THIRD DIVISION
October 22, 2014

No. 1-12-3534

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.	)	09 C6 62035
	)	
LOVIE ALLEN,	)	Honorable
	)	Frank Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in admitting GPS tracking data evidence where the evidence was admitted to explain the course of the investigation and the substance of that evidence did not relate to the crime with which defendant was charged. Moreover, the evidence was not more prejudicial than probative. Defendant did not request a limiting instruction and therefore waived that issue on appeal. Counsel did not provide ineffective assistance by failing to request a limiting instruction where defendant has not shown that the outcome would have been different if such an instruction had been given. Finally, the trial court did not err in instructing the jury to continue deliberating and try to work toward a verdict after receiving a note that, after slightly over two hours of deliberation, the jury was deadlocked.

¶ 2 Following a jury trial, defendant-appellant Lovie Allen was convicted of armed robbery and sentenced to 28 years in prison. On appeal, Allen contends that (1) he was denied a fair trial when the use of evidence relating to a cell phone's global positioning system (GPS) tracking data exceeded the scope of the course-of-investigation exception to the hearsay rule and the trial court failed to provide a limiting instruction; (2) his counsel was ineffective for failing to request a limiting instruction for the GPS evidence; and (3) the trial court's instruction to the jury to keep deliberating in response to a note that the jury was deadlocked effectively coerced a verdict. We are not persuaded by Allen's arguments and affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 During the evening of November 20, 2009, Paul White and Tracy Baker were talking outside of the garage at Baker's father's house when two men approached. While both held White at gunpoint, one of them took White's car keys, cell phone and $80 in cash. As the men backed away, one of them threw White's car keys but he was later unable to locate them.

¶ 5 After the men left, Baker called 911 and provided descriptions of the two men. While the 911 operator was still on the phone, White used his cell phone provider's database to track his cell phone using a GPS application that was installed on the phone. White informed the 911 operator of the current location of his cell phone, and the police went to the address and observed two men walking across the street who fit the descriptions provided by White and Baker.

¶ 6 The police detained both individuals and took White to the area for a show-up. White identified Allen as the man who robbed him but stated that the other man, although similarly attired, was not the second offender. The following day, both Baker and White went to the

police station and viewed a lineup. Both of them separately identified Allen as the man who robbed White. Allen was charged with armed robbery, four counts of aggravated unlawful use of a weapon, unlawful use of a weapon by a felon, and possession of a firearm without a firearm owner identification card.

¶ 7 Prior to trial, Allen filed a motion to bar evidence relating to the GPS tracking data on hearsay and foundation grounds. At a hearing on the motion, the parties discussed what evidence the State proposed to present. The State indicated that some evidence regarding the GPS system was necessary to show why police, shortly after the robbery, went to a location about two miles away from the scene of the robbery and apprehended Allen. Defense counsel acknowledged the necessity of explaining why the police went to a particular location, but wanted to avoid "any reference to a GPS telling them that the suspect" was in the area identified on the GPS system.

¶ 8 The trial court ruled that White could testify regarding the GPS tracking system on his phone and actions he took after the phone was stolen, but that police officers would only be permitted to testify that they received information from a dispatcher to go to a particular location to look for persons matching the description of suspects in the robbery. In delineating the evidence it would permit, the court addressed defense counsel:

> "[I]t is difficult for me to rule on [the motion *in limine*] at this stage without actually hearing what the evidence will be. If we need to have a sidebar when these issues come to being where both of you *** have more information on what is going to be presented, I can give a more vivid ruling regarding it. But, right now, these are general rulings ***."

¶ 9 At trial, White testified that around 8 p.m. on November 20, 2009, Allen and another man approached White and Baker as they stood talking outside a garage. The area was illuminated by a streetlight and two motion-activated floodlights on either side of the garage. Allen was approximately one foot away from White when he pulled out a gun and said, "You know what this is." Allen was wearing a brown jacket, brown baseball cap, white T-shirt and jeans.

¶ 10 White put his hands up but told Allen the gun did not look real. Allen pulled out the clip and showed White that the clip was full. White, who served in the army for four years, recognized the gun as a .40-caliber Glock and the bullets as full metal jacket bullets. Allen put the clip back in the gun and proceeded to search White while Allen's companion held White at gunpoint. Allen took White's car keys, his cell phone, and $80 in cash. Allen also removed White's wallet from his pocket, saw his military identification, and put the wallet back in White's pocket. White told the men they could keep the money but told them to give him the car keys and the phone.

¶ 11 The men started to back away with both guns pointed at White. Baker was standing approximately five or six feet away from White. One of the men threw the car keys and then both ran between two houses. White looked but was unable to find the keys.

¶ 12 White and Baker went inside the house and called 911. White remembered that he had an application on his cell phone that would allow him to track it using GPS. While he and Baker were still on the phone with the 911 operator, White went online to Sprint's database, which indicated that his phone was on a specific block on 141st Street in Dolton. White gave the location to the operator. Defense counsel made no objection during White's testimony.

¶ 13 A short time later, police officers came to the house and notified White that they had apprehended two suspects and asked him to go with them for a show-up. When they arrived

in the area where the suspects had been apprehended, White saw two men standing outside but he remained in the back seat of the police car and was driven slowly past the two men. The police officers turned a spotlight on the two men and White was asked if he could identify them. White identified Allen, who was wearing a brown coat, but said the other man was not the second offender. The following day, White went to the police station and viewed a lineup. White identified Allen in the lineup as the person who robbed him.

¶ 14 On cross-examination, White testified that he knew the guns were real and only told Allen they did not look real because he was trying to stall for time. White said he was not scared during the robbery, but was angry that Allen had taken his possessions. While White was tracking his cell phone, he got a new address to convey to the dispatcher each time he refreshed the computer screen. The final address was 251 East 141st Street, in the area of 141st Street and Indiana, although White also told the dispatcher that the phone then appeared to be moving back toward Wentworth.

¶ 15 White told the police the second offender was wearing a gray jacket and a gray hat, and was 5'7" and 140 pounds. White confirmed that the second individual he viewed in the show-up, who was wearing a gray coat, was definitely not the second offender because he was heavier than the person White had seen and had a different body shape and type.

¶ 16 White estimated that the robbery lasted five or six minutes and confirmed that he got a clear view of Allen's face. At the show-up, White identified Allen primarily by recognizing his face, not simply because he was wearing a brown hat and jacket.

¶ 17 Baker testified that the two offenders held White up against the garage door, triggering the motion sensors in the floodlights. Baker was only able to see Allen, because the second offender was not under the floodlights. The offenders did not point their guns at Baker, nor

did they touch her or even look at her. Baker went to the police station and identified Allen in a lineup the day after the robbery. Baker explained that she recognized Allen's white T-shirt and that she also remembered his face because she had seen his face under the motion-activated lights.

¶ 18 Officer Lewis was on assignment with his partner in the area of the robbery on November 20, 2009. After hearing the dispatch call about the robbery, they began patrolling the area, looking for the suspects. They then received information via a radio dispatch that White had used GPS to locate his cell phone and they went to the address provided in the dispatch. After Lewis testified regarding the specific address he received, defense counsel objected and stated that he was renewing his initial objection. The objection was overruled.

¶ 19 When Lewis and his partner arrived in the area, they noticed two men walking across the street, one wearing a brown coat and hat and the other wearing a gray coat but no hat. The officers stopped their vehicle and detained both men. A show-up was conducted and White identified Allen as the man who robbed him, but stated that the man in the gray coat was not one of the offenders. The police searched Allen and recovered $40. White's cell phone and the remaining cash were not recovered.

¶ 20 Two lineups were later conducted at the police station. Officer Lewis was present for both lineups. When White viewed the lineup, Allen was in position number five and White identified Allen as soon as the light was turned on in the lineup room. When Baker viewed the lineup, Allen was in position number one and Baker also identified Allen without hesitation.

¶ 21 The defense did not present any evidence and did not request a limiting instruction regarding the GPS evidence. The jury retired to deliberate at 3 p.m. Allen and counsel for

both sides returned to the courtroom after the court received two notes from the jurors. The first note, sent at 4:30 p.m., read: "We can't reach a verdict." The second note, sent at 4:42 p.m., requested the itemized inventory report, clearer pictures and larger maps.

¶ 22 Both sides agreed that the court would instruct the jury that it had all of the evidence and should continue deliberating. At 5:10 p.m., the court received another note from the jury, stating that it was deadlocked 11 to 1. Over defense counsel's objection, the court sent the following response to the jury: "You have deliberated for a short time. With an open mind, please consider all of the evidence and work towards reaching a verdict. Please continue your deliberation." At 5:30 p.m., the jury returned a verdict of guilty of armed robbery.

¶ 23 In his motion for a new trial, Allen argued that the GPS evidence was hearsay and should have been barred, and that the use of the evidence at trial exceeded the limited purpose allowed by the court to explain why the police went to a certain location. Allen did not cite the failure to give a limiting instruction as a basis for a new trial. Allen also contended that the court should have declared a mistrial when the jury sent the note stating it was deadlocked. The motion was denied.

¶ 24 The trial court sentenced Allen to 13 years for armed robbery with a mandatory 15-year enhancement because he carried a firearm during the commission of the offense, for a total of 28 years in prison. Allen timely filed this appeal.

¶ 25 ANALYSIS

¶ 26 Allen first contends that he was denied a fair trial because the trial court allowed the admission of GPS tracking data evidence but failed to instruct the jury that such evidence, admitted under the course-of-investigation exception to the hearsay rule, was not to be

considered as substantive evidence. Allen further contends that the State improperly used this evidence to bolster its case.

¶ 27 As an initial matter, we must address the confusion and internal inconsistencies surrounding Allen's argument on this issue, which appears to conflate two separate and distinct issues. The issue as stated in the brief under both the "issues presented" section and in the main heading in the argument section is whether the trial court erred when it failed to provide a limiting instruction regarding the GPS evidence. However, Allen includes many subheadings under this issue in his argument section and only one section briefly addresses the issue of whether a limiting instruction (which defense counsel never requested) should have been given, while the remaining sections address whether the trial court erred in admitting the GPS evidence in the first place. Indeed, in his concluding section for this issue, Allen states in the first sentence that the GPS evidence was erroneously admitted by the trial court. The failure to give the limiting instruction is only mentioned in passing while the remainder of the conclusion section is devoted to arguing that the admission of the evidence was prejudicial and constitutes reversible error. Moreover, Allen refers variously and confusingly to both plain error and harmless error analysis throughout his argument on this issue even though he acknowledges that the trial court's failure to provide a limiting instruction should only be reviewed for plain error given the failure to raise the issue in the trial court.

¶ 28 Allen is certainly free to raise alternative issues on appeal. However, when the issue that is raised is whether the failure to provide a limiting instruction was reversible error, the arguments should be framed in terms of that issue and not in terms of the completely separate issue of whether it was reversible error for the trial court to admit the evidence in the first place. If Allen wanted to alternatively contest the admission of the GPS tracking evidence,

he should have raised it as a separate issue rather than thrusting the burden of deciphering his arguments on this court. Although it would be within this court's authority to decline to review an issue that is not properly raised, because Allen has included arguments and citations to authority on the separate issue of whether the trial court erred in admitting the GPS evidence and the State has responded to those arguments, we will address both issues: (1) whether the evidence was erroneously admitted, and (2) whether the limiting instruction should have been given.

¶ 29 A. Admission of GPS Tracking Data

¶ 30 In general, rulings on evidentiary motions are within the sound discretion of the trial court and will not be disturbed on review absent an abuse of that discretion. *In re Leona W.*, 228 Ill. 2d 439, 460 (2008). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Even where an abuse of discretion has occurred, reversal of the judgment is warranted only where the record indicates the existence of substantial prejudice affecting the outcome of the trial. *Leona W.*, 228 Ill. 2d at 460.

¶ 31 We first consider whether the issue of the admissibility of the GPS tracking data has been preserved for review. In his opening brief, Allen contends that he fully preserved this issue by moving *in limine* to exclude the GPS evidence and including the issue in his posttrial motion. Although it is not mentioned when Allen initially states that this issue was preserved for review, in other areas of his argument section on this issue, Allen contends that defense counsel also "strenuously objected" to this evidence when it was introduced at trial.

¶ 32 It is well settled that a denial of a motion *in limine* does not in itself preserve an objection to disputed evidence; a contemporaneous objection must also be made at the time the evidence is introduced at trial to preserve the issue for review. See, *e.g.*, *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002); *People v. Denson*, 2013 IL App (2d) 110652, ¶ 9. Our examination of the record discloses that defense counsel only objected when Lewis testified that he received an address from the dispatcher that was relayed by White, who was using GPS data to track his cell phone. No objection was made during White's testimony. Therefore, we agree with Allen that the issue of whether the GPS evidence should have been admitted through the testimony of Officer Lewis was preserved for review, but the argument that White's testimony should not have been admitted has not been preserved.

¶ 33 Not only did defense counsel fail to object during White's testimony, he also elicited additional details from White on cross-examination, including the exact address on 141st Street shown on the tracking data. In ruling on the motion *in limine*, the trial court noted that testimony from the victim himself regarding what he did relating to the GPS application on his phone and what he relayed to the 911 operator would be allowed because White would be testifying and could be cross-examined. The trial court limited White's testimony to generally describing what he did and what he relayed without going into specifics such as the accuracy or reliability of the GPS data.

¶ 34 Both the motion *in limine* and the posttrial motion note that the objections to the GPS tracking evidence were on grounds of both foundation and hearsay; however, we note that neither objection was raised during White's testimony, despite the fact that the trial court explicitly stated that it was difficult to rule on the issue without hearing exactly what the evidence would be and invited the parties to revisit the issue at trial if necessary. Although the evidence was certainly also objectionable on lack of foundation grounds, Allen's

arguments on appeal center around hearsay, with foundation only mentioned briefly in the section regarding whether the evidence was more prejudicial than probative. There is no development of any argument related to foundation on appeal, and specifically not in relation to White's testimony.

¶ 35 Instead, Allen merely contends that White's testimony was hearsay because the information he relayed to the 911 operator was generated by his cell phone provider's website. This argument was not made in the trial court and is not developed on appeal, where Allen's hearsay arguments relate solely to whether the evidence was properly admitted as a course-of-investigation exception to the hearsay rule. Therefore, even if an objection to White's testimony had been preserved, Allen has waived any argument related to White's testimony on appeal. See *People v. Dinger*, 136 Ill. 2d 248, 254 (1990) ("Points raised but not argued or supported with authority in a party's brief are waived.").

¶ 36 We further note that there is some case law indicating the course-of-investigation exception should not be extended to witnesses other than police officers. See *In re Jovan A.*, 2014 IL App (1st) 103835, ¶¶ 29-30 (declining to address the issue of whether to extend the exception to laypersons but noting that no authority for such an extension appears to exist). However, it is not necessary for us to address this issue here. Because no contemporaneous objections were made when White testified at trial, Allen has waived any arguments related to White's testimony. See *People v. Steidl*, 142 Ill. 2d 204, 233 (1991) ("The failure to raise a contemporaneous objection waives an issue for review on appeal."). Therefore, we will limit our analysis on the introduction of GPS evidence to the testimony of Officer Lewis and first consider whether the course-of-investigation exception to the hearsay rule applies to that testimony.

¶ 37 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless it falls under one of the exceptions to this rule. *Caffey*, 205 Ill. 2d at 88. The course-of-investigation exception allows police officers to testify regarding out-of-court statements that are offered not for the truth of those statements, but to show why the officers took certain actions, where such testimony is necessary and important to fully explain the State's case. *People v. Simms*, 143 Ill. 2d 154, 173 (1991).

¶ 38 Allen argues that the GPS evidence was substantive rather than course-of-investigation evidence because the GPS data "effectively fingered Allen as the offender because he was found at the address where White's cell phone was purportedly located." Allen also contends that it was reasonable that the jury could conclude that he was guilty simply because he was found at one of the addresses where the cell phone had been tracked.

¶ 39 In fact, the evidence did not establish that Allen was found at the address given to the police by White. Rather, the evidence showed that when the police went to the area of the address given, the officers saw Allen and another man crossing the street. We further note that even if Allen had been found at that particular address with the cell phone on his person, all that would have established was that Allen was in possession of White's cell phone. This fact, standing alone, would not connect Allen to the armed robbery since he could have obtained the phone from someone else or found it after it was discarded.

¶ 40 Allen also argues that there was no reason for the State to present evidence of the GPS tracking data when it did not bridge any gaps in the testimony or clear up any issues that would have otherwise been confusing to the jury. We disagree. Allen was apprehended in an adjacent suburb almost two miles from where the robbery occurred, and on the other side of some railroad tracks that required a detour of several blocks either to the north or the south in order to get around them, both by car and on foot. Indeed, defense counsel's opening

statement suggested to the jury that given the distance between the site of the robbery and where Allen was apprehended, Allen was stopped by police merely because he fit the description given by White. The testimony regarding the GPS tracking data was thus necessary to explain why the police were even looking for the robbery suspects in that area.

¶ 41 Finally, Allen claims that the GPS tracking data was erroneously admitted because the substance of the data, namely, a specific address that was obtained, was brought out at trial instead of merely general evidence that GPS tracking data was used in the investigation. At trial, Lewis testified regarding the address he received from the radio dispatcher, and explained that the dispatcher informed him that the address was provided by White who had gone on the internet and used GPS to track his cell phone.

¶ 42 We are mindful of the fact that this court has frequently noted that the substance of out-of-court statements is generally inadmissible under the course-of-investigation exception. See, *e.g.*, *Jovan A.*, 2014 IL App (1st) 103835, ¶ 34; *People v. Jura*, 352 Ill. App. 3d 1080, 1085 (2004). These cases generally rely on *People v. Gacho*, 122 Ill. 2d 221, 247-48 (1988), in which our supreme court held that testimony from which an inference could be drawn that a witness identified the defendant was admissible to explain the course of the investigation, but noted that if the substance of the conversation had been introduced, it would have constituted inadmissible hearsay.

¶ 43 However, in *People v. Jones*, 153 Ill. 2d 155, 160 (1992), our supreme court distinguished *Gacho* and explained that the substance of the statement is only inadmissible under this exception if the substance goes to the essence of the dispute. In *Jones*, the substance of the out-of-court statement was that the police obtained the defendant's name from another individual they apprehended running away from a stolen car, which the two men were in the process of stripping. *Id.* at 159-60. The court held that this was not

inadmissible under the course-of-investigation exception because, even if offered to prove the truth of the matter asserted, it would merely show that the defendant was involved in car stripping and not the charged offense of armed robbery. *Id*. at 160. See also *Simms*, 143 Ill. 2d at 173-74 (holding that a police officer was allowed to testify that a witness identified the defendant as the perpetrator to explain why the officer continued to question the defendant).

¶ 44 Our supreme court has also held that the substance of flash messages regarding a shooting and a carjacking were admissible under the course-of-investigation exception because the flash messages were not admitted to prove that a vehicle had been taken in a shooting but to explain the subsequent actions of the police officers. *People v. Banks*, 237 Ill. 2d 154, 180-81 (2010). Therefore, it is clear that the substance of out-of-court statements is admissible under this exception when the substance does not relate to a defendant's guilt for the crime charged.

¶ 45 Here, the trial court ruled that evidence regarding the specifics or the reliability of the actual tracking data was inadmissible, but the officer would be allowed to testify regarding why he went to that particular location. The out-of-court statement offered was the information obtained from the cell phone provider's website that indicated White's cell phone was at a specific location. Lewis was permitted to testify regarding the substance of that information, namely, a physical address for the stolen cell phone that was relayed through multiple people before it finally reached Lewis.

¶ 46 The evidence was not offered for the truth of the matter asserted, that the cell phone was, in fact, located at that physical address. Rather, the evidence was offered to explain why the officers went to a particular area, at some distance from the site of the robbery, where they observed someone who matched the description they had received. Moreover, the substance of the evidence did not go to the essence of the dispute. Even if Allen had been found in

possession of the cell phone at that physical address, such evidence could not establish that Allen was the one who robbed White. The person who robbed White could have given the cell phone to someone else or even abandoned it at that location or elsewhere.

¶ 47 Therefore, even if the evidence was admitted to establish that the cell phone was traced to a particular address, such evidence could not have proven that Allen committed armed robbery. The GPS tracking data only suggested that the cell phone might be at a particular location, or evidence from the crime that could lead to the offender could be at that location. Thus, the evidence was properly admitted under the course-of-investigation exception to the hearsay rule.

¶ 48 Allen next contends that the trial court erred in admitting the evidence because it was more prejudicial than probative. Allen claims that while the potential prejudice was tremendous, the probative value of the evidence was nominal because the State could have simply stated that officers who were canvassing the area after receiving a report of an armed robbery saw someone matching the description of one of the offenders. Allen argues that the potential for prejudice was increased by the fact that there was no evidence demonstrating the reliability and accuracy of the information, and the jury may have viewed the GPS tracking data as reliable because of its basis in science.

¶ 49 As previously noted, the area in which Allen was apprehended was some distance from where the robbery took place and the evidence was necessary to explain why the police officers went to that area to look for the suspects. Moreover, it is well settled that evidence that is relevant and admissible should not be excluded just because it might have a tendency to prejudice the defendant. *People v. Patterson*, 154 Ill. 2d 414, 458 (1992).

¶ 50 We reiterate that even if the cell phone had been found on Allen's person and he had been found at the address indicated by the GPS tracking data, this would not implicate Allen in the armed robbery. Any prejudice attendant to the admission of this evidence was diminished by the fact that Allen was merely crossing the street in the area where the phone was traced and was not in possession of the phone when he was apprehended.

¶ 51 Allen argues that the prejudicial impact of the evidence was heightened because the descriptions of the offenders provided by White and Baker were very general and, therefore, the State needed the GPS evidence to bolster its case. We disagree. White's physical description of the clothing, height and weight of the person who robbed him were specific and closely matched Allen's clothing, height and weight. The evidence established that the lighting and the length of time White had to observe the offender were both more than adequate for him to make an accurate identification less than an hour after the robbery.

¶ 52 We also disagree with Allen's contention that White was too focused on the weapon to notice the offender's appearance. In fact, White, who had served in the military and was very familiar with weapons, testified that he was not afraid during the robbery and that when he told the offender the weapon did not look real, he was simply stalling for time, something that indicates presence of mind and alertness rather than fear. Moreover, when White arrived at the show-up, he immediately identified Allen, who closely matched the description he had previously given. However, he told the officers that he was sure that the second person had not been one of the offenders, even though he was wearing the same color coat, because his body type and size did not resemble that of the second offender. The fact that White could make this distinction regarding the person he did not have the opportunity to observe that closely only tended to enhance the reliability of his identification of Allen, who stood very close to him under adequate lighting for several minutes.

¶ 53 In light of these circumstances, we cannot say that the GPS tracking evidence was more prejudicial than probative and, thus, the trial court did not abuse its discretion in admitting it.

¶ 54 B. Limiting Instruction

¶ 55 Allen also claims the trial court erred in not giving a limiting instruction for the GPS evidence, an issue that Allen acknowledges was not preserved for review. Although Allen did not request a limiting instruction, he relies on *People v. Trotter*, 254 Ill. App. 3d 514, 527-28 (1993), for the proposition that when evidence is admitted under the course-of-investigation exception, a limiting instruction must always be given and asks us to review this issue for plain error.

¶ 56 We do not agree that *Trotter* supports a hard and fast rule. The *Trotter* court held that the testimony at issue did not qualify for admission under the course-of-investigation exception because the police officer testified regarding the substance of a conversation with a witness. *Id.* at 527. The police officer was permitted to testify that the witness reported that after the victim's murder, he had obtained the gun used in the crime from the defendant. *Id.* Finding that the substance of the witness' statement should not have been admitted because it was hearsay, the court then proceeded to observe that the trial court should have "instruct[ed] the jury that the testimony was introduced for the limited purpose of explaining what caused the police to act." *Id.* But if the substance of the statement was hearsay and the course-of-investigation exception did not apply, then the testimony should not have been admitted at all and the proper analysis would be whether the erroneous admission of this evidence prejudiced the defendant. In *Trotter*, although the court found reversible error in the trial court's failure to give a limiting instruction (*id.*), it was clear that there was no prejudice given that an eyewitness to the defendant's transfer of the murder weapon and defendant's contemporaneous statement, "Don't get caught with it because you will probably catch a

case," (*id*. at 518) was properly permitted to testify to those events. The only authority cited by the *Trotter* court for the proposition that a limiting instruction must be given in all cases is *Simms*, 143 Ill. 2d at 174. *Trotter*, 254 Ill. App. 3d at 527. However, the *Simms* court merely observed that the trial court in that case had, in fact, provided a limiting instruction to the jury and did not hold that the failure to give such an instruction is error under all circumstances. *Simms*, 143 Ill. 2d at 174.

¶ 57 Apart from *Trotter* and cases that rely on *Trotter*, we have found no authority for the proposition that a limiting instruction must be given when evidence is admitted under the course-of-investigation exception to the hearsay rule and that the failure to give such an instruction, even when not requested by defense counsel, constitutes reversible error. In contrast, this court has repeatedly held that the failure to request a limiting instruction results in a waiver of any claim regarding the lack of such an instruction on appeal. See *People v. Rush*, 401 Ill. App. 3d 1, 16 (2010) ("While we recognize that the trial court did not provide a limiting instruction to the jury as to the [course-of-investigation testimony], at no time did defense counsel request a limiting instruction and, therefore, the matter is waived."); *People v. Gonzalez*, 379 Ill. App. 3d 941, 956 (2008); *People v. Smith*, 362 Ill. App. 3d 1062, 1082 (2005). In *People v. Peoples*, 377 Ill. App. 3d 978, 982 (2007), relied on by the State, this court also declined to hold that a trial court must provide a limiting instruction where one is not requested by the defendant, although we note that in that case, defense counsel also failed to object when the evidence was introduced. Because Allen did not request a limiting instruction, this issue is waived and we decline to address it, following *Rush*, *Gonzalez*, *Smith*, and *Peoples*.

¶ 58 C. Ineffective Assistance

¶ 59 Allen next contends that he received ineffective assistance of counsel because his trial counsel failed to request a limiting instruction for the GPS tracking data. Ineffective assistance of counsel claims are measured against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 687-88, 694; see also *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 60 Because a defendant must satisfy both prongs of the *Strickland* test to prevail on an ineffective assistance claim, a reviewing court need not consider whether counsel's performance was deficient before determining whether defendant was so prejudiced by the alleged deficiency that he is entitled to a new trial. *Perry*, 224 Ill. 2d at 342.

¶ 61 We have already concluded that the GPS tracking data was not more prejudicial than probative in light of White's identification of Allen as the person who robbed him and the fact that Allen was not in possession of White's cell phone when he was apprehended. Therefore, Allen has not established that the result of the proceeding would have been different had his trial counsel requested a limiting instruction and his ineffective assistance claim fails.

¶ 62 D. Verdict Coercion

¶ 63 Finally, Allen contends that the trial court coerced a verdict when it instructed the jury to continue deliberating in response to a note that the jury was deadlocked 11 to 1. Allen

acknowledges that this error was not preserved for review because defense counsel failed to object to the court's proposed response but asks this court to review the issue for plain error.

¶ 64 Unpreserved errors may be reviewed if either: (1) 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) 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. Thompson*, 238 Ill. 2d 598, 613 (2010) (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). In plain error review, we must first determine whether an error in fact occurred *(People v. Walker*, 232 Ill. 2d 113, 124-25 (2009)), and the burden of persuasion rests with the defendant (*People v. McLaurin*, 235 Ill. 2d 478, 495 (2009)).

¶ 65 In reviewing the propriety of the trial court's response to the jury, the test is whether, considering the totality of the circumstances, the language used actually interfered with the jury's deliberations and coerced a verdict. *People v. Fields*, 285 Ill. App. 3d 1020, 1029 (1996). Because coercion is a highly subjective concept that does not lend itself to a precise definition, a reviewing court must ascertain whether the comments imposed such pressure on the minority juror that it caused him or her to defer to the conclusions of the majority for the purpose of expediting a verdict. *Id*.

¶ 66 In *People v. Prim*, 53 Ill. 2d 62, 74-76 (1972), our supreme court rejected supplemental instructions that urge minority jurors to heed the majority and adopted language proposed by the American Bar Association that encourages continued deliberation with an open mind but urges minority jurors not to change their opinions solely for the purpose of conforming with the majority or returning a verdict. However, it is clear that the trial court has the discretion to have the jury continue its deliberations even though it reports that it is deadlocked (*People*

v. Ferro, 195 Ill. App. 3d 282, 292 (1990)), and that the mere failure to give a *Prim* instruction is not reversible error (*Prim*, 53 Ill. 2d at 76-77; *People v. Wilcox*, 407 Ill. App. 3d 151, 164 (2010)).

¶ 67 The length of the jury's deliberations following the trial court's comments is relevant to the issue of coercion and, while not conclusive, brief deliberations can invite an inference of coercion. *Ferro*, 195 Ill. App. 3d at 292. This court has found comments coercive where the trial court told the jury that if it could not reach a verdict, it would be housed somewhere until it could do so (*id.*), and where the trial court reminded jurors they had pledged to obtain a verdict when they were sworn in and they should continue to deliberate and obtain a verdict (*Wilcox*, 407 Ill. App. 3d at 164-65).

¶ 68 Allen contends that the instructions here similarly demanded that the jury reach a verdict. We disagree. The trial court's comments to the jury were: "You have deliberated for a short time. With an open mind, please consider all of the evidence and work towards reaching a verdict. Please continue your deliberation." These comments do not demand a verdict, nor do they urge the minority juror to adopt the position of the majority. We acknowledge that a verdict was reached 20 minutes after the comments were made, but that fact alone does not persuade us that the verdict was coerced. We also note that the jury had only been deliberating for a little over two hours prior to sending the note that it was deadlocked, and that it had previously sent a note stating that it could not reach a verdict, but then immediately followed that up with a note asking for additional evidence.

¶ 69 Considering the totality of the circumstances, we conclude that the trial court properly exercised its discretion in urging the jury to continue deliberations, asking them to keep an open mind, and asking them to *work toward* reaching a verdict. Therefore, because there was no error in the trial court's comments, we need not conduct a plain error analysis.

¶ 70 CONCLUSION

¶ 71 For the reasons discussed herein, we conclude that the trial court did not err in admitting the GPS tracking data evidence to explain the course of the investigation, nor was the evidence more prejudicial than probative. Allen's failure to request a limiting instruction resulted in a waiver of that issue. Moreover, Allen's trial counsel did not provide ineffective assistance by failing to request a limiting instruction because even if the instruction had been requested and given, the outcome of the trial would not have been different in light of White's identification of Allen. Finally, the trial court did not err in instructing the jury to continue deliberating with an open mind and try to work toward reaching a verdict after being informed that the jury was deadlocked. Therefore, we affirm Allen's conviction and sentence.

¶ 72 Affirmed.