2012 IL App (1st) 102093-U

FOURTH DIVISION
April 19, 2012

No. 1-10-2093



IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County |
| | ) | |
| v. | ) | No. 09 CR 5383 |
| | ) | |
| JOE ANDERSON, | ) | Honorable |
| | ) | John T. Doody, Jr., |
| Defendant-Appellant. | ) | Judge Presiding. |
| | ) | |

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1 *HELD*: The circuit court did not err in denying the motion to quash arrest and suppress evidence where the officers had a reasonable and articulable suspicion of criminal activity sufficient to support the initial *Terry* detention, and subsequent probable cause to search the vehicle after the surveillance officer provided additional information and an enforcement officer observed a piece of plastic protruding from the armrest on the door that was left open when defendant exited the vehicle. The circuit court erred in allowing the State to cross-examine a witness regarding an alleged statement that was not admitted

> into evidence and in entering into evidence a certified copy of a driver's abstract for impeachment purposes without giving the witness an opportunity to explain the inconsistency. However, the errors did not constitute plain error under either prong of the plain error doctrine where the jury's verdict was consistent with finding the witness credible despite the errors and where the errors were not of such magnitude that the integrity of the judicial system was in question. Finally, the circuit court did not abuse its discretion in failing to question the jurors regarding whether they were prejudiced by the alternate juror's attempt to shield her face where an assumption that the remaining jurors noticed the alternate juror's actions and were prejudiced by them is mere speculation.

¶ 2 Defendant Joe Anderson was charged with possession of a controlled substance with intent to deliver. Following a jury trial, Anderson was convicted of possession of a controlled substance and sentenced to 15 months in prison. On appeal, Anderson contends that the trial court erred in denying his motion to quash arrest and suppress evidence where the police did not have probable cause to arrest Anderson when they removed him from his vehicle and held him while they searched his vehicle without a warrant. Anderson further contends that the trial court erred in permitting the State to question a defense witness about a prior statement not in evidence, and in admitting a defense witness's driving abstract for impeachment purposes without allowing the witness to explain the alleged inconsistency. Finally, Anderson contends that the trial court erred when, upon receiving a note from a juror indicating her fear that she would be recognized by defendant's family and friends, it failed to investigate whether other jurors were aware of her fears or her efforts to conceal her identity. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Anderson was arrested on February 11, 2009, after a police officer who was working as a member of a tactical narcotics enforcement team observed three individuals enter the passenger

seat of his parked car, give money to Anderson who was seated in the driver's seat, and receive something from Anderson before exiting the car. The officer radioed the other officers on the team and they approached the vehicle and asked Anderson to step out of the car. Anderson was patted down for weapons and then held at the rear of the car while one officer searched the driver's side door of the car and found a plastic bag containing 15 smaller plastic bags that were filled with a pink substance. Anderson was then handcuffed, searched, and transported to the police station.

¶ 5 On April 27, 2009, Anderson filed a motion to quash arrest and suppress evidence and an evidentiary hearing was held on the motion. Officer Todd Olsen testified that on February 11, he was working with Officers Sarabia, Escobedo, Wrigley and Beyna. Officer Olsen stated that he had gone to the area of 15th Street and Pulaski because he knew it was a high narcotics trafficking area and it seemed like there was some activity. He observed Anderson sitting in the driver's seat of an older black vehicle parked facing east at approximately 4002 West 15th Street, a one-way westbound street. Officer Olsen stated he was approximately 200 feet from the car, above ground level, and using binoculars. It was dark outside and there were no lights on in the vehicle, but there were streetlights and a traffic light that provided enough light for him to see inside the vehicle. On three separate occasions within approximately 10 minutes, Officer Olsen saw an individual approach the car on foot, sit in the passenger seat, and give Anderson some money. He then observed Anderson reach to his left near the driver's side door and give an item to the person who was sitting in the car. The individual then got out of the car and left. Officer Olsen said he could not see what Anderson had in his hand after he reached toward the driver's

side door.

¶ 6 After the third individual left the vehicle, Officer Olsen radioed the other officers on the team, gave them a description of the car, and told them he believed the driver was involved in narcotics transactions. From his surveillance position, Officer Olsen saw the other officers arrive and saw Anderson exit the vehicle. He then radioed the officers and told them he had seen Anderson reaching down with his left arm so he believed the narcotics were secreted near the door or near the bottom of the driver's seat. On cross-examination, Officer Olsen testified that he had witnessed thousands of narcotics transactions during his 14 years as a police officer. He said that it was "kind of unique" for the individuals to come and sit in the car, but the actual exchange was consistent with other narcotics transactions he had witnessed.

¶ 7 Officer John Wrigley also testified at the hearing. He said that he was directed to the area of 15th Street and Pulaski by Officer Olsen. Officer Wrigley approached Anderson's vehicle and asked him to exit the vehicle. Anderson got out of the car and left the door open. Officer Wrigley glanced in briefly but did not see anything at that time. His partner patted Anderson down and stood with him at the rear of the car. On Officer Olsen's direction, Officer Wrigley looked at the driver's side door and noticed a piece of plastic protruding from the edge of the plastic covering that was over a vanity light on the driver's armrest. He opened the plastic covering with his fingernail and found a plastic bag containing 15 smaller bags that were filled with a "pink tint," which Officer Wrigley believed to be crack cocaine. Anderson was then arrested and searched.

¶ 8 Tamika Giles testified that she lived in a second floor apartment at 1450 South Pulaski

with Anderson, who is her cousin. She said that she heard a car horn outside at 8:15 p.m. on February 11 so she went to the window and looked out. She saw Anderson in his car and he called up and told her to get his cell phone and bring it down to him. Giles went to Anderson's room and got his phone, went to her own room and put on some jeans, a jacket and some shoes, and went downstairs. She estimated that it took her approximately 5 minutes to get downstairs after Anderson called up to her. Giles walked to Anderson's car and got in. She gave Anderson his cell phone and talked to him for a few minutes about a party she was planning. After about eight minutes, Giles got out of the car and went back upstairs. Giles also testified that the vehicle belonged to Anderson. When asked how she knew it was Anderson's vehicle, she replied that Anderson bought the vehicle.

¶ 9 The trial court denied the motion to quash arrest and suppress evidence, stating that there was "reasonable articulable suspicion" based on the area and the officer's observations. The trial court further explained that when the driver's side door was left open and the officer saw the piece of plastic protruding from the vanity light cover, that suspicion "ripened" into probable cause.

¶ 10 At trial, Officer Olsen testified that on the night of February 11, 2009, he was conducting surveillance of the 1500 block of south Pulaski as a member of a tactical team. Officer Olsen explained that a tactical team is a group of officers who are assigned to a drug and gang "hot spot," and one or more of the officers secrete themselves in a hidden location and observe an area for possible narcotics sales. The remaining officers on the team wait for instructions from the surveillance officer. Officer Olsen further testified that in his nearly 15 years as a Chicago police

officer, 8 of those years were spent as a tactical officer in the Tenth District. On February 11, Officer Olsen secreted himself in an elevated position with a view of the intersection of 15th Street and Pulaski, a corner he knew to be a "drug spot" from his experience as a tactical officer in the district. He testified that he was in position to start making observations around 8:20 p.m. The intersection was well-lit and he was using binoculars. He observed a parked car in the area of 4002 West 15th Street and identified Anderson as the person he saw sitting in the driver's seat. After a minute or two, he observed a male pedestrian approach the vehicle, open the passenger door, and get inside. Officer Olsen observed the pedestrian pass what he believed to be money to Anderson, who took the money and then reached down with his left hand somewhere between the seat and the door area. He observed Anderson pass an unknown item to the person in the passenger seat, and the person then exited the vehicle. Within a minute or two, a female pedestrian approached the vehicle and a similar transaction occurred. After she left the vehicle, another female approached within a minute or two and a similar transaction occurred.

¶ 11 Officer Olsen then radioed the other officers on the team and told them he had observed possible sales of narcotics on 15th Street, just west of Pulaski. He remained secreted and saw the officers arrive in two separate cars. One car approached Anderson's car from the rear and the other pulled up in front of Anderson's vehicle. He saw the officers in the first car exit the vehicle and approach Anderson's car. He then saw Anderson exit the vehicle. He radioed the officers and told them to look by the driver's door or underneath the driver's seat. Officer Olsen then left his surveillance point and joined the other officers. On cross-examination, Officer Olsen testified that he did not see or could not recall which direction any of the three pedestrians came

from. He further testified that when he joined the other officers, he looked in the car and observed that the light on the driver's side door was burned out. He stated that the officers told him they saw a piece of plastic protruding from the vanity light cover but acknowledged that he did not include that information in either of the two reports he prepared regarding the incident. Officer Olsen also stated that he did not observe anyone soliciting customers or directing them toward the passenger seat of the vehicle.

¶ 12 After Officer Olsen was excused as a witness, the trial court received a note from one of the alternate jurors. The note stated the following:

> "I noticed that there were family/friends present for the defendant. Although I couldn't get a clear visual of them....
>
> I wanted to let you know that I was partly covering my face to disguise my identity because I work directly in the emergency dept. @ Mt. Sinai Hospital (15th & California) where many of the residents of this area frequent our facility and may recognize me. Hence, the area in discussion is near 15th & Pulaski."

The trial court showed the note to counsel for both parties and, following a brief discussion, stated that the parties agreed to proceed with the trial. Defense counsel suggested that the trial court speak to the juror and she was brought out in the presence of both parties.

¶ 13 The trial court explained to the juror that notes that are sent out must be shared with everyone. The court then stated that she would be kept on as an alternate juror and the trial would proceed. The juror said, "I was sending the note. I wasn't sure." The trial court said the note would be kept as part of the record. The trial court then stated, "You can do what you

want," verified that she was an alternate juror, and explained that alternates are not used very often. The juror explained that part of what she was trying to do by sending the note out was to inform the court that she knew the defendant's family, and that she was covering her face as a disguise for herself. The trial court thanked the juror and she was excused to the jury room. The trial court wrote on the bottom of the note that the juror would continue to serve and could cover the side of her face that was visible to the gallery.

¶ 14 The trial resumed with testimony from Officer John Wrigley. He testified that on February 11, 2009, he was working as an enforcement officer on the tactical team. The team was conducting a surveillance operation at the corner of 15th Street and Pulaski because illegal narcotics activity is prevalent in that area. Officer Wrigley received a radio call from Officer Olsen around 8:35 p.m. and proceeded to the corner of 15th Street and Pulaski with his partner, Officer Beyna. Officer Wrigley stopped his vehicle behind Anderson's vehicle and another vehicle with two additional enforcement officers stopped just in front of Anderson's vehicle. Officer Wrigley approached the vehicle on the driver's side and asked Anderson to step out of the vehicle. Anderson exited the vehicle and left the driver's side door open. Officer Wrigley told Anderson to turn around and patted Anderson's waistband area quickly to check for any weapons. He then told Anderson to step toward Officer Beyna who was standing at the rear of the vehicle. Officer Beyna conducted a more thorough search for weapons and then stood with Anderson near the rear of the vehicle. After additional radio contact with Officer Olsen, Officer Wrigley focused his attention on the driver's side door of the vehicle which Anderson left open. He scanned the door with his flashlight and noticed a piece of plastic protruding from the molding of

a vanity light on the armrest. He removed the cover of the light with his fingernail and retrieved a clear plastic bag containing smaller clear plastic bags filled with an off-white rock-like substance with a pink tint. Officer Wrigley testified that he had often seen similar packages containing crack cocaine. Anderson was then placed in handcuffs and informed that he was under arrest. Officer Wrigley estimated that a little over a minute elapsed between the time he stopped his vehicle behind Anderson's vehicle and the time he recovered the narcotics. Officer Wrigley kept the suspected narcotics in his possession until he returned to the police station, at which time he placed them in a department envelope and gave the envelope to the officer who was assigned to inventory duties.

¶ 15 Officer Beyna testified that he was working with Officer Wrigley as part of a tactical team doing narcotics surveillance on February 11, 2009. They received a radio call from Officer Olsen around 8:35 p.m. and proceeded to 15th Street and Pulaski. Officer Wrigley stopped the police vehicle behind Anderson's vehicle and both officers exited their vehicle. Officer Wrigley approached the driver's side of Anderson's vehicle and Officer Beyna was a few feet behind him. Officer Wrigley asked Anderson to exit the vehicle and Anderson complied, leaving the driver's side door open. After Anderson exited the vehicle, he walked in Officer Beyna's direction. Officer Beyna asked Anderson to keep his hands where Officer Beyna could see them and proceeded to search Anderson for any weapons. He then stood with Anderson near the rear of the vehicle. After Officer Wrigley said that he had recovered narcotics, Officer Beyna placed Anderson in handcuffs and performed a custodial search. Officer Beyna recovered $231 from Anderson's pockets. Officer Beyna testified that no more than a minute elapsed between the time

he detained Anderson and the time he placed him in custody. He further testified that the remaining two officers on the team assisted by being there for additional security.

¶ 16 The parties stipulated that Officer Acevedo, if called, would testify that he received a plastic bag containing 15 smaller plastic bags on February 11, 2009, and he kept it in his safe care, control and custody from the time of recovery to the time of inventory. The parties further stipulated that, if called, Joseph Gillono, a forensic chemist with the Illinois State Police Crime Lab, would testify that he received the inventory and the testing he performed on 7 of the 15 bags were positive for the presence of cocaine.

¶ 17 Lola Ross testified that she was a field manager for Retail Marketing Solutions. She hired Anderson as a merchandiser in 2007. She stated that Anderson was a good employee, was generally punctual, and had no problems with absenteeism. Ross testified that Anderson was her special projects person and would go with a team into various retail stores after hours and take old merchandise off the shelves and replace it with new merchandise. Anderson was scheduled to begin work at 9 p.m. on February 11, 2009 at a store located in Bartlett, Illinois. Ross testified that Anderson did not make it to his shift that night.

¶ 18 Giles testified that on February 11, 2009, she and her cousin, Anderson, lived in a second floor apartment at 1450 South Pulaski with their cousin, Christina Ferguson, and Anderson's three daughters. Giles further testified that, at the time of trial, she lived at the same address. When Giles arrived at the apartment around 7:30 p.m. on February 11, Anderson was not there. Around 8:15 p.m., she heard a car horn outside. Giles testified that the doorbell to their apartment did not work so if they heard a horn outside the building, they would look out the

window. She went to the window and saw Anderson outside. He asked her to get his cell phone. Giles went to Anderson's room and got the phone and then put on some clothes and a jacket and went outside, approximately five minutes after she spoke to Anderson from the window. She got into Anderson's car on the passenger side, gave him the cell phone, and talked to him about a birthday party she was planning. She sat in the car for approximately eight minutes and then went back upstairs to the apartment. On cross-examination, Giles was asked a question regarding the time that she was in the car, in which the vehicle was referred to twice as her car. Giles responded that Anderson was in his car, and confirmed that she was in Anderson's car with him during the time in question. Giles testified that Anderson's name was not on the lease but that he had lived at the apartment for over a year. Giles was then asked if she knew that Anderson told the officers his address was 1544 South Springfield. The trial court overruled defense counsel's objection. Giles answered that she did not know, and that the Springfield address was not familiar to her.

¶ 19 After the defense rested, the State sought leave to enter into evidence a certified copy of Giles' driver's abstract, which showed her address as 1533 North Leamington. Defense counsel objected, arguing that if Giles had been asked about the abstract, she could have offered an explanation for the inconsistency. According to the abstract, the license was issued in June 2009. The trial court admitted the abstract over defense counsel's objection, but noted that there was no opportunity to question Giles regarding a possible explanation. The abstract was then entered into evidence in the presence of the jury prior to closing arguments. The State argued in closing that Giles was not credible because she testified that she lived at 1450 South Pulaski on February

11, 2009, and that she still lived there at the time of trial, but her driver's abstract from June 2009 showed that she lived at a different address.

¶ 20 Defense counsel addressed the issue of Giles' credibility and suggested there could be an explanation for having a different address listed on a driver's license, such as having mail sent to the home of a relative rather than a current address. Defense counsel then stated there was an explanation for the discrepancy between where Giles said she lived and what the driver's license record showed. Defense counsel further stated that he wished there would have been an opportunity to question Giles about the discrepancy, but pointed out that she was not questioned about it.

¶ 21 The jury was instructed that under the law, a person charged with the possession of a controlled substance with intent to deliver may be found not guilty of possession of a controlled substance with intent to deliver and not guilty of possession of a controlled substance, or guilty of possession of a controlled substance with intent to deliver, or guilty of possession of a controlled substance. The jury was provided with three verdict forms reflecting these three options and instructed to only sign the form that reflected its verdict. During deliberations, the jury sent out two questions. First, the jury asked to see a copy of Officer Olsen's report. The trial court responded that the jury had all the evidence and asked the jury to continue deliberations. The jury then asked what would happen if the jurors could not all agree on a verdict. The trial court responded that the jury had all the evidence and instructions and asked the jurors to please keep deliberating. The jury returned a verdict of guilty of possession of a controlled substance.

¶ 22 At the hearing on Anderson's posttrial motion, defense counsel argued that the trial court

erred in denying the motion to quash arrest and suppress evidence. The trial court denied the motion for a new trial and sentenced Anderson to 15 months in prison and one year of mandatory supervised release. Anderson timely filed this appeal.

¶ 23 ANALYSIS

¶ 24 Anderson first contends that the trial court erred in denying his motion to quash arrest and suppress evidence where the officers lacked probable cause to arrest Anderson when they detained him and searched his car without a warrant. Moreover, even if the officers did not arrest Anderson before they searched his car, Anderson contends that the search was not justified under *Terry v. Ohio*, 392 U.S. 1 (1968). Anderson cites to *People v. Luedemann*, 222 Ill. 2d 530, 542-43 (2006), for the proposition that where no dispute exists as to the facts or witness credibility, our standard of review for a trial court's ruling on a motion to suppress is *de novo*. However, this is not the standard articulated in *Luedemann*, and is in fact a standard of review that has been supplanted. See *People v. Pitman*, 211 Ill. 2d 502, 512-13 (2004) (noting that the traditional standard of review, namely, that a trial court's ruling on a motion to suppress would not be disturbed unless it was manifestly erroneous, but that *de novo* review was appropriate where neither the facts nor the credibility of witnesses was questioned, had been supplanted based on *Ornelas v. United States*, 517 U.S. 690 (1996)). Under the current standard of review, this court still gives deference to a trial court's findings of historical fact and will not disturb such findings unless they are manifestly erroneous. *Pitman*, 211 Ill. 2d at 512. However, a reviewing court may undertake an independent assessment of the facts and draw its own conclusions when deciding what relief should be granted. *Id.* "Accordingly, we review *de novo* the ultimate

question of whether the evidence should be suppressed," regardless of whether the facts or credibility of witnesses are in dispute. *Id*.; see also *Luedemann*, 222 Ill. 2d at 542.

¶ 25 At the hearing on the motion to quash arrest and suppress evidence, the trial court found that there was a reasonable, articulable suspicion for the team's enforcement officers to approach Anderson, based on the testimony of Officer Olsen that the area was known as a high narcotics trafficking area and that he observed what could have been three narcotics transactions. The trial court further found that when the door was left open and Officer Wrigley noticed a piece of plastic protruding from an unusual place, it "ripened" into probable cause and the search of the light on the armrest was therefore valid.

¶ 26 We first address Anderson's contention that he was arrested before the search of his car, and that because probable cause did not exist at that time, the search was illegal and the trial court should have granted the motion to suppress. Our supreme court has explained that police-citizen encounters have been divided by courts into three tiers: "(1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or '*Terry* stops,' which must be supported by reasonable, articulable suspicion of criminal activity; and (3) encounters that involve no coercion or detention and thus do not implicate fourth amendment interests." *Luedemann*, 222 Ill. 2d at 544. The third tier is not an issue in this case, so we begin our analysis with a determination of whether the initial encounter was an arrest or an investigative detention pursuant to *Terry*.

¶ 27 Anderson contends that he was under arrest from the moment the officers arrived, because a reasonable person confronted with four officers converging on him in two different

vehicles would not have believed he was free to leave or refuse the officers' requests. In the proceedings below, the State argued that the officers had a reasonable, articulable suspicion of criminal activity sufficient to detain Anderson on the basis of Officer Olsen's observations, and that when the driver's door was left open and Officer Wrigley observed the piece of plastic protruding from the light cover on the armrest, the officers then had probable cause to arrest Anderson and search his vehicle. However, on appeal, the State first contends that Officer Olsen's observations were sufficient to support a finding of probable cause to arrest Anderson, thus, he was lawfully under arrest from the moment the officers arrived. In the alternative, the State argues, as it did in the proceedings below, that the initial detention was justified under *Terry*, and that the subsequent search was lawful under the automobile exception to the fourth amendment.

¶ 28 The United States and Illinois Constitutions protect individuals from unreasonable searches and seizures. U.S. Const., Amend. IV; Ill. Const. 1970 art I, § 6. An arrest in the absence of probable cause violates the protections of the fourth amendment. See *Dunaway v. New York*, 442 U.S. 200 (1979). An individual has been arrested when his freedom of movement is restrained by means of physical force or show of authority. *People v. Brownlee*, 186 Ill. 2d 501, 517 (1999). In general, the relevant inquiry is whether, under the circumstances, a reasonable person would conclude that he was not free to leave. *People v. Melock*, 149 Ill. 2d 423, 437 (1992). However, when an individual is detained for investigative purposes pursuant to *Terry*, this court has recognized that the individual is " 'no more free to leave than if he were placed under a full arrest' [citations], [t]hus, mere restraint does not turn an investigatory stop

into an arrest." *People v. Maxey*, 2011 IL App (1st) 100011, ¶ 60. Rather, we must consider both the length of the detention and the scope of the investigation in determining whether an arrest occurred. *Id.* ¶ 61.

¶ 29 Under appropriate circumstances, a police officer is entitled to briefly detain a person for questioning without probable cause "if the officer reasonably believes that the person has committed, or is about to commit, a crime." *Terry*, 392 U.S. at 22. Such limited investigatory detentions are permissible only upon a reasonable suspicion based upon specific and articulable facts that the person has committed, or is about to commit, a crime. *Id.* at 21-22. In determining whether an officer's investigative detention is reasonable, we must consider whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference. *Id.* at 19-20. We apply a *de novo* standard of review to determine whether reasonable suspicion existed such that the initial *Terry* investigation was lawful. *People v. Young*, 306 Ill. App. 3d 350, 353 (1999).

¶ 30 The record is clear that the initial investigation of Anderson pursuant to *Terry* was based on a reasonable, articulable suspicion, known to the team's enforcement officers, that Anderson may have committed a crime. A surveillance officer with eight years of experience in narcotics enforcement observed three exchanges within a short time span that appeared to be narcotics transactions. The team's surveillance officer notified the team's enforcement officers of the three exchanges he observed. Where police officers are acting in concert in investigating a possible crime, reasonable suspicion can be established from all the information collectively received. *People v. Fenner*, 191 Ill. App. 3d 801, 806 (1989). Thus, the officers who approached

Anderson had a reasonable, articulable suspicion that he may have committed a crime. Indeed, Anderson does not contest the trial court's finding that the evidence established the existence of a reasonable, articulable suspicion that a crime had been committed. Therefore, we must consider whether the length of the detention and the scope of the investigation indicate an investigative detention rather than an arrest.

¶ 31 Officer Wrigley testified that less than two minutes elapsed between the time he stopped his vehicle behind Anderson's vehicle and the time he recovered the narcotics. Officer Beyna testified that no more than a minute elapsed between the time he initially detained Anderson and the time he placed him in custody following the recovery of the narcotics. There is no testimony in the record that contradicts these estimates. A detention of less than two minutes is certainly a reasonable length of time to investigate whether a crime was, in fact, committed and whether the defendant may have committed the crime. As for the scope of the investigation, testimony at trial established that Officer Wrigley glanced briefly into the vehicle and then, upon receiving additional information from the surveillance officer, used a flashlight to scan the driver's side door that had been left open by Anderson. The purpose of a *Terry* investigation is to allow a police officer the opportunity to either confirm or dispel the suspicion of criminal activity. *Maxey*, 2011 IL App (1 st) 100011, ¶ 66. Officer Wrigley did not initially conduct a search of the vehicle, but rather used his flashlight to illuminate and scan the car door that had been left open. Thus, the scope of the investigation was also appropriate under *Terry* and we conclude that Anderson was not under arrest at the time the officers initially asked him to step out of the vehicle, but was being briefly detained for investigative purposes pursuant to *Terry*.

¶ 32 An actual arrest requires the higher standard of probable cause. *Id.* ¶ 69. "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Wear*, 229 Ill. 2d 545, 563 (2008) (citing *People v. Love*, 199 Ill. 2d 269, 279 (2002)). A determination of whether probable cause exists depends on the totality of the circumstances and requires the probability of criminal activity rather than proof beyond a reasonable doubt. *Id.* at 564. We agree with the trial court and with Anderson that, at the time the officers approached Anderson's vehicle, they had a reasonable, articulable suspicion of criminal activity, but they did not have probable cause for an arrest. Officer Olsen's observations of the three possible narcotics transactions could not, by themselves, constitute the probability of criminal activity where his surveillance point was 200 feet away, it was dark outside, he testified that he "believed" the three individuals handed Anderson some money, and he further testified that he could not see what Anderson handed them in return. The mere witnessing of three exchanges under those circumstances does not rise to the level of probability that the exchanges involved narcotics, but only to a reasonable, articulable suspicion that narcotics were involved, given the officer's experience, the number of exchanges he witnessed in a short time period and the fact that the intersection was known as a high narcotics trafficking area.

¶ 33 We now turn to Anderson's contention that, although the *Terry* investigation was justified, the search of his car exceeded what is allowed under *Terry*. Anderson argues that the only search allowed under *Terry* is a protective search for weapons in certain circumstances, citing *Terry*, 392 U.S. at 24, 26 and *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

Anderson then devotes most of his argument to explaining why neither Officer Wrigley nor Officer Beyna were justified in conducting a search for weapons on his person. While this may be the case, it is irrelevant to our analysis of whether the search of the light cover on the armrest of the driver's side door was lawful. Because the officers did not recover any narcotics as a result of the protective searches, we need not determine whether those searches were justified under *Terry*. Anderson contends that when Officer Wrigley initially asked Anderson to step out of the vehicle, he saw no weapons or contraband in plain view inside the vehicle, and, therefore, the subsequent search for evidence rather than weapons exceeds what is permissible under *Terry*.

¶ 34 The State contends that the search of the driver's side door was permissible under the automobile exception to the fourth amendment. A warrantless search is permitted under the automobile exception if there is probable cause to believe that the vehicle contains evidence of criminal activity that the officers are entitled to seize. *People v. James*, 163 Ill. 2d 302, 312 (1994). "Probable cause to search the vehicle exists where the totality of the facts and circumstances known to the officer *at the time of the search*, in light of the officer's experience, would cause a reasonably prudent person to believe that a crime occurred and that evidence of the crime is contained in the automobile." (Emphasis added.) *People v. Stroud*, 392 Ill. App. 3d 776, 803 (2009) (citing *People v. Parker*, 354 Ill. App. 3d 40, 45 (2004); *People v. Clark*, 92 Ill. 2d 96, 100 (1982); *People v. Erickson*, 31 Ill. 2d 230, 233 (1964)).

¶ 35 Anderson focuses on whether or not probable cause existed at the time the officers removed him from the car and argues that if no probable cause existed then, it could not have existed when the officers searched the door. However, this argument overlooks two critical facts.

First, almost immediately after Officer Wrigley removed Anderson from the car, he received another radio transmission from Officer Olsen, who informed him that Anderson had been reaching toward the driver's side door. Second, the driver's side door was left open and when Officer Wrigley looked at the open door with the aid of his flashlight, he noticed a piece of plastic protruding out of a light cover on the door's armrest. The additional information from Officer Olsen and the observation of the plastic in an unusual place and in plain view where the door was left open, combined with the previous information that led to the *Terry* investigation, constituted probable cause to believe the vehicle contained evidence of criminal activity. Thus, at the time of the search and in light of the officer's experience, the facts known to Officer Wrigley would cause a reasonably prudent person to believe that a crime had occurred and that evidence of the crime was contained in the vehicle. Therefore, the trial court correctly determined that probable cause existed at the time of the search that resulted in the recovery of the narcotics.

¶ 36 Anderson next contends that he was denied a fair trial when the trial court permitted the State to ask his key witness if she was aware of a statement allegedly made by Anderson, where that statement was never introduced into evidence. Anderson further contends that he was denied a fair trial where the State was allowed to introduce into evidence a driver's abstract to impeach his key witness even though she was never confronted with the alleged inconsistency and allowed to explain it. The State responds that these arguments have been waived because defense counsel did not raise them in a posttrial motion. Anderson acknowledges that these errors were not raised in his posttrial motion but argues that this court should consider the errors

under the plain error doctrine. Anderson contends that his conviction should be reversed under both prongs of the plain error doctrine.

¶ 37 Issues raised on appeal are preserved for review by both objecting during trial *and* filing a written posttrial motion raising the alleged error. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defense counsel objected to both alleged errors at trial but did not include either error in Anderson's posttrial motion. The plain error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, before conducting a plain error analysis we must determine whether an error in fact occurred. *People v. Sims*, 192 Ill. 2d 592, 621 (2000).

¶ 38 It is well-settled that it is error for the State to ask questions on cross-examination presuming facts not in evidence as a precursor to impeachment, unless the State has admissible evidence to substantiate the inquiry. *People v. Enis*, 139 Ill. 2d 264, 297 (1990); *People v. Williams*, 204 Ill. 2d 191, 211 (2003). The State asked Giles if she was aware that Anderson had given the police officers 1544 South Springfield as his address. There is no evidence in the record of any address given by Anderson to the police officers, and the State made no attempt to introduce such evidence either before or after Giles' testimony. Thus, it was error for the trial court to allow this question on cross-examination.

¶ 39 It is equally well-settled that a proper foundation must be laid in order to impeach a witness with a prior inconsistent statement. *People v. Cobb*, 97 Ill. 2d 465, 479 (1983) (citing *People v. Smith*, 78 Ill. 2d 298 (1980)). The purpose of this requirement is to prevent unfair surprise and grant the witness an opportunity to explain any inconsistency. *Id*. After the defense rested, the State sought leave to enter into evidence a certified copy of Giles' driver's abstract, which showed her address as 1533 North Leamington. Although the trial court acknowledged that Giles should have been confronted with the apparent inconsistency between the address on the abstract and the address she gave in her testimony, the court permitted the abstract to be entered into evidence. Moreover, no limiting instruction was given to the jury regarding the abstract. Because Giles was Anderson's key witness and her credibility was crucial to his defense, the trial court erred in admitting the abstract without allowing the defense to recall Giles to explain the apparent inconsistency. See *Cobb*, 97 Ill. 2d at 480-81 (holding that the trial court abused its discretion in not permitting the recall of a witness to perfect the foundation for the impeachment of another witness through a prior inconsistent statement).

¶ 40 Having determined that two errors, in fact, occurred, we must consider whether either of these errors deprived Anderson of a fair trial under either prong of the plain error doctrine. Under the first prong, we must consider whether the evidence was so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, in order to preclude an argument that an innocent person was wrongly convicted. *Herron*, 215 Ill. 2d at 178. The jury found Anderson guilty of possession of a controlled substance. Giles' testimony was relevant to the charge of possession with intent to deliver, where her account of bringing

Anderson his cell phone, if believed by the jury, cast doubt on Officer Olsen's testimony that he observed three instances where Anderson received money in exchange for what he believed to be narcotics. Anderson argues that Giles' testimony that cast doubt on whether the alleged sales took place also supported the defense argument that the State failed to prove Anderson knew the drugs were in the car. We disagree. No evidence was presented to indicate that anyone other than Anderson had access to the vehicle. The only witness to testify regarding the ownership of the car was Giles, who corrected the Assistant State's Attorney who referred to the vehicle as her car and stated that it was Anderson's car. Giles' testimony also confirmed that Anderson was alone in the car when she took him the cell phone. Thus, Giles' testimony, if believed, actually tended to support the possession charge. Therefore, we cannot conclude that the jury's verdict may have resulted from either or both of the errors and not from the evidence, where the verdict instead indicates that the jury believed Giles' testimony despite the errors. Moreover, under the second prong, we cannot conclude that the errors here were so fundamental and of such magnitude that the fairness of the trial was affected or that the integrity of the judicial process was challenged.

¶ 41 Finally, Anderson contends that he was denied a fair trial where, after receiving a note from an alternate juror explaining why she was shielding her face during trial, the trial court failed to investigate whether she may have discussed her fears with other jurors. Because Anderson did not object at trial or include this error in his posttrial motion, a plain error analysis is appropriate (*Enoch*, 122 Ill. 2d at 186), and we must first determine whether an error occurred (*Sims*, 192 Ill. 2d at 621). In general, matters relating to jury management are within the

discretion of the trial court. *People v. Roberts*, 214 Ill. 2d 106, 121 (2005). The primary consideration in determining whether the trial court abused its discretion is the potential prejudice to the defendant. *Id.* Moreover, in determining whether to reverse a conviction based upon a tainted jury, the standard that must be applied is "whether it reasonably appears that at least some of the jurors have been influenced or prejudiced so that they cannot be fair and impartial." *People v. Williams*, 344 Ill. App. 3d 334, 335-36 (2003) (citing *People v. Thomas*, 296 Ill. App. 3d 489 (1998)). The burden of establishing influence or prejudice is on the party challenging the verdict to show a disqualifying state of mind; "mere suspicion of partiality is not enough." *Id*. at 336.

¶ 42 In *Williams*, this court held that the trial court did not abuse its discretion in refusing to inquire into whether there was jury fear or intimidation based on the statement of a dismissed juror that some of the other jurors had discussed feeling uncomfortable because spectators stared at them as they left the courtroom. *Id.* at 337. The *Williams* court noted that the trial court held extensive hearings regarding a threatening phone call from the jail to the home of the juror who was subsequently dismissed. *Id.* However, the court noted that the dismissed juror's observation that some of the other jurors felt uncomfortable failed to rise beyond the level of mere suspicion of impartiality. *Id.*

¶ 43 In the case *sub judice*, the defendant has not shown that any of the jurors could reasonably appear to have been influenced or prejudiced by the alternate juror's attempts to shield her face. Anderson argues that the alternate juror's actions must have been obvious and that is why she felt the need to send a note to the judge, but the record discloses that her actions were

not noticed by the judge or by counsel for either party. An assumption that other jurors noticed her actions and were prejudiced by them is mere speculation. This speculation is even less compelling than the situation in *Williams*, where a juror stated that other jurors had discussed feeling uncomfortable. Here, there is nothing to suggest the other jurors even noticed the alternate juror's actions, much less that they were prejudiced by those actions. Thus, the trial court did not abuse its discretion in failing to question the remaining jurors. Accordingly, we affirm the judgment of the circuit court.

¶ 44 Affirmed.