2016 IL App (1st) 152677-U
No. 1-15-2677

THIRD DIVISION
July 27, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ANTOINE H., a Minor	)	Appeal from the Circuit Court
	)	of Cook County.
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	
	)	No. 12 JD 4288
v.	)	
	)	
Antoine H., a Minor,	)	The Honorable
Respondent-Appellant.)	)	Cynthia Ramirez,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

Held: (1) In an appeal from an adjudication of delinquency for first-degree murder, the evidence was sufficient for a rational trier of fact to find Antoine guilty beyond a reasonable doubt even though the minor respondent was excluded as the source of a minor DNA profile found under the victim's right fingernails where there was no evidence that the victim scratched the shooter. (2) The trial court did not abuse its discretion in denying Antoine's motion *in limine* and barring a defense expert on the reliability of eyewitness identifications from testifying. The case was tried in a bench trial and the trial court indicated familiarity with the area of scientific studies and research concerning the reliability of eyewitness identifications. (3) The trial court did not err in denying Antoine's motion to suppress the out-of-court identifications, as they were not a result of impermissibly suggestive police procedures. Only one of several identifying eyewitness testified he saw a photograph of the minor respondent on a desk on his way to view the lineup, and there was no evidence the police intentionally placed a photograph there. The

photo array and the lineup were not impermissibly suggestive so as to lead to identification of the minor respondent, who had dreadlocks, where one of the fillers did not have dreadlocks and the other fillers all had dreadlocks and were similar in appearance to the minor respondent. (4) The minor respondent forfeited review of alleged prosecutorial misconduct for statements made during closing and rebuttal arguments by failing to object at trial. The complained-of comments regarding the lack of any scratching of the minor respondent and do not constitute plain error, as there was no error in the first place. Viewed in context, the prosecutor's comments were fair and accurate comments on the evidence and were invited by defense counsel. Because there was no error, the minor respondent's procedural default was honored and review was forfeited.

¶ 1 BACKGROUND

¶ 2 The minor respondent, Antoine H.[1], was tried in a bench trial and adjudicated delinquent for the first-degree murder of Terrence Wright. At trial, the State's evidence against Antoine consisted solely of the identification testimony of three eyewitnesses. The trial court denied Antoine's motion to suppress the out-of-court identifications of him as the offender. The trial court also denied Antoine's motion *in limine* to allow the testimony of an expert in the field of eyewitness identification. We summarize only the relevant facts from the record.

¶ 3 Motion to Suppress Out-of-Court Identifications

¶ 4 Antoine's motion to suppress out-of-court identifications is not part of the common law record. Instead, Antoine relies on a transcript of the hearing on the motion. At the hearing on the motion, Chicago Police Detective Patrick Ford testified that on October 19, 2012, around 4:15 p.m., he arrived at the scene of a shooting which had occurred on the corner of East 99th Street and South Yates Avenue in Chicago, Illinois, at about 3:40 p.m. When Detective Ford parked his car, two witnesses approached him, Timothy Riley and Willie Williams. Detective Ford, with his partner Detective Hill, spoke with Riley and Williams both together and then separately.

¶ 5 Riley told Detective Ford that he and Williams were doing lawn work outside when he noticed a group of students in uniform at the bus stop at the southeast corner of the block and

[1] Respondent was born November 1, 1997.

saw four or five black males, who were not in school uniforms, approaching the group of students. Riley saw one of the male black individuals from the group of four or five black males approach one of the uniformed students with a book bag. They engaged in some kind of brief conversation and then the individual pointed an object at the student, which Riley could not identify at the time. There was a brief struggle and then Riley then heard a pop, like a gunshot, and the student stumbled a couple of feet and fell face-first towards the parkway. At that point Williams headed over and observed the shooter and his friends run into the alley behind the bus stop.

¶ 6 Both Riley and Williams described the shooter as 5'8" to 5'10" tall, slender build, between 150 and 160 pounds, with a medium complexion, and wearing dreadlocks in his hair. However, both Riley and Williams said they would be unable to make an identification.

¶ 7 Detective Ford and other officers conducted a canvas of the area and identified a female witness, Ms. Mason, who was approximately 65 years old. Detective Ford interviewed Mason on the scene in the street. Mason said she saw three black males run into the alley behind her house. She provided a description of a taller, thin build, male black with braids and a medium complexion. Mason was not shown a photo array or brought to the lineup. She also was not brought before the grand jury.

¶ 8 While Detective Ford was at the scene, an officer from the Fourth District approached him and his partners and informed them that they had placed two other individuals in custody a couple of blocks away after running from the scene: Jarone Carter and Devon Radford. A few days later, on October 22, 2012, Detective Ford also spoke with several students from Banner High School who witnessed the shooting: M.S.; M.P.; A.F.; and B.C. A photo array was presented to the students at the school and Carter and Radford were identified by some of the

student witnesses as two of the individuals who were in the group with the shooter. Antoine was not in this photo array, as he was not yet a suspect.

¶ 9 Detective Ford testified that the day of the murder he provided the description of the shooter to Detective Sylvia Van Witzenburg, who searched the Chicago Police Department contact cards database. Detective Ford testified that the police contact cards database is populated with index cards filled out by officers of information of individuals they come into contact with, which can be anything from street interviews to arrests to talking to a citizen about issues on the block. An individual named Earl Payne matched the physical description of the shooter and had been arrested for robbery in close proximity to the shooting. The contact card database also yielded Antoine as an individual who lived in the vicinity of the shooting and also matched the physical description of the shooter. This information was in the case report. Detective Ford testified that he and the other detectives learned from tactical officers and people in the area that Antoine was part of the robbery crew in the area, though this information was not included in the case report.

¶ 10 The police arranged another photo array for the witnesses, this time including a photo of Antoine. Detective Ford testified that photo arrays are selected by a computer system called "Mugshot," where a suspect's central booking (CB) number is entered, which would retrieve the individual's mugshot photo, and then a search is run for similar demographics. Officers always use the suspect's mugshot photo from his or her most recent arrest. The program yields hundreds of photos to choose from and the officer selects the photos that he or she believes are the most appropriate.

¶ 11 Detective Ford testified that Detective Van Witzenburg showed the photo array to the four student witnesses from Banner High School: M.S.; M.P.; A.F.; and Juanita Pittman.[2] M.P.; A.F. and Pittman viewed the photo array at the school. M.S. viewed the photo array after school at his home. Detective Van Witzenburg had the witnesses read and sign advisory forms which stated three things: (1) the suspect may or may not be in the array; (2) the witnesses should not assume that the detective knows who the suspect is; and (3) the witnesses are not required to make an identification. Detective Van Witzenburg showed the photo arrays to M.S., M.P., and A.F. separately, after reading them a lineup advisory form.

¶ 12 M.S. was the only witness who identified Antoine from the photo array. M.P. did not make any identification and stated that he was focused on the gun. A.F. identified someone other than Antoine. Juanita Pittman identified two people in the photo array as looking "familiar," but stated she would "need to see [them] in person." Detective Ford arrested Antoine based on the probable cause provided by the positive identification of Antoine by M.S. At the time of Antoine's arrest, he was 5'8" and 125 pounds.

¶ 13 The following witnesses were not shown a photo array: Mason; Williams; Riley; and Brandon Crosby. Detective Ford testified that once M.S. identified Antoine from the photo array and the police had probable cause, he no longer shows photo arrays because the police want witnesses to look at a live lineup. Mason was not shown either a photo array or taken to view a lineup because Detective Ford believed that she would not be able to identify the shooter due to her viewing distance from inside her house to the alley.

¶ 14 An investigative alert was issued for Antoine's arrest. Antoine was arrested on October 28 and brought into custody to participate in a lineup that evening conducted by Detective Ford.

[2] Pittman was eighteen years old at that time. The other minor witnesses at the school were not yet eighteen years old, and so we use only their initials for identification in our order.

The fillers used for the lineup were not the same fillers used for the photo array. The officers used individuals in custody at lockup facilities as fillers.

¶ 15 The following witnesses viewed the lineup: M.S.; A.F.; B.C.; M.P.; Rachelle McDowell; Riley; and Williams.

¶ 16 The witnesses were brought in to view the lineup at different times. First, several of the student witnesses were brought in to view the lineup. They were placed into a "vendeteria," which is about 50 feet from the office, separated by an open air atrium, a hallway, and a set of double doors. Next to Detective Ford are two interview rooms that are divided by a one-way mirror. The officers went into the data warehouse to find a minimum of four individuals in custody in surrounding districts within a reasonable travel distance who are similar to Antoine's demographics. The officers always use five people in a lineup, including the suspect. The officers were able to locate three other individuals in police custody who had dreadlocks, and one individual who did not have dreadlocks.

¶ 17 Antoine was brought into the lineup room and was allowed to choose where he wanted to stand in the lineup. Antoine and the other four individuals lined up against the wall. Detective Ford brought one witness in at a time. After each witness viewed the lineup, they were escorted out of the room and Detective Ford brought them to a conference room with tables and a television. Only the witnesses who already viewed the lineup were brought to this area so they could not talk to any witness who had not yet viewed the lineup, so as not to contaminate the lineup procedure. Detective Ford testified that before he walks each witness to the viewing room he alerts the detectives in the hold area so as not to compromise this investigation or any other investigation. Detective Ford then again alerted detectives he was escorting a witness before proceeding through the double door. Detective Ford read each witness lineup advisory forms and

had them sign the forms before viewing the lineup. The lineup advisory forms was the same form as the photo array advisory forms.

¶ 18 Detective Ford testified that he walked Riley from the vendeteria to the viewing area and that he alerted other detectives before he walked Riley to the viewing room. Detective Ford testified that he and his partners did not place a photograph of Antoine or any other fillers or suspects on a desk in plain view that would be seen when walking to the lineup viewing room. Detective Ford also testified that while he was walking each witness to the lineup viewing room he did not see any prominently displayed photographs of Antoine or any other suspect on any desk.

¶ 19 Of the witnesses who viewed the lineup, the following identified Antoine: M.S.; A.F.; B.C.; and McDowell. Detective Ford testified that these five witnesses all stated that Antoine pointed a gun at the victim, Wright, and made demands for his property. Wright attempted to wrestle the gun away and there was a brief struggle. Antoine shot Wright and Wright stumbled a couple of feet and collapsed. Antoine then gave the gun to another individual and they all took off running together.

¶ 20 Riley, Williams and M.P. did not identify Antoine in the lineup. A.F. did not identify defendant in the lineup but from a subsequent photo array.

¶ 21 Mason did not view either the photo array or the lineup because she stated she was too far from the shooter. M.P. did not view the lineup because he stated that he was focused on the gun and unable to see the face of the shooter and could not make a positive identification. Detective Ford testified that he did not place any pictures of Antoine or the other individuals in the lineup in the area outside the lineup viewing room and did not see any prominently displayed photos of Antoine.

¶ 22 Detective Ford received a defense report regarding an additional suspect but did not pursue the information because he found the report self-serving and irrelevant and felt that he "had the right guy in custody."

¶ 23 Timothy Riley testified that on October 19, 2012, at approximately 3:45 p.m., he, Williams and probably two other friends were working on a house he owns. They were finishing working when Riley saw the students gathering at the 100th Street bus stop after getting out of school. Riley also saw police cars patrolling the area and individuals peering from the alley. Riley thought a house had been broken into, as there had been recent burglaries. The bus stop was less than half a block from Riley's house. He estimated there were about 30 students at the bus stop. Riley heard a pop but thought it was a firecracker. He turned toward the direction of the sound and Williams said someone was hit. Riley saw someone in the crowd take a few steps and fall. Riley and Williams both ran to the bus stop to the victim, called 911 and waited until the police arrived. At that time, only about half the students were still on the scene. Riley and Williams went back to Riley's house.

¶ 24 Detective Ford came to Riley's house and spoke with him. Riley told Detective Ford what he witnessed. About a week later, Riley went to the station to view a lineup. Detective Ford walked him to the lineup viewing room. Riley testified that before viewing the lineup he and Detective Ford walked past some desks and Detective Ford stopped at a desk where Riley saw a photograph with information regarding someone who was in the lineup he viewed. Riley testified that Detective Ford did not, however, draw his attention to this picture. Riley also testified that he returned to the station a few weeks later to view a second lineup and noticed a photograph of another person in the lineup, in the same spot that he witnessed the other photograph when he went to view the first lineup.

¶ 25 Riley testified that some time later, he spoke with a defense investigator and told the investigator that one of the people in the lineup was in a photograph that he saw displayed before going to the lineup room. Riley denied speaking to a defense investigator on March 9, 2013 and telling him that he observed boys in the alley talk and then fight with a boy who got shot. Riley signed a statement on September 16, 2014, about a month before the motion to suppress, that seeing the photograph before the lineup "upset [him] very much." Riley never told the police about this visit from the defense investigator.

¶ 26 The defense argued that, based on Riley's testimony, and the fact that A.F. initially identified someone else in the photo array then subsequently identified Antoine in the lineup, the police procedure for the lineup was likely suggestive for each witness who viewed the lineup. The defense also argued that several individuals in the lineup did not resemble the physical description of the suspect that was identified.

¶ 27 After hearing argument, the court denied Antoine's motion to suppress the identifications. The court also found that it was too much of a "leap" to infer that seven other witnesses also saw a photograph merely because one witness saw a photograph.

¶ 28 Antoine's Motions *in Limine* to allow Expert on Eyewitness Identifications and For the Trial Court To Take Judicial Notice of Articles on Eyewitness Identification

¶ 29 Antoine filed a motion *in limine* to allow Dr. Shari R. Berkowitz, an expert on eyewitness identification, to testify. Dr. Berkowitz's report summarized scientific research in the field of eyewitness memory and explained the factors tending to distort and undermine memory including violence, stress, the present of a weapon, exposure to contaminating information after viewing the event; and a phenomenon known as "unconscious transference" through which memories cross-contaminate each other in ways that seem real to the witness. Dr. Berkowitz's

report noted that identifications by multiple eyewitnesses do not eliminate these problems, and that in a study of 250 DNA exonerations revealed that in 38% of those cases multiple eyewitnesses had mistakenly identified the same innocent person. Dr. Berkowitz opined that "several eyewitness memory factors which affect memory and the reliability of eyewitness identifications are present in this case." Antoine also filed a motion *in limine* for the trial court to take judicial notice of scholarly articles in the field of eyewitness identification.

¶ 30 The State filed a motion *in limine* to exclude Dr. Berkowitz's testimony, arguing that the testimony would not be helpful to the trier of fact because "[t]he trustworthiness of an eyewitness' observation is not generally beyond the common knowledge and experience of the average juror [and] is not a proper subject for expert testimony."

¶ 31 The court that heard Antoine's motion to suppress also denied Antoine's motion to admit Dr. Berkowitz's testimony at the motion to suppress hearing but stated it would "not preclud[e] [Antoine] from going into any of that, should it become necessary at a later date."

¶ 32 Antoine renewed his motions for the adjudication hearing. The trial court for Antoine's adjudication hearing denied Antoine's motion *in limine* to allow Dr. Berkowitz to testify at the adjudication hearing and his motion for the court to take judicial notice, ruling as follows:

> "*** I don't think it's proper to put Ms. Berkowitz on for this. ***
>
> *** I've read a lot of this stuff. I mean, I'm all aware of it [sic]. It's not something that's coming out of left field. This has been going on for, you know, at least ten years with a lot of research.
>
> I'm very wary in cases where the entire evidence that the State's put forward is eyewitness identification and consider that carefully. And it's *** a question of *** weight rather than admissibility at this point, because we did the motion [to] suppress

identification; and, you know, in certain circumstances that evidence is really not worth much weight if there – depending on the circumstances surrounding the identification. ***

*** To put it on in terms of either witnesses or judicial notice is – I just don't think evidentially that's the right way to do it [*sic*].

So my ruling on that ** is that *** these motions are denied but, of course, you're able to argue any and everything that you feel *** goes against the weight of the eyewitness identification because of the circumstances and because of the things that we all know from experience, having done this for years, about the danger of eyewitness identification ***."

¶ 33 The case was then assigned to a different trial judge for the adjudication hearing.

¶ 34 Adjudication Hearing

¶ 35 The evidence at the adjudication hearing was substantially the same regarding the events the day of the shooting, with some additional witness testimony and details. We summarize only the testimony of witnesses relevant to this appeal.

¶ 36 Detective Ford's testimony was substantially the same as his testimony at the motion to suppress. Detective Ford additionally testified that when Carter and Radford were apprehended, gunshot residue tests were performed on them and then they were released. Based on the number of days that had passed since the shooting, no gunshot residue test was performed on Antoine when he was arrested. Detective Ford testified that B.C., M.S., and A.F. were all placed together in the vendeteria prior to viewing the lineup but then were taken one by one to view the lineup. B.C., M.S., and A.F. identified Antoine as the shooter. When Detective Ford walked each witness to the lineup room he did not stop and did not show the witnesses anything. On October

29, 2012, he conducted a lineup that included Carter. M.S. and A.F identified Carter as the individual to whom Antoine handed the gun after the shooting. B.C. identified Carter as being on the scene. Detective Ford testified that all of the fillers in the lineup matched the description of the shooter as 5'8" to 6' tall, 1501 to 160 pounds, brown skin, shoulder-length dreadlock braids, except for the hair. One of the fillers did not have dreadlocks.

¶ 37 Detective Ford took the witnesses to the Grand Jury on November 21, 2012, including the student witnesses and Riley and Williams. Riley did not testify before the Grand Jury. Detective Ford again testified that he received a report from defense investigators of witness statements but testified that that the statements in the report "were all self-serving alibis from friends and acquaintances" and believed that they "had the right guy."

¶ 38 On cross-examination, Detective Ford testified that he was aware of an Illinois State Police crime laboratory report regarding testing of DNA retrieved from Terrence's fingernails, which was entered into evidence. Detective Ford, however, did not believe there was any way that DNA was transferred from the shooter to the victim. Detective Ford testified that he also reviewed phone records but did not find them relevant.

¶ 39 Riley's adjudication hearing testimony was substantially the same as his testimony for the hearing on the motion to suppress.

¶ 40 M.S. testified that on October 19, 2012, he was a senior at Banner high school. The students wore uniforms of white shirts, a tie, and khaki pants. When school let out that day, M.S. walked to the bus stop with about 17 to 20 other students, including Terrence Wright. The students were "horseplaying" at the bus stop. M.S. saw a group of about five or six males, not in the Banner student uniforms, walking towards them and the students stopped playing. A few of the males went through the alley. The alley was about 50 feet from the bus stop. Two continued

walking toward the students. M.S. identified Antoine in court one as of these males. There were about six students between M.S. and Antoine, but none of these students were blocking M.S.'s view. Antoine had dreadlocks and was wearing a hooded sweatshirt. The hood was on his head but was not covering any part of his face. The other male stopped and handed Antoine what M.S. believed was a gun. M.S. observed a black handle. Antoine walked past M.S. and the crowd, went straight to Terrence and told Terrence, "Give me everything you got," and pulled out a gun from his hoodie pocket. Terrence was about 10 feet from M.S. and had his back to M.S., but M.S. testified he could observe what was happening. Antoine and Terrence started "tussling," which is when the gun was fired. M.S. lost sight of Antoine for only about two seconds when Antoine walked past him and behind him, but M.S. turned around and continued observing. Terrence kept telling Antoine, "I don't have anything." Antoine kept patting down Terrence and had the gun to his chest. Terrence grabbed the barrel of the gun with his left hand and they "tussled" over the gun for about four or five seconds. Then Terrence hit Antoine with his right hand on Antoine's upper ear and the shot went off. M.S. did not observe Terrence scratch Antoine. No one else had a weapon. After the gunshot, M.S. ran back to the school. The incident happened in about 25 to 30 seconds, from when he first saw Antoine, to when the shot was fired.

¶ 41 M.S.'s mother and father did not allow him to return to school on Monday, but M.S. went back to school the following Tuesday, October 23, 2012, which is when M.S. met with detectives. M.S. then met with detectives later after school at his home. The detectives showed M.S. a photo array. M.S. was advised regarding the advisory form, which he signed. From the photo array, M.S. identified Antoine as the shooter. He marked "shooter" on the photo and signed it. M.S. also identified another individual from the array as the second individual who walked with Antoine, the "hand-off man."

¶ 42 On October 28, 2012, M.S. went to the station to view a lineup. M.S. was again advised regarding an advisory form, which M.S. signed. On the way to the lineup room, the detective did not show M.S. anything. M.S. identified Antoine from the lineup. Antoine was the only individual in the lineup who was also in the photo array. The following day, the police asked M.S. to view another lineup. M.S. was again advised regarding an advisory form, which he signed. M.S. identified the "hand-off man" from this second lineup.

¶ 43 A.F. testified that he was a student at Banner High School and was at the bus stop on October 19, 2012, with approximately 15 to 20 fellow uniformed students, one of whom was Terrence. A.F. testified that the students were horseplaying when they noticed a group of males, not in the school uniform, at the corner of 110th and Yates about a block away. A.F. saw two individuals who were students walk up to these other individuals and talk to them and then they walked off. A.F. saw three remaining individuals walk into a gangway and then come back out. A.F. identified Antoine in court as one of those individuals. A.F. took notice of the individuals because there had been robberies around the neighborhood. Three of the individuals walked toward the students, Antoine and two other individuals. Two stopped at a gate by a gangway and went into the gangway but Antoine kept walking toward the students. A.F. saw Antoine walk past him and walk up to Terrence. Antoine was within arm's length of A.F. when he walked by. A.F. testified that Antoine had dreadlocks that were not long but were up to his eye level and ear level. Antoine withdrew a gun, pointed it at Terrence's face and said, "Give me your sh** or I'm going to blow your sh** off." The gun looked like either a 9 mm or a .45-caliber gun. No one else had a gun. Terrence said, "Get that gun out my face [*sic*]." Terrence then reached for the gun with his left hand and swung at Antoine with his right hand. Terrence and Antoine tussled for the gun, like a tug of war. They both grabbed each other's hands and the gun, fighting over it, and

then the gun went off. A.F. saw that Antoine had his hand positioned where the trigger was. Terrence let go of the gun, put his hands up, said "Wau Wau ***, I'm hit," and fell. Wau Wau was Juanita Pittman, another student who was also at the bus stop. Terrence fell to the ground, started having a seizure, and his eyes rolled to the back of his head. One of the students told two of the individuals Antoine was with, "Give me my gun, you tweaking," and they ran back to 100th Street and Yates.

¶ 44 A.F. noticed another classmate named J.M. walking down the street with her baby, who was A.F.'s godson. A.F. walked with J.M. to her house at 98th and Yates. By then, a security guard from the school and the police pulled up. A.F. spoke with the school security guard and went home. He did not talk to the police or call the police because he was in shock. The following Monday, October 22, 2012, A.F. went to school and spoke with detectives. A.F. was advised regarding the advisory form, which he signed. A.F. was shown a photo array and he identified the individual who was with Antoine and owned the gun. This was the individual who said to Antoine to give him his gun after the shooting. This individual had gone to Banner High School and was kicked out two days prior. The following day A.F. was shown another photo array at school. He was again advised regarding the advisory form. A.F. identified someone other than Antoine but told the police that he had to see the individual in person in a lineup to give an accurate identification. A.F. was also shown a third photo array for the third individual, but A.F. did not identify anyone because he "didn't get a good look at the person's face."

¶ 45 On October 28, 2012, A.F. went to the station to view the lineup. Before viewing the lineup, A.F. was advised regarding the advisory form, which he signed. A.F. identified Antoine as soon as he walked into the lineup viewing room. A.F. went back to the station the next day to view another lineup. A.F. identified the person who retrieved the gun from Antoine. A.F.

described Antoine's appearance the day of the shooting as "pretty skinny." He could not remember what Antoine wore but remembered his face because it "stuck in [his] head."

¶ 46 B.C. testified that on October 19, 2012, he was a student at Banner High School and was at the bus stop with about 10 to 15 uniformed Banner students, including Terrence. A group of about eight males, not in uniform, started walking towards B.C. and the group of students, one of whom was the shooter. B.C. identified Antoine as the shooter in court. About three of the individuals went down an alley. Antoine and a two other individuals continued walking toward the students. One of the individuals stopped at the alley, and the other individual kept walking with Antoine. B.C. was about three feet away from Antoine when Antoine walked up. Antoine had dreadlocks, was light-skinned, around 5'9" and not heavily built. Antoine wore a hood but it did not cover his face. Antoine pointed a gun at Terrence's face and said, "Run your f***ing pockets" and said, "Don't nobody move." Terrence was in front of B.C. within arm's length, with his back to B.C. Terrence said, "Get that gun out my face [*sic*]." Terrence reached for the gun, grabbed it by the end of the barrel with his right hand, and hit Antoine with his left hand on either his face or his chest. Antoine and Terrence wrestled and then B.C. heard a gunshot. No one else had a weapon. Terrence then fell. Antoine and the second individual walked back to the third individual, who was by the alley, gave him the gun, and then they ran off. B.C. waited until the ambulance came and then he walked away and got on the bus.

¶ 47 The following Monday, October 22, 2012, B.C. met with detectives at school and was shown a photo array. Prior to viewing the photo array, B.C. was advised regarding the identification advisory form, which he signed. B.C. identified the individual who gave Antoine the gun. On October 28, 2012, B.C. went back to the station to view the lineup. B.C. identified Antoine. Before the lineup B.C. viewed another photo array with Antoine in it. No further

testimony was elicited regarding whether B.C. identified Antoine from this photo array. B.C. testified that the following day he viewed another lineup and identified the individual who took the gun after the shooting.

¶ 48 Officer Christopher Krizka testified that he arrested Antoine pursuant to the investigative alert. When he arrested Antoine, he did not observe any marks on his face or hands.

¶ 49 Detective Sylvia Van Witzenburg testified that she was assigned to the case on Monday, October 22, 2012. Detective Van Witzenburg familiarized herself with available reports on the case and compiled a photo array using the two individuals who had been apprehended on the day of the shooting and released, Carter and Radford. Detective Van Witzenburg used the police Mug Shots database system by typing in the individuals' names, which yields their mug shots, and then the computer picks mug shots of individuals with similar looks and a similar background. The computer yields about 20 similar individuals and she selected the ones to include in the photo array. She went to Banner High School with another detective and interviewed students in a room at the school. She spoke with each student witness separately and showed them the photo array. She first interviewed A.F. She explained the advisory form to him, he indicated that he understood it, and he signed it after reading it. A.F. identified Carter as the person who took the gun and left the scene.

¶ 50 She interviewed B.C. and also explained the advisory form to him, which he signed. B.C. also identified Carter as the individual who took the gun and left the scene. Detective Van Witzenburg then returned to the station and used the contact card database to search for any known associates of Carter in the vicinity of the shooting, which yielded Antoine and Erron Payne. Detective Van Witzenburg then created a photo array that included Antoine and Payne. The following day Detective Van Witzenburg went back to the school and spoke with around 20

or 30 students. Detective Van Witzenburg showed this photo array to A.F. She again explained the advisory form and he signed the form. A.F. identified another individual, not Antoine, as the shooter from this photo array. Detective Van Witzenburg then showed A.F. the photo array including Carter. A.F. did not identify anyone from this array.

¶ 51 Detective Van Witzenburg spoke with M.S. at his home. She explained the advisory form to him, which he signed. M.S. identified Antoine as the shooter. M.S. also identified Carter as the person he saw walking with Antoine. M.S. did not identify anyone from the third photo array. After that, Detective Van Witzenburg made an investigative alert for Antoine's arrest.

¶ 52 On October 28, 2012, Detective Van Witzenburg met with B.C. at the station after he viewed the lineup and recorded his interview. Detective Van Witzenburg testified that she showed B.C. a photo array prior to the lineup, but it was not the same day as the lineup.

¶ 53 The parties entered a stipulation that the medical examiner concluded that Terrence died of a gunshot wound to the chest, which entered front to back. There were abrasions on the left lateral canthus one to one and one-quarter inches, the left cheek measuring one-quarter inch, left ear measuring one-eighth inch, and the right cheek measuring one to one and a one-quarter inches. There were also abrasions on the right shoulder and left side of the chest, as well as on the right knee.

¶ 54 The parties also entered into evidence a stipulation that Christina Caccamo, a DNA analyst for the Illinois State Police crime lab, would be qualified as an expert in forensic DNA analysis and that she tested and compared the DNA from the fingernail clippings of Terrence to Antoine's buccal swab DNA and Carter's buccal swab DNA, as well as a blood standard from Terrence. She identified a mixture of two human DNA profiles in Terrence's right fingernails. A major male DNA profile was identified in the right fingernail, which matched Terrence's own

DNA and did not match either Antoine or Carter. A minor DNA profile was identified in the swab of the right fingernails from which Carter could not be excluded. Antoine was excluded from having contributed to this minor DNA profile. Male DNA was identified in the swab of Terrence's left fingernails, which matched Terrence's own DNA and did not match either Antoine or Carter.

¶ 55 Antoine's sister, Ashley, testified that Antoine was present with her at her house during the time of the shooting and that Antoine left the house that day at around 3:40 p.m. Ashley also testified that Antoine, she and their mother were on a T-Mobile family cell phone plan and that she was the account holder. The cell phone records showed that there were some text messages on Antoine's cell phone around the time of the shooting.

¶ 56 Trial Court's Findings

¶ 57 The court made the following findings:

"After having heard all of the witnesses, in particular the eyewitnesses, I find that those witnesses were credible; that the defense did not show or indicate any motive or bias on the part of those eyewitnesses to lie.

I find that those eyewitnesses had ample opportunity to view the incident, the incident taking place during the early afternoon daylight hours; all the witnesses indicated that there were no obstructions of their view of the incident that took place; that at some point in time the offender passed directly next to them and that at some occasions [sic] the offender was close enough for them to reach out and touch the offender.

* * *

I find also that the degree of attention that all of the witnesses had was very able [sic] to observe the incident and that they were definitely on alert. All of the three

eyewitnesses indicated that in fact they were on alert because they observed the minor respondent and his associates coming down the street and noted that those individuals were not wearing school uniforms because of the nature of the neighborhood, that put them on alert.

* * *

The accuracy of their description [sic] were similar for the offender and all of the witnesses described the offender in a similar fashion.

The level of certainty at the point of identifications both at photo array as well as the lineups were certain for two of the witnesses ***.

I find that the length of time between the offense and the identification was not a nature [sic] that would taint or call into question the identification. The photo arrays were provided within days of the shooting; the lineup took place a week after the shooting.

* * *

I did not find that the officers tainted or primed any of the witnesses to such a degree or any degree that would have called into question the photo array identification or the lineup identifications.

I did not find the alibi to be credible. She was impeached by her prior statement to the police officers in which she stated that the minor respondent was at school at the time of the incident. And while testifying before this Court, her demeanor reflected a deceptiveness that impeached her credibility to this Court.

* * *

Because I did not find her credible, the phone records that were submitted by the minor respondent also lacked credibility ***.

> I did not find the DNA to be dispositive or determinative of anything in the proceedings. There was nothing in the testimony of the eyewitnesses that indicated that there was a transference of DNA; there was no scratch; there was no cut; there was no pulling of hair or anything that would have indicated to this Court that there would have been a transference of DNA such as to make the DNA results dispositive or determinative to this Court."

¶ 58 Antoine was sentenced on March 4, 2015 to imprisonment of an indeterminate term, to automatically terminate upon attaining 21 years of age.

¶ 59 Antoine's motion for a new trial was denied on September 9, 2015. Antoine filed a timely notice of appeal. On appeal, Antoine raises the following arguments: (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt where the DNA evidence exculpated him; (2) the trial court erred in excluding expert testimony on the reliability of eyewitness testimony; (3) he was deprived of his right to due process and a fair trial when the trial court denied his motion to suppress the eyewitnesses' out-of-court identifications; and (4) the State committed reversible error in making material misrepresentations of fact during closing argument. We reject each of Antoine's contentions and affirm his adjudication.

¶ 60 ANALYSIS

¶ 61 I. Insufficiency of the Evidence

¶ 62 We first consider Antoine's argument that the evidence at trial was insufficient to adjudicate him delinquent for the murder of Terrence Wright because the DNA evidence exculpated him.

¶ 63 In reviewing the sufficiency of the evidence for a finding of delinquency "the applicable standard of review is whether, after viewing the evidence in the light most favorable to the State,

any rational trier of fact could have found the elements of the delinquency petition were proved beyond a reasonable doubt." *In re S.M.*, 2015 IL App (3d) 140687, ¶ 13 (citing *In re W.C.*, 167 Ill. 2d 307, 336 (1995)); *In re Winship*, 397 U.S. 358, 367-68 (1970) (juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with a violation of a criminal law). In determining whether a defendant's conviction was proven beyond a reasonable doubt, the reviewing court views the evidence in the light most favorable to the prosecution and asks whether any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). "Insufficient evidence is that which is 'unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt.' " *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 25 (quoting *People v. Campbell*, 146 Ill. 2d 363, 375 (1992)).

¶ 64 The prosecution has the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. *In re Keith C.*, 378 Ill. App. 3d 252, 257-58 (2007) (citing *People v. Slim*, 127 Ill. 2d 302, 306 (1989)). A single witness's identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *In re Keith C.*, 378 Ill. App. 3d at 258 (citing *Slim*, 127 Ill. 2d at 306). The reliability of a witness's identification of a defendant is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d at 258 (citing *People v. Cosme*, 247 Ill. App. 3d 420, 428 (1993)). To the extent that eyewitness testimony was inconsistent, it is for the trier of fact to resolve conflicts or inconsistencies in the evidence. *In re Keith C.*, 378 Ill. App. 3d at 259 (citing *People v. Tenney*, 205 Ill. 2d 411, 428 (2002)). On appeal, reviewing courts consider "whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt." United States v. Powell, 469 U.S. 57, 67 (1984).

¶ 65 Antoine argues that because he was excluded as the contributor of the DNA the other evidence was insufficient to prove his guilt beyond a reasonable doubt. Antoine argues that DNA transference "was likely" when Wright and the shooter "fought hand-to-hand," and that because the foreign DNA under Wright's nails was not Antoine's, this establishes that Antoine could not have been the shooter.

¶ 66 The trial court found that the DNA evidence was not dispositive because the defense had not shown that Wright scratched cut, or pulled the hair of the shooter, stating:

> "I did not find the DNA to be dispositive or determinative of anything in the proceedings. There was nothing in the testimony of the eyewitnesses that indicated that there was a transference of DNA; there was no scratch; there was no cut; there was no pulling of hair or anything that would have indicated to this Court that there would have been a transference of DNA such as to make the DNA results dispositive or determinative to this Court."

¶ 67 This finding is supported by the evidence. Contrary to Antoine's assertion, there was no testimony that there was any contact between the victim and the shooter of the type that would leave skin cells beneath the victim's fingernails. The autopsy revealed that the victim had scratches on his body, but there was no testimony that the victim ever scratched the shooter. There was no testimony of any hand-to-hand combat, as Antoine portrays. Rather, Wright and the shooter struggled over control of the gun. There was no evidence that Wright ever scratched the shooter. None of the witnesses who identified Antoine as the shooter at trial ever testified that Wright scratched Antoine. M.S. testified that he did not see Wright scratch the shooter. B.C. answered, "I don't know" when he was questioned whether or not Wright scratched the shooter. A.F. was not even asked this question.

¶ 68 We further note that the DNA found under Wright's right-hand fingernails was a mixture, with the victim's own DNA being the major profile, and the other DNA profile was only a minor profile. However, there was no evidence of any scratching of the shooter by the victim in this case. We do not find that the DNA test excluding Antoine from the minor DNA profile renders all the other evidence at trial insufficient to establish his guilt beyond a reasonable doubt. The fact that Antoine was excluded as the source of the minor DNA profile found under the victim's right fingernails does not exculpate him where there was no evidence that the victim even scratched the shooter. See *People v. Gholston*, 297 Ill. App. 3d 415, 422 (1998) (in the context of a post-conviction petition in a rape and murder case, holding that a DNA non-match did not exculpate the defendant where there were multiple defendants involved and a lack of evidence regarding ejaculation by the defendant, and so any evidence that could be obtained via DNA testing would not be material to the defendant's actual innocence and would not be of such conclusive character as to probably change the result on retrial). Further, the DNA non-match under these circumstances does not create any reasonable doubt where multiple witnesses identified Antoine as the shooter. See *People v. Allen*, 377 Ill. App. 3d 938, 944 (2007) (positive eyewitness testimony linked the defendant to an offense despite the lack of DNA evidence on the gun); *People v. Harris*, 314 Ill. App. 3d 409, 419 (2000) (rejecting a sufficiency of the evidence challenge and holding that, while the DNA evidence did not inculpate the defendant, it also did not exculpate him, and the victims identified the defendant in lineups and in open court). "In other words, and contrary to defendant's claim, DNA does not trump all other evidence." *Rivera*, 2011 IL App (2d) 091060, ¶ 31.

¶ 69 "[A] reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Davison*, 233 Ill. 2d 30, 43 (2009). Considering the evidence in the light

most favorable to the prosecution, we hold that the evidence at Antoine's trial was sufficient for a rational trier of fact to find Antoine guilty beyond a reasonable doubt.

¶ 70 II. Barring Identification Expert Testimony

¶ 71 Antoine also argues that the court erred in denying his motion *in limine* to present the eyewitness identification expert testimony and barring the expert from testifying. Antoine argues that defense counsel's closing argument is not a substitute for his constitutional right to present witnesses, including expert witnesses. *Lerma* held that the right to present witnesses is a core component of "[a] criminal defendant's right to due process and a fundamentally fair trial." *Lerma*, 2016 IL 118496, ¶ 23 (citing *People v. Wheeler*, 151 Ill. 2d 298, 305 (1992)).

¶ 72 " 'In Illinois, generally, an individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion.' " *People v. Lerma*, 2016 IL 118496, ¶ 23 (quoting *People v. Enis*, 139 Ill. 2d 264, 288 (1990)). " In addressing the admission of expert testimony, the trial court should balance the probative value of the evidence against its prejudicial effect to determine the reliability of the testimony." *Lerma*, 2016 IL 118496, ¶ 23 (citing *Enis*, 139 Ill. 2d at 288). "In addition, in the exercise of its discretion, the trial court should carefully consider the necessity and relevance of the expert testimony in light of the particular facts of the case before admitting that testimony for the jury's consideration." *Id*. Expert testimony is "only necessary when the subject is both particularly within the witness's experience and qualifications and beyond that of the average juror's, and when it will aid the jury in reaching its conclusion." *Lerma*, 2016 IL 118496, ¶ 23 (citing *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993). "[A] trial court's decision to allow or exclude eyewitness identification expert testimony must be made on a case-by-case basis" *People v. Aguilar*, 396 Ill. App. 3d 43, 51

(2009) (*People v. Tisdel*, 338 Ill.App.3d 465, 468 (2003)). The admission of eyewitness identification expert testimony is reviewed under the abuse of discretion standard. *Lerma*, 2016 IL 118496, ¶ 23; *People v. Becker*, 239 Ill. 2d 215, 234 (2010); *Enis*, 139 Ill. 2d at 281. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *Becker*, 239 Ill. 2d at 234 (citing *People v. Illgen*, 145 Ill. 2d 353, 364 (1991), *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997)).

¶ 73 Defendant relies on *Lerma* in his reply brief. In *Lerma* the Illinois Supreme Court held that the circuit court abused its discretion in denying defendant's motion to allow expert testimony concerning the reliability of eyewitness identifications. The sole evidence of the defendant's guilt was two eyewitness identifications, and one eyewitness testified that the defendant had been friends for several years, while the other eyewitness had also knew the defendant and had seen him a few times previously, then testified that she did not know the defendant. *Id*. at ¶¶ 5-6, 26. There was no physical evidence linking the defendant to the crime. *Id*. at ¶ 26. Only one eyewitness was subject to cross-examination; the identification by the other eyewitness was admitted under the excited utterance exception to the hearsay rule. *Id*. at ¶ 26. The court found that "there is no question that this is the type of case for which expert eyewitness testimony is both relevant and appropriate." *Id*. The court held that such expert testimony would have assisted the jury "under the circumstances present in this case," and reversed. *Id*. at ¶¶ 39-40. The court noted that the body of research on the validity of eyewitness identifications is "largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive." *Lerma*, 2016 IL 118496, ¶ 24. The court granted the defendant a new trial and

specifically instructed the circuit court to allow an expert on eyewitness identification. *Lerma*, 2016 IL 118496, ¶ 35.

¶ 74 We note that, since *Lerma*, there have been several cases where this court affirmed the barring of eyewitness identification experts but the Illinois Supreme Court directed this court to vacate its judgment and reconsider the decisions in light of *Lerma*. See *People v. Calaff*, __ Ill. 2d __, 48 N.E.3d 180 (Ill. 2016); *People v. Taylor*, __ Ill. 2d __, 48 N.E.2d 668 (Ill. 2016); *People v. Masterson*, __ Ill. 2d __, 48 N.E.2d 668 (Ill. 2016).

¶ 75 Each of these cases, however, involved review of jury trials. See *People v. Calaff*, 2015 IL App (1st) 130344-U, ¶¶ 12-15; *People v. Taylor*, 2014 IL App (1st) 113492-U, ¶¶ 12-13, 17-18; *People v. Masterson*, 2014 IL App (1st) 120385-U, ¶¶ 9-18.[3] The case before us was a bench trial, and not a jury trial – an important and dispositive distinction. The Illinois Supreme Court has held that expert testimony is only necessary when the subject is both particularly within the witness's experience and qualifications and is beyond that of the average juror's, and when it will aid the jury in reaching its conclusion. *Lerma*, 2016 IL 118496, ¶ 23 (citing *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993)).

¶ 76 In this case, expert testimony on the reliability of eyewitness identifications was unnecessary because the case was tried by the court and not a jury, and the trial court was well aware of the issues surrounding the reliability of eyewitness identifications:

> "I've read a lot of this stuff. I mean, I'm all aware of it [sic]. It's not something that's coming out of left field. This has been going on for, you know, at least ten years with a lot of research.

[3] We do not cite these unpublished decisions for any precedential value.

> I'm very wary in cases where the entire evidence that the State's put forward is eyewitness identification and consider that carefully. And it's *** a question of *** weight rather than admissibility at this point, because we did the motion [to] suppress identification; and, you know, in certain circumstances that evidence is really not worth much weight if there – depending on the circumstances surrounding the identification."

¶ 77 We hold the trial court did not err in denying Antoine's motion in *limine* and barring the defense eyewitness reliability expert from testifying in this case.

¶ 78 III. Denial of Motion to Suppress

¶ 79 Third, Antoine argues that he was deprived of his right to due process and a fair trial when the trial court denied his motion to suppress the eyewitnesses' out-of-court identifications. Antoine argues that the witnesses' testimony was inconsistent regarding the shooting and that the identifications of him were the result of suggestive procedures by the police. Antoine argues that only one witness was able to identify Antoine as the shooter from a photo array in the days immediately after the murder. At trial, however, all three eyewitnesses identified Antoine. The State argues that any inconsistencies among the eyewitnesses' version of events were minor and that, while the witnesses disagreed about what the shooter told T.H. and where T.H. subsequently struck the shooter, all the eyewitnesses agreed that they saw the shooter's face and that the shooter shot T.H. after trying to rob him with a gun.

¶ 80 "For identification evidence to be inadmissible, a defendant must meet the burden of proving that the identification procedures were 'so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.' " *People v. Karim*, 367 Ill. App. 3d 67, 86-87 (2006) (quoting *People v. Miller*, 254 Ill. App. 3d 997, 1003 (1993), quoting *People v. Blumenshine*, 42 Ill. 2d 508, 511 (1969)). "Whether due process has been

violated in a particular case depends on the totality of the circumstances surrounding the identification." *Karim*, 367 Ill. App. 3d at 87 (quoting *Miller*, 254 Ill. App. 3d at 1003, citing *Stovall v. Denno*, 388 U.S. 293, 302 (1967)).

¶ 81 "Evidence of the pretrial identifications of an accused by a witness must be excluded at trial only where (1) the procedure was unnecessarily suggestive and (2) there was a substantial likelihood of misidentification." *People v. Hartzol*, 222 Ill. App. 3d 631, 642 (1991). When a witness identifies the defendant in a police-organized photo lineup, the identification should be suppressed only where "the photographic identification procedure was so [unnecessarily] suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384-385 (1968). On a motion to suppress, the defendant bears the burden of establishing that, within the totality of the circumstances, the pretrial identification was so unnecessarily suggestive that it gave rise to a substantial likelihood of an unreliable identification. *People v. Jones*, 2012 IL App (1st) 100527, ¶ 24 (citing *People v. Denton*, 329 Ill. App. 3d 246, 250 (2002). Even where a pre-trial identification is found to be improper, an in-court identification by a witness may still be allowed if the State establishes by clear and convincing evidence that the defendant's identification is based upon an observation independent of and prior to the tainted out-of-court lineup identification. *Westbrook*, 262 Ill. App. 3d at 849 (citing *Harris*, 220 Ill. App. 3d at 860). In other words, the State may show by clear and convincing evidence that the identification was based on the witness's independent recollection. *People v. Moore*, 2015 IL App (1st) 141451, ¶ 16.

¶ 82 The trial court's ruling on a motion to suppress will not be overturned on review unless the factual findings are manifestly erroneous. *Jones*, 2012 IL App (1st) 100527, ¶ 24 (citing

People v. Melock, 149 Ill. 2d 423, 432 (1992)). The ultimate legal ruling on whether suppression is warranted, we review *de novo*. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006).

¶ 83 Antoine first argues that the lineup identifications of him were suggestive because the witnesses had seen his photo in the photo array. We reject this argument outright. It has long been established that lineups are not rendered inadequate merely because the defendant is the only individual in the lineup who was also in the photo array. See *People v. Johnson*, 149 Ill. 2d 118, 148 (1992).

¶ 84 Antoine next argues that the police tainted the lineup procedure by leaving a photo of Antoine in plain view on the way to bringing the witnesses to the lineup, based on Riley's testimony. We find that the identifications made from the physical lineup were not tainted. The trial court, which was in the best position to determine the credibility of the witnesses, did not believe the police purposefully left a photo of Antoine in plain view to the witnesses on their way to view the lineup. Even if Riley did see a photo of Antoine on his way to viewing the lineup, there is no evidence to suggest this was an intentional act of suggestiveness on the part of the police. Also, contrary to Antoine's argument that all of the witnesses were exposed to such a photograph, there is no evidence that any of the other witnesses were exposed to a photo of defendant on their way to view the lineup,

¶ 85 Antoine then argues that fillers in the photo array and lineup were so different that the identifications were impermissibly suggestive. Specifically, Antoine complains that the lineup fillers looked "nothing like" him. We find that the fillers used in both the photo array and the lineup do not look so different from Antoine as to focus attention on him. Rather, they appear similar. The photo array consisted of five photographs of individuals of the same approximate age, skin tone, hairstyle, and facial hair, except for one individual who did not have dreadlocks.

If anything, any suggestiveness would have been geared toward choosing identifying this individual who was the only one who did not have dreadlocks, instead of Antoine. Likewise, the photograph of the physical lineup showed five individuals with similar physical attributes and neutral clothing. Individuals selected for a lineup need not be physically identical. *Denton*, 329 Ill. App. 3d at 250. "Differences in their appearance go to the weight of the identification, not to its admissibility." *Denton*, 329 Ill. App. 3d at 250.

¶ 86 We hold that Antoine failed to sustain his burden of establishing that the pretrial identifications were so unnecessarily suggestive that they gave rise to a substantial likelihood of an unreliable identification. *People v. Jones*, 2012 IL App (1st) 100527, ¶ 24.

¶ 87 Antoine also argues that lineups must now be conducted by an independent administrator, citing to section 107A-2(a)(1) of the Code of Criminal Procedure. However, as the State points out, that law went into effect over two years after the lineups were conducted in this case. See 725 ILCS 5/107A-2(a)(1) (eff. January 1, 2015).

¶ 88 Antoine further makes much of the fact that two out of three eyewitnesses who identified Antoine had failed to identify Antoine initially in the photo array and that M.S. was the only witness to identify Antoine from the photo array. Illinois courts have repeatedly held that a witness's failure to identify a defendant in a photo array does not make the witness's later identification of the defendant in a lineup incompetent or inadmissible. *People v. Maloney*, 201 Ill. App. 3d 599, 609 (1990); *People v. Flint*, 141 Ill. App. 3d 724, 729-30 (1986); *People v. Rosa*, 93 Ill. App. 3d 1010, 1014 (1981); *People v. Woods*, 114 Ill. App. 3d 348, 355 (1969)). Also, as the trial court noted in its findings, the fact that only one witness identified Antoine from the photo array actually cuts against any argument of suggestiveness.

¶ 89 Based on our careful review of the record, we reject defendant's contention that the photo array and physical lineup were impermissibly suggestive. Having found that the pretrial identification procedure was not suggestive, we need not reach the question of whether under the totality of circumstances the identification was reliable or whether the State established an independent basis for the in-court identification. *People v. Johnson*, 222 Ill. App. 3d 1, 8-9 (1991). On our *de novo* review of the ultimate question, we agree with the trial court's decision to deny defendant's motion to suppress identification and conclude that the trial court did not err in denying defendant's motion to suppress the out-of-court identifications.

¶ 90 IV. Statements Made by the State During Closing Argument.

¶ 91 Finally, Antoine argues that the State committed reversible error in making material misrepresentations of fact and "mischaracterizing" evidence during closing argument, namely: (1) misstating the evidence that Terrence Wright did not scratch the shooter; and (2) making inaccurate statements about the reliability of eyewitness identification.

¶ 92 As the State argues, however, Antoine forfeited these arguments because he failed to object at trial. In juvenile proceedings, the respondent need not include the issue in a post-adjudication motion, but must still have objected at trial in order to preserve the error for review. *In re M.W.*, 232 Ill. 2d 408, 430 (2009). Antoine concedes forfeiture but requests us to review these alleged grounds based on the plain error doctrine.

¶ 93 Under the plain error doctrine this court may consider unpreserved error if "(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. Jenkins*, 2016 IL App (1st) 133656, ¶ 25 (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). See also *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). "Under both prongs, the defendant has the burden of persuasion and, if he fails to meet his burden, his procedural default will be honored." *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 12 (citing *People v. Hillier*, 237 Ill. 2d 539, 545 (2010)). See also *Piatkowski*, 225 Ill. 2d at 564 (the burden of persuasion is on the defendant); *People v. Woods*, 214 Ill. 2d 455, 471 (2005) (with respect to plain error, "it is the defendant who bears the burden of persuasion with respect to prejudice"). The plain-error doctrine is intended to ensure a defendant receives a fair trial, but it does not guarantee defendants a perfect trial. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010). Rather than operating as a general savings clause, it provides a narrow and limited exception to the general rule of procedural default. *Id.*

¶ 94 Antoine argues under the first prong, that there was clear and obvious error and that the evidence in this case was closely balanced because "[t]he verdict [*sic*] here rested exclusively on the reliability of eyewitness testimony." Under the first prong, "the defendant must prove 'prejudicial error.' " *Herron*, 215 Ill. 2d at 187. "That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Id.* "The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant." *Id.*

¶ 95 " 'To be proper, closing argument comments on evidence must be either proved by direct evidence or be a fair and reasonable inference from the facts and circumstances proven.' " *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 64 (quoting *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992)). Prosecutors are afforded wide latitude in making closing arguments, and a reviewing

court will not reverse a jury's verdict based upon improper remarks made during closing arguments unless the comments resulted in substantial prejudice to the defendant and constituted a material factor in his conviction. *People v. Bell*, 343 Ill. App. 3d 110, 116 (2003) (citing *People v. Foster*, 322 Ill. App. 3d 780, 790 (2000)).

¶ 96 "The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (citing *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009)). See also *Hillier*, 237 Ill. 2d 545 ("To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred."). We therefore first examine each of the comments complained of by Antoine to consider whether the prosecutor committed any error in making the statements and, if so, whether they constituted plain error.

¶ 97 Antoine first argues that the prosecutor made material misrepresentations regarding the evidence in arguing that Wright did not scratch the shooter and that DNA transference was therefore impossible. On this point, the prosecutor argued the following:

> "The witnesses testified that there was a struggle. *** It was specifically asked of them if they saw Terrence Wright scratch [Antoine]. No. Did you see any scratching, any of that sort of activity? They said no."

¶ 98 Antoine argues that such argument was factually and scientifically inaccurate because scratching is not required for DNA transference during a "hand-to-hand" struggle. Antoine also argues that this argument mischaracterized the testimony from the witnesses. "In reviewing whether comments made during closing argument are proper, the closing argument must be viewed in its entirety, and remarks must be viewed in context." *People v. Cosmano*, 2011 IL App (1st) 101196, 2011 IL App (1st) 101196 at ¶ 57 (citing *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994)). The prosecutor's statements, placed in context, are as follows:

"DNA. Defense [sic] states that because there's no DNA linking [Antoine] to the DNA underneath [Wright's] fingernails, there's no way he could have done this. There's no evidence of that.

The evidence that you heard, Judge, none of the eyewitnesses said it was a life-and-death struggle. That's Defense's [sic] term. The witnesses testified that there was a struggle. Absolutely. They were pulling on the barrel of the gun and at some point they were tussling or pulling on their arms. They were close, shoulders bumping into each other. It was specifically asked of them if they saw [Wright] scratch [Antoine]. No. Did you see any scratching, any of that sort of activity? They said no."

¶ 99 Here, defense counsel had portrayed the interaction between Wright and the shooter as a life-and-death struggle, and so the prosecutor's comments were a response clarifying the nature of the altercation. The State may properly respond to comments made by defense counsel that clearly invite a response. *Cosmano,* 2011 IL App (1st) 101196, ¶ 63 (citing *People v. Hudson*, 157 Ill. 2d 401, 444 (1993)). We find that the comments by the prosecutor were fair comments, based on the evidence, and were invited by defense counsel. We find no error in these comments.

¶ 100 Antoine further argues that this statement in closing argument by the prosecutor misstated the medical evidence, as the medical examiner's report showed that Wright suffered multiple scratches on multiple parts of his body. But the prosecutor argued that there was no evidence that Wright scratched the *shooter*, which was accurate, not that *Wright* had no scratches. The scratches on Wright's own body are irrelevant to the issue of the contributor to the DNA under his fingernails, which necessarily would have to result from Wright scratching someone else. Antoine's argument on this point has no merit.

¶ 101 Antoine argues that the State also "made a series of grossly inaccurate, pseudo-scientific claims about the accuracy and reliability of eyewitness identifications" during closing and rebuttal arguments, including the following: (1) eyewitnesses' confidence level correlates with the reliability of their identifications; (2) the presence of a firearm during the killing enhances the accuracy of eyewitnesses' identifications; (3) the violence and stress of Wright's killing ensured a "high degree of attention," thus making the identifications accurate; (4) identifications of an unknown assailant are more accurate, because they remove the possibility that the identification was caused by personal bias; (5) viewing a suspect's photo in a photo array will not taint a subsequent identification in an in-person lineup; (6) memory cannot substantially decay over ten days; and (7) a partial head covering will not reduce witnesses' ability to accurately identify a suspect.

¶ 102 Again, the record demonstrates that the trial court indicated it was well aware of the scientific studies and research concerning the reliability of eyewitness identifications. From our review of the record, contrary to Antoine's argument that the prosecutor's argument was so prejudicial that the trial court found Antoine guilty, the trial court instead based its finding on its own assessment of the facts in this particular case and the witnesses' credibility. The trial court indicated in its findings that it found the eyewitnesses credible and that the witnesses had a confident demeanor in making their in-court identifications of Antoine. The trial court found that the hood did not obstruct the witnesses' view of the shooter, and that these particular witnesses were able to observe the incident. The record indicates that the prosecutor's closing and rebuttal arguments did not impact the trial court's finding.

¶ 103 Because we find no error in the complained-of comments, Antoine forfeited review and we honor the procedural default.

¶ 104 CONCLUSION

¶ 105 We hold that the evidence in this case was sufficient for a rational trier of fact to find Antoine guilty beyond a reasonable doubt.

¶ 106 Second, we also hold that it was not an abuse of discretion to deny Antoine's motion *in limine* and bar the defense expert on the reliability of eyewitness identifications from testifying. The case was tried in a bench trial and the trial court indicated familiarity with the area of scientific studies and research concerning the reliability of eyewitness identifications.

¶ 107 Third, we hold that the trial court did not err in denying Antoine's motion to suppress the out-of-court identifications, as they were not a result of impermissibly suggestive police procedures.

¶ 108 Fourth, we hold that Antoine forfeited review of alleged prosecutorial misconduct during closing arguments by failing to object at trial, and that the complained-of comments do not constitute plain error, as there was no error in the first place. Viewed in context, the prosecutor's comments were fair and accurate comments on the evidence and were invited by defense counsel. Because there was no error, we honor Antoine's procedural default.

¶ 109 We therefore affirm Antoine's adjudication of delinquency and sentence.

¶ 110 Affirmed.