted. Thus, there is no evidence of any impermissibly suggestive procedure on the part of the State.

¶ 36 Jermaine relies on the case of *People v. Taylor*, 163 Ill. App. 3d 346 (1987) to assert that the State's showing of photographs to the victims before trial increased the risk of misidentification and exacerbated the suggestive pre-trial identification procedures employed by Saa. However, we find this case distinguishable. In *Taylor*, the witness had not previously identified the defendant and did not identify the defendant until immediately before he testified at trial when the assistant state's attorney showed him a single photograph of the defendant. *Id.* at 358. The witness then asked, "This is the guy, isn't it?" and the assistant state's attorney responded, "Yes, it was." *Id.* Thus, in *Taylor*, not only was the in-court identification stigmatized by the State's pretrial display of the photograph and affirmative respond to the witness's inquiry as to whether the defendant was the robber, but the State also failed to prove that the witness had any independent basis for the identification where the witness's description was inconsistent with the defendant's actual appearance. *Id*. at 362.

¶ 37 Here, the victims' identification of Jermaine had an independent origin, which makes this case distinguishable from *Taylor*. Accordingly, the trial court properly denied Jermaine's motion to suppress the witnesses' identification.

¶ 38 Furthermore, Madhave's and Roman's in-court identifications were inherently reliable and not the product of impermissible suggestive procedures. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). The United States Supreme Court has listed the following factors to consider in evaluating the ability of a witness to make a reliable evaluation: (1) the opportunity of the witness to view the defendant at the time of the crime; (2) the witness's degree of attention at the time of the crime; (3) the level of accuracy of the witness's prior description of the defendant; (4) the level of certainty demonstrated by the witness at the time of his confrontation with the defendant; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

¶ 39 Applying each of the *Biggers* factors, we find that both Roman's and Madhave's identifications were reliable. First, both victims had ample opportunity to view Jermaine at the time of the robbery because they both testified they observed him running toward them. Roman testified that the two boys, including Jermaine, approached the victims in "about three, four seconds" and were "about two, three feet" away. Jermaine points out at this point in the attack Madhave turned his back for help and Roman had been punched in the face, had a broken nose, and resorted to covering his eye. Nonetheless, their initial observation of the two boys running toward them is sufficient. The victims' testimony is reliable because they had the opportunity to view Jermaine. *People v. Williams*, 143 Ill. App. 3d 658, 662 (1986) ("a positive identification need not be based upon perfect conditions for observation, nor does the observation have to be of

a prolonged nature."). Furthermore, Madhave and Roman were in very close proximity to Jermaine, the robbery occurred in broad daylight, and there was nothing covering Jermaine's face.

¶ 40 Furthermore, the length of time between the crime and the witnesses' identifications was minimal. Roman's identification was just two days after the robbery, while Madhave's in-court identification was only seven months later. Illinois courts have found identifications to be reliable where significantly more time has elapsed between the crime and the identification. *See People v. Rodgers*, 53 Ill. 2d 207, 213-14 (1972) (upholding an identification made two years after the crime). Thus, viewed in light of all the evidence, we find that neither the two-day nor seven-month lapses undermined reliability of Roman's and Madhave's identifications.

¶ 41 Applying all of the *Biggers* factors, both Roman's and Madhave's identifications of Jermaine were inherently reliable. Therefore, the trial court correctly denied Jermaine's motion to suppress the witnesses' identifications and we find that the identification procedures employed by Saa and the state were not unduly suggestive and the victims' identifications of Jermaine were reliable.

¶ 42 II. Disclosure of Pretrial Photographs

¶ 43 Jermaine complains that the State violated Illinois Supreme Court Rule 412(a) and *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to tender the photographs it showed to the victims during trial preparation. He argues that the photographs were not exempt from disclosure and, without the photographs, he was unable to make the "most effective argument against the reliability of the witness identification." Rule 412(a) provides:

> "Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense

> counsel, disclose to defense counsel the following material and information within its control:
>
> > (v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from *** the accused.

¶ 44 The record establishes that Jermaine was arrested on June 15, 2012 and charged by information with robbery and aggravated battery. He filed a motion for discovery on June 28, 2012, requesting that the State provide defense counsel with information concerning his identification, and any photographs that had been used. The State responded, "Please see previously tendered Chicago Police Department ("C.P.D.") arrest report, C.P.D. original case incident report, and C.P.D. supplemental reports." The arrest report contained a photograph of Jermaine.

¶ 45 At trial, Madhave and Roman testified about viewing the photographs but their testimony was sketchy as to when the State showed them the photographs, how many photographs were shown, and what the photographs depicted. Jermaine's counsel objected to the State allegedly violating discovery by not tendering the photographs used to identify Jermaine despite his requests. The trial court overruled Jermaine's objection, reasoning that *Brady* was not violated and explained that methods of identification go to the weight of the identification and not to the admissibility of the evidence.

¶ 46 After both sides rested, Jermaine requested that the trial court grant his previous motion to suppress identification and instruct the jury not to consider the identifications made by Roman and Madhave because of the suggestive nature of the pretrial identification procedure followed by the state, and because there was no independent demonstration that the witnesses'

identification were reliable. Jermaine also alleged that the State violated its discovery obligation by failing to disclose evidence of identification procedures and requested that the court grant a mistrial. The State objected to disclosing the details pertaining to when and if it showed photographs to Roman and Madhave, contending that the photographs were shown during the state's trial preparation. The trial court denied Jermaine's motion to reconsider its prior ruling on the motion to suppress identification and the motion for a mistrial, finding that the issue was litigated before trial and the jury could properly gauge the weight to be given the testimony.

¶ 47 We agree with the trial court that Jermaine's discovery violation and *Brady* claims are without merit, as the photographs were disclosed before trial. Although Jermaine asserts that the state withheld the photographs, he failed to prove that the photographs were not tendered to him. During discovery, the state tendered photographs of Jermaine and his co-offenders as part of their arrest reports. Jermaine's receipt of the arrest photograph is evidenced by the fact that a defense investigator later showed that photograph to Roman during a pretrial interview. Madhave's testimony that he was shown photographs "from the chest up" was consistent with him viewing arrest photographs. Accordingly, there is no evidence that the photographs which the state showed the victims had not been tendered to Jermaine during discovery.

¶ 48 The case of *People v. Carvillo*, 170 Ill. App. 3d 1070 (1988) is instructive. In *Carvillo*, the court found that a photo array, which the defendant claimed was withheld during discovery, had been sufficiently identified in police reports made available to the defendant as part of the state's discovery answer. *Id*. at 1079. Under the identification procedures, the state's answer to the defendant's motion for discovery stated, "See Police Reports," and included "Photos" in the list of physical evidence that it intended to use at trial. *Id*. Likewise, in this case, the state also

referenced the police reports in response to Jermaine's request for identification procedures. Jermaine's photograph was included in those reports.

¶ 49 Jermaine has not established a *Brady* violation. In *Brady*, the Supreme Court held that the prosecution violates an accused's constitutional right to due process of law by failing to disclose evidence which is favorable to the accused and material to guilt or punishment. *Brady*, 373 U.S. at 87. The rule "encompasses evidence know to police investigators, but not to the prosecutor." *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). A *Brady* claim requires a showing that: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *Id*. at 73-74. Thus, "[e]vidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Id*. at 74. Where the facts giving rise to the alleged discovery violation are not in dispute, whether the state committed the violation presents a question of law that is reviewed *de novo*. *People v. Hood*, 213 Ill. 2d 244, 265 (2004).

¶ 50 Our review of the record establishes that *Brady* is inapplicable because in this case the photographs constituted neither impeachment nor exculpatory material. The photographs shown by the state were not used for impeachment because Roman had already identified Jermaine long before he met with the prosecutor. In contrast, where Madhave identified Jermaine for the first time at trial, Jermaine's attorney questioned Madhave about the photographs shown by the state to cast doubt on Madhave's in-court identification. Furthermore, the photographs were not exculpatory evidence where there was no evidence that any identification was made from those photographs, let alone an identification of an individual other than Jermaine.

¶ 51 *Brady* is also inapplicable because the evidence was not material. A defendant is not entitled to relief under *Brady* unless he can establish that the evidence improperly withheld was favorable and material to the defense. Favorable evidence is material "'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *People v. Hickey*, 204 Ill. 2d 585, 604 (2001) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Therefore, "[a] reasonable probability that the result of the proceeding would have been different is a 'probability sufficient to undermine the confidence in the outcome.'" *Id*.

¶ 52 The case of *People v. Elston*, 46 Ill. App. 3d 103 (1977) is instructive. In *Elston*, the police showed several witnesses a photo array which included a color photograph of the defendant and black-and-white mug shots of the other suspects. *Elston*, 46 Ill. App. 3d at 105-06. The court found that withholding mug shots used by the police in a suggestive identification procedure resulted in prejudice to the defendant. However, the court's decision was predicated on the fact that the mug shots were favorable to the defendant's case because they were evidence of a suggestive identification procedure. *Id*. at 106. Unlike in *Elston*, here there was no evidence that the pictures shown to the victims were suggestive.

¶ 53 Jermaine has failed to establish that, had the photographs been disclosed, the results of his trial would have been any different. At trial, Jermaine had the opportunity to cross-examine both victims about their ability to perceive their attackers and about the identification procedures used by Saa, the police, and the state. In closing argument, Jermaine highlighted the allegedly suggestive identification procedures and argued that the victims' "uncertain, hesitant identifications" were not "worth anything."

¶ 54 The jury rejected Jermaine's argument by finding him guilty of robbery. While Jermaine states that, without disclosure of the photographs, the information he had was "insufficient to make the most effective argument against the reliability of the witness identifications," we find that the record establishes there was nothing more Jermaine could have done. Any photographs shown during trial preparation would not have undermined Roman's previous identification of Jermaine made just after the incident. Even if Jermaine did not know which photographs were shown to the victims during trial preparation, having that information would not have helped Jermaine as there was nothing more he could have done with the photographs than what he accomplished at trial. Furthermore, the evidence was not close, as the record established that Jermaine committed the robbery where multiple witnesses identified Jermaine in video surveillance footage and he made two statements admitting his involvement in the crime. Accordingly, Jermaine has failed to establish a *Brady* violation.

¶ 55 III. Motion to Quash Arrest and Suppress Evidence

¶ 56 Jermaine complains that the trial court erred in denying his motion to quash arrest and suppress evidence because he was arrested without probable cause and his statements were the fruit of that unlawful arrest. He claims there was insufficient evidence to establish probable cause for his arrest because there was no evidence of criminal activity on the video and the victims could not identify him by name. He further asserts that the two statements he made should have been suppressed because they were coerced and he had not been properly informed of his *Miranda* rights.

¶ 57 "In determining whether a trial court has properly ruled on a motion to suppress, findings of fact and credibility determinations made by the trial court are accorded great deference and will be reversed only if they are against the manifest weight of the evidence." *People v. Slater*,

228 Ill. 2d 137, 149 (2008). However, "[w]e review *de novo* *** the ultimate question posed by the legal challenge to the trial court's ruling on a suppression motion." *Id*. When reviewing the issue, a court may consider the testimony introduced at trial, as well as at the suppression hearing to uphold the court's decision. *People v. Brooks*, 187 Ill. 2d 91, 127-28 (1999). A reviewing court may not rely on facts or testimony not presented to the fact finder to reverse a court's decision denying a motion to suppress. *People v. Murdock*, 2012 IL App 112362, ¶ 39.

¶ 58 "To quash an arrest as violative of the fourth amendment and to suppress evidence based upon the illegality of that arrest, the burden is on the defendant to show that an illegal seizure has occurred. To satisfy his burden he must prove two things: first, that a seizure occurred, and second, that the seizure was illegal." *People v. Graham*, 214 Ill. App. 3d 798, 806 (1991). The existence of probable cause is determined by the trial court based on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). A warrantless arrest must be supported by probable cause, which exists "when the totality of the facts and circumstances known to the officer is such that a reasonable prudent person would believe that the suspect is committing or has committed the crime." *People v. Geier*, 407 Ill. App. 3d 553, 557 (2011). It is a principle that, "[i]n dealing with probable cause *** as the very name implies, [courts] deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

¶ 59 In this case, the totality of the circumstances amply establishes that the police had probable cause to arrest Jermaine. When Jermaine was initially brought to Saa's office on June 15, 2012 to meet with police officers, the officers had reason to believe that Jermaine was involved in the robbery of Roman. Then, at the time when the police arrived at Sullivan High

School, Saa relayed the information provided to him by Roman, showed the officers the surveillance video of the incident, and provided them with the names of the individuals that Roman had pointed out as being involved in the crime. Officer Yousef personally interviewed Roman and learned that he had been jumped by four boys, one of the boys had punched Roman in the face, and Roman's iPod was stolen. Roman's account of the attack was corroborated by the video which showed a portion of the attack. Roman identified the offenders in the video, and Saa provided the names associated with the offenders, including Jermaine's name.

¶ 60 Jermaine also claims that the video did not show him "engaging in any criminal activity." A video of Jermaine's illegal act of robbery is not necessary to establish probable cause. A probable cause determination is made by a reasonable assessment of the information available to the officers at the time of the arrest. *People v. Ferral*, 397 Ill. App. 3d 697, 714 (1999). The officers do not need to gather evidence sufficient to prove that Jermaine committed the crime beyond a reasonable doubt. *People v. Sims*, 192 Ill. 2d 592, 614-15 (2000). Here, Roman relayed first-hand knowledge of the crime which was corroborated by video showing Jermaine plotting the crime with his co-offenders. We find this evidence was sufficient to establish that Jermaine was involved in the robbery for the purposes of a probable cause analysis.

¶ 61 Even if this was not sufficient to establish probable cause, Jermaine made inculpatory statements which were obtained independently of his arrest. "The relevant inquiry is whether the confession was obtained by exploitation of the illegality of the arrest." *People v. Jackson*, 374 Ill. App. 3d 93, 101 (2007). Thus, "[e]vidence obtained following an illegal arrest need not be suppressed if such evidence was obtained 'by means sufficiently distinguishable to be purged of the primary taint of illegality.'" *Id*. (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). The factors that are to be considered in deciding if a confession was the product of an

illegal arrest include: "(1) whether *Miranda* warnings were given; (2) the proximity in time between the arrest and confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the police misconduct." *Id*. at 102. Intervening circumstances and police misconduct are considered the key factors in the attenuation analysis. *People v. Wilberton*, 348 Ill. App. 3d 82, 85 (2004).

¶ 62 Jermaine made his first statement in Saa's office after asking Officer Perez why he had been called to the office. In response, Officer Perez informed him that he was under arrest. Jermaine then stated to Officer Perez, "All I did was tell him to give him — to give him your stuff, he has a gun." Here, Jermaine made this statement spontaneously, not in response to questioning by Officer Perez or any other police officer. While Jermaine claims that the police did not advise him of his *Miranda* rights before he made the statement in Saa's office, the police were not required to do so because they were not interrogating him. The police need to supply *Miranda* warnings only if the defendant is under "custodial interrogation" which means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Thus, the defendant must be both in custody (or its equivalent) and under interrogation. *People v. Peo*, 391 Ill. App. 3d 815, 818 (2009).

¶ 63 The term "interrogation" under *Miranda* "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant on arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). However, volunteered statements are not barred by the Fifth Amendment and thus do not require *Miranda* warnings. *Miranda*, 384 U.S. at 478. The reasoning for this is that the "fundamental import of the privilege

while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated." *Id*.

¶ 64 We find that Jermaine's statement to Officer Perez was a voluntary statement. Officer Perez testified that he did not ask Jermaine any questions either before or after Jermaine made the statement. Simply informing Jermaine that he was under arrest was not a statement that Office Perez should have known was likely to elicit an incriminating response. *People v. Parker*, 344 Ill. App. 3d 728, 735 (2003) (police officer's reading of defendant's arrest warrant to defendant was not reasonably likely to elicit an incriminating response, and thus did not constitute an interrogation). Accordingly, Jermaine's statement made in response to Officer Perez statement that he was under arrest was voluntary and not the result of custodial interrogation.

¶ 65 Furthermore, Jermaine was advised of his *Miranda* rights before making his second statement. Here, the trial court found that Detective Cox was a "seasoned detective" and had a "very honest" demeanor. Detective Cox testified that the arresting officers brought Jermaine to the detective room in the station where he was joined his mother. Jermaine, his mother, and Detective Cox were the only people in the room during the interview. Detective Cox immediately read the *Miranda* warnings to Jermaine directly from his Fraternal Order of Police handbook. After each right was read, Jermaine and his mother indicated that they understood. Jermaine then explained to Detective Cox that he had previously been in the custody of the Juvenile Justice Department as a result of some robberies and made a second statement regarding the present matter. Here, he stated that he was present when the boy got robbed; he was trying to help the boy because he had been punched in the face, and he told the boy to give up his property or whatever he had because Ocyrus had a gun.

¶ 66 The circumstances surrounding Jermaine's second statement, including his mother's presence at his side, the fact that Jermaine and his mother indicated they understood the *Miranda* rights, and the interview's short duration of only ten minutes, are indicative of a non-coercive setting. We therefore conclude that Jermaine's second statement was voluntary and of his own free will.

¶ 67 Jermaine's other contentions for requesting that his second statement be suppressed are likewise without merit. First, there is no evidence to suggest that the police arrested Jermaine solely for the purpose of furthering an investigation. At the time of his arrest, Jermaine had been identified by the victim from a video recording, and the police possessed that video footage. The police conducted no further investigation after Jermaine's arrest. Thus, Jermaine has no basis to claim that the police arrested him with the intent of producing further information through interrogation; no additional information was necessary. In other words, the police arrested Jermaine because the evidence at that time was sufficient to establish probable cause.

¶ 68 Jermaine's next allegation that his second statement should be suppressed because Detective Cox engaged in misconduct is also without merit. Detective Cox was neither required to obtain Jermaine's signature nor formally record his statement. Detective Cox testified that his supplemental report was submitted on June 26, 2012, so Jermaine cannot conclusively conclude that Detective Cox did not write the report until that date because he testified that he did not remember when he had written the report. Furthermore, any issues pertaining to the veracity of the statement go to the weight of the evidence, not its admissibility. Accordingly, there is no evidence of any misconduct on the part of Detective Cox that would warrant suppression of Jermaine's second statement.

¶ 69 Based on the totality of the circumstances, the police had reason to believe that Jermaine was involved in the robbery at the time he was brought to Saa's office. Furthermore, Jermaine's statements were sufficiently attenuated from the taint of his earlier arrest where he made spontaneous, voluntary statements admitting his presence at the crime. He was also advised of his *Miranda* rights prior to making his second statement. Accordingly, the trial court properly denied Jermaine's motion to quash arrest and suppress evidence.

¶ 70 IV. Sufficiency of the Evidence

¶ 71 Jermaine next argues that he was not proven guilty of the robbery beyond a reasonable doubt. Here, he claims that the victims' unreliable identifications and statements were not supported by any corroborating evidence.

¶ 72 Where a criminal defendant alleges that the state's evidence is insufficient to sustain a conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the state, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original). *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 214 Ill. 2d 206, 217 (2005). A reviewing court will not retry the defendant or impose its judgment as to whether the evidence was sufficient. *Collins*, 214 Ill. 2d at 217. A conviction will not be reversed unless the evidence is so "improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *Id*. The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). A reviewing court must allow all reasonable inferences from the record in favor of the state. *People v. Wheeler*, 226 Ill. 2d 92, 116-17 (2007).

¶ 73 Our review of the evidence in this case shows that the state proved Jermaine guilty of robbery beyond a reasonable doubt. A person commits robbery when he knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force. 720 ILCS 5/18-1(a) (West 2010). "Proof of a threat of the imminent use of force is established by evidence that the fear of the victim was of such a nature as in reason and common experience is likely to induce a person to part with his or her property for the sake of his or her person." *People v. Grengler*, 247 Ill. App. 3d 1006, 1007 (1993). A victim's subjective feeling of fear is insufficient to establish this factor when there are no facts to show the fear was reasonable. *Id*. However, a robbery conviction may be based on facts from which the victim reasonably concluded that the defendant was armed with a deadly weapon when he took the property from the victim's person or presence. *People v. Hollingsworth*, 120 Ill. App. 3d 177, 179-80 (1983). A finding that a defendant indicated he was armed must be supported by objective criteria. *People v. Hall*, 352 Ill. App. 3d 537, 543 (2004).

¶ 74 In this case, both Roman and Madhave identified Jermaine as being one of the offenders that attacked and robbed Roman as the boys were walking home from school. Roman identified Jermaine in the video depicting the incident and Saa provided Jermaine's name as one of the individuals identified by Roman. At trial, both Roman and Madhave identified Jermaine in court as being one of the offenders. As such, Roman's and Madhave's eyewitness identifications were sufficient evidence to sustain Jermaine's conviction.

¶ 75 Additionally, as noted above, Jermaine made two statements admitting his involvement in the robbery. On the basis of these statements, Jermaine placed himself at the scene of the crime, admitted to his participation in the crime, and established that Roman allowed Jermaine and the co-offenders to take his iPod because Jermaine and the others threatened to use a gun.

¶ 76 Jermaine's statements were corroborated by the video and Roman's statement to the police. The video showed that Jermaine was at the scene of the robbery and showed an interaction between Jermaine and Ocyrus, the boy who initially followed and attacked Roman and Madhave. Roman told Officer Yousef that one of the offenders threatened him stating, "Hey, give him what you got, he has a gun." This is in essence the same statement Jermaine admitted he made.

¶ 77 Jermaine attempts to rely on *People v. Rivera*, 2011 IL App (2d) 091060, to support his proposition that the only evidence connecting him to the robbery were his own statements, which are insufficient to sustain his conviction without corroborating evidence. *Rivera*, however, is distinguishable because in that case the court found that the state failed to present sufficient evidence to corroborate the defendant's conviction. In *Rivera*, there was no credible witness testimony and the physical evidence conclusively excluded the defendant. *Id*., ¶¶ 16-19. The court held that the state failed to prove the defendant's independent knowledge of the facts contained in the confession where the information had been published in the newspapers prompting the defendant's father to discuss the facts of the case with the defendant, and the police used leading questions during the defendant's interrogation. *Id.*, ¶¶ 43-44. The court found the details of the crime were provided to the defendant during the investigative process and that the defendant's confession was a result of psychological suggestion or linguistic manipulation. *Id*., ¶ 44.

¶ 78 Here, in contrast, none of the physical evidence specifically excluded Jermaine and he made his first statement to officer Perez prior to any questioning by the police. Jermaine made his second statement only after being asked by Detective Cox if he had participated in the June 15, 2012 robbery. Thus, there were no details in Jermaine's statements that could have been

supplied by the police. Therefore, there is no basis to question the reliability of Jermaine's statements as in Rivera and Jermaine's statements were sufficient to corroborate a finding of guilt in this case.

¶ 79 Furthermore, the evidence established Jermaine's guilt on the basis of accountability. The Illinois accountability statutes provides that a person is legally accountable for the conduct of another when:

> "(c) either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he *** solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense.
>
> When 2 or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts. Mere presence at the scene of a crime does not render a person accountable for an offense; a person's presence at the scene of the crime, however, may be considered with other circumstances by the trier of fact when determining accountability."
>
> 720 ILCS 5/5-2(c) (West 2010).

¶ 80 As discussed, both Roman and Madhave identified Jermaine as one of the offenders who attacked them. Even if Jermaine was not the boy that punched Roman and Madhave or physically took Roman's iPod, he was equally accountable based on his participation in the robbery. The evidence in this case establishes that Jermaine was not "merely present" at the scene. Rather, by Jermaine's own admission to Officer Perez, he assisted in taking Roman's iPod by threatening, "[G]ive him your stuff, he has a gun." This was corroborated by Roman's

statement to Officer Yousef that one of the offenders said, "Hey give him what you want, he has a gun." Although Officer Yousef stated that Roman did not use Jermaine's name, Roman suggested it was Jermaine who made the statement. Thus, the evidence suggests that Jermaine played an active role in the robbery.

¶ 81 "[W]here one aids another in the planning or commission of an offense, that person is legally accountable for the conduct of the person he aids; and that the word "conduct" encompasses any criminal act done in furtherance of the planned and intended act." *People v. Fernandez*, 2014 IL App (1st) 115527, ¶ 18 (where defendant conceded he aided another in the planning and commission of a burglary, he was accountable for any criminal act committed by his companion in the furtherance of the burglary). While Jermaine argues the evidence in this case does not support an accountability theory, "[t]here need not be evidence of words of agreement to establish a common purpose;" instead, "[t]he common design can be inferred from the circumstances." *People v. Reeves*, 385 Ill. App. 3d 716, 727 (2008).

¶ 82 Our review of the record establishes that Jermaine also participated in planning the robbery. The video shows Ocyrus slowly wander around the intersection, look around, and then head down Bosworth Street. Less than a minute later, Ocyrus returned to the intersection with two other boys, one wearing a blue shirt. At about the same time, Jermaine entered the camera frame and immediately headed toward Ocyrus. Ocyrus walked toward Jermaine, while the two other boys waited on the other side of the street. Jermaine pointed toward the other two boys, shook hands with Ocyrus, and then jogged to meet the other two boys across the street. Ocyrus remained at that corner, looking down Bosworth Street, while Jermaine slowly walked with the boy in the blue shirt and kept looking back toward Ocyrus. Roman and Madhave then emerged from the direction in which Ocyrus had been looking, and Ocyrus followed closely behind them,

finally cornering them on the side of the street where Jermaine and the boy in the blue shirt were just steps ahead. Thus, the video showed Jermaine planned to commit the crime with his co-offenders, which sufficiently establishes his guilt based on accountability.

¶ 83 When viewing the light most favorable to the state, any rational trier of fact could have found Jermaine guilty of robbery beyond a reasonable doubt.

¶ 84 V. Closing Argument

¶ 85 Jermaine argues that he was denied a fair trial because of misstatements made by the state during closing argument at trial. He claims that the state "dehumanized" him by characterizing him as an animal and also referred to him and his friends as a "pack" on six separate occasions. Thus, Jermaine asserts that these statements played to the jury's fears by characterizing him and the other minors as vicious animals who were operating outside of the law. Furthermore, Jermaine contends that the state misled the jury when it suggested that the defense had not provided the jury with information about the state's display of the photos to the victims just prior to trial and also improperly downplayed its responsibility for discovery violations to which the defense did not have sufficient time to respond. Accordingly, Jermaine argues that these errors caused him substantial prejudice and denied him a fair trial.

¶ 86 In order to preserve an issue for review, "both a trial objection and a written post-trial motion raising the issue" are necessary for alleged errors that could have been raised during the trial. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988). The "primary purpose of the post-trial motion is to allow trial judges an opportunity to consider the litigants' arguments and assess h[er] rulings." *People v. Stove*, 89 Ill. 2d 189, 194 (1982). "An objection based upon a specified ground waives all grounds not specified, and a ground of objection not presented at trial will not be considered on review." *People v. Gales*, 248 Ill. App. 3d 204, 229 (1993). Failure to

properly preserve an issue will result in forfeiture of that issue on appeal in the absence of plain error. *Enoch*, 122 Ill. 2d at 186-87. The rationale for the rule is:

> "'Failure to raise issues in the trial court denies that court the opportunity to grant a new trial, if warranted. This casts a needless burden of preparing and processing appeals upon appellate counsel for the defense, the prosecution, and upon the court of review. Without a post-trial motion limiting the consideration to errors considered significant, the appeal is open-ended. Appellate counsel may comb the record for every semblance of error and raise issues on appeal whether or not trial counsel considered them of any importance.'" *Id*. (quoting *People v. Caballero*, 102 Ill. 2d 23, 31–32 (1984)).

¶ 87 Our review of the record indicates that Jermaine's counsel did not object to a number of the state's comments that he now claims were improper. For example, he did not object to the state's comment that "You run with the pack, you share in the prey," nor did he object to the state's comment regarding "the rules of the jungle . . . where they scurry off under the cover of the trees." Although Jermaine's counsel did object to the state referring to Jermaine and his friends as a "pack," he failed to include raise this objection in his post-trial motion. Accordingly, he has forfeited our review of whether the state dehumanized him by characterizing him as an animal. *People v. Trail*, 197 Ill. App. 3d 742, 749-50 (1990) (defendant waived error allegations where the court was "presented with an argument by defendant's counsel on appeal regarding alleged grievous improprieties of the prosecutor's closing argument; yet, defendant's trial counsel, who the record shows presented a vigorous defense, apparently found the prosecutor's closing argument sufficiently bland as to not warrant a single objection").

¶ 88 Next, whether an argument constitutes a prejudicial error is calculated according to the language used, its relation to the evidence, and the effect of the argument on the defendant's right to a fair and impartial trial. *People v. Pasch*, 152 Ill. 2d 133, 184 (1992). It is well-settled that the state is afforded wide latitude in closing argument. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). A prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible from the evidence, even if they are unfavorable to the defendant. *People v. Smith*, 177 Ill. 2d 53, 80 (1997). "The prosecutor may also respond to comments by defense counsel which clearly invite a response." *People v. Hudson*, 157 Ill. 2d 401, 404 (1993). Furthermore, allegations of prosecutorial misconduct require arguments of both the prosecutor and defense counsel to be reviewed in their entirety and allegations of improper comments must be placed in their proper context, rather than focusing on selected phrases or remarks. *Williams*, 192 Ill. 2d at 573. "Even if prosecutorial comment exceeds the bounds of proper argument, the verdict must not be disturbed unless it can be said that the remark caused substantial prejudice to the defendant." *Id*.

¶ 89 Jermaine claims that the state dehumanized him and "played to the jury's fears," by characterizing him and the other minors as "vicious animals operating outside the law." In support of his argument, he cites to several comments which refer to him and his friends as a "pack." Our review of the alleged misstatements in the context of the state's closing argument and the evidence introduced at trial, show that the state's closing argument was proper.

¶ 90 The evidence in this case demonstrated that Jermaine and three other co-offenders planned to rob Roman and Madhave. They worked as a group to corner and separate Roman and Madhave, chased Roman, and ultimately forced Roman to give them his iPod. While one offender threatened Madhave, other offenders blocked Roman's escape. Jermaine admitted that

he assisted the group by threatening Roman stating, "Give him what you got. He has a gun." After beating Madhave and taking Roman's iPod, the group fled.

¶ 91 The state never referred to Jermaine as an animal in its closing argument. Instead, it referred to Jermaine and his co-offenders as a "pack" in order to explain that Jermaine was part of a group working in concert with one another to isolate and attack a targeted victim. *People v. Liddell*, 240 Ill. App. 3d 229, 234-35 (1992) (finding that comparing the defendant to a "wolf in sheep's clothing" and noting that wolves "like to run in packs" in order to explain that the defendant and his friends worked as a team was not improper). Here, the state's use of the term "pack" was based on the evidence or an inference from the evidence introduced at trial as Jermaine and his co-offenders worked as a team or a pack to rob Roman.

¶ 92 Furthermore, the state's comment that Jermaine and his co-offenders relied on the rules of the jungle, namely "strength in numbers," in order to overpower the two victims, as well as the state's comment, "You run with the pack, you share in the prey," were proper because the comments were based on the evidence. In this case, a group of four boys, or a pack, targeted two boys walking home from school and planned to rob them. Jermaine and his co-offenders followed the two boys and used the size of their group to corner and then separate the two boys.

¶ 93 Although Jermaine claims that the state's comment, "You run with the pack, you share in the prey," is analogous to the situation in *People v. Johnson*, 208 Ill. 2d 53, 80 (2003), we disagree. In *Johnson*, the Illinois Supreme Court found a similar comment improper because it likened the defendant to an animal, the comment was not based on the evidence and was solely used as a metaphor to explain the theory of accountability. In *Johnson*, there was no evidence that the defendant and his co-defendants worked together as a "pack," but instead, showed that the one offender wrestled with and shot one officer, while a co-offender exchanged gunfire with

another officer. *Johnson*, 208 Ill. 2d at 69. Thus, the defendants in *Johnson* relied on their weapons, rather than their strength in numbers to attempt to escape from the police. There was also no evidence that the defendants gained anything from their crime. Furthermore, *Johnson* involved other issues, including that the victim was a police officer, the state's closing argument was an emotional appeal to support law enforcement, and the prosecuting attorneys engaged in egregious behavior, wanting in professionalism.

¶ 94 Unlike the combination of "emotion-laden evidence, and inflammatory argument obviously designed to exploit that evidence" in *Johnson*, here, there was no effort on the state's part to shift the jury's focus away from the actual evidence in this case. *Johnson*, 208 Ill. 2d at 84. Instead, the state's comment was based on the evidence or an inference from the evidence and was limited to the relevant evidence of Jermaine's guilt. Thus, the comment stemmed from the state's overall focus on the facts and law of this case, and is not predicated on the same multiple, repeated and pervasive errors committed by the state in *Johnson*.

¶ 95 Even if we were to find that the issued had not been waived, the plain-error doctrine would not assist Jermaine. "The plain-error doctrine is a narrow and limited exception." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). In order "[t]o obtain relief under this rule, a defendant must first show that a clear or obvious error occurred." *Id*. Next, a defendant must show: "(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. Thompson*, 238 Ill. 2d 598, 613 (2010). The burden of persuasion rests with the defendant. *Id*. The evidence establishes that, under the first prong of

the analysis, the evidence of Jermaine's guilt was overwhelming, not closely balanced. Additionally, Jermaine has failed to establish plain error under the second prong, because errors in closing arguments are not recognized as structural errors. *People v. Glasper*, 234 Ill. 2d 173, 215 (2009).

¶ 96 VI. Other Alleged Errors

¶ 97 Jermaine also contends that the state misstated the law regarding its obligation to disclose evidence at trial and attempted to shift the burden of proof to him. To support that argument, he alleges the state misled the jury when they suggested that the defense had not given the jury information about the state's display of the photos to the victims just before trial. These comments, however, were not made in closing comment before the jury but were made during a sidebar outside the presence of the jury. Therefore, this was not an error requiring reversal.

¶ 98 Furthermore, the state's comment to the jury that its discovery conduct was proper was not error because it was supported by the evidence in this case. The state disclosed the photographs to Jermaine during discovery and did not violate the *Brady* doctrine. More importantly, any error in the state's argument would also be viewed as harmless because the trial court provided a limiting instruction that "[n]either opening statements nor closing arguments are evidence and any statement or argument made by the attorney's which is not based on evidence should be disregarded." *People v. Williams*, 192 Ill. 2d 548, 586-87 (2000) (confusion caused by state's argument is cured by jury instructions).

¶ 99 CONCLUSION

¶ 100 Accordingly, we affirm the judgment of the trial court.

¶ 101 Affirmed.