2019 IL App (3d) 170117-U

Order filed June 12, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0117
v.	)	Circuit No. 16-CF-16
	)	
TODD L. HASSELBRING,	)	Honorable
	)	Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court committed plain error by denying defendant's motion to suppress the firearm discovered in a warrantless search of defendant's vehicle.

¶ 2 The State charged defendant, Todd Hasselbring, with aggravated unlawful use of a weapon and aggravated assault. Prior to trial, defendant moved to suppress the firearm discovered during the investigation of the alleged offenses. The trial court denied defendant's motion to suppress. Following a jury trial, the jury acquitted defendant of aggravated assault and

found defendant guilty of aggravated unlawful use of a weapon. The trial court sentenced defendant to 6 consecutive weekends in jail and 24 months of probation. Defendant appeals.

¶ 3 I. BACKGROUND

¶ 4 On January 22, 2016, the State indicted Todd L. Hasselbring (defendant) on two counts. Count I alleged defendant committed the offense of aggravated unlawful use of a weapon (AAUW) (720 ILCS 5/24-1.6(a)(1)(3)(A-5) (West 2016)) on or about January 10, 2016, "in that said defendant knowingly carried in a vehicle, a firearm, at a time when he was not on his own land, or in his own abode or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, and the firearm possessed was uncased, loaded and immediately accessible at the time of the offense," *inter alia*. Count II alleged defendant committed the offense of aggravated assault (720 ILCS 5/12-2(c)(1) (West 2016)) on or about January 10, 2016, in that defendant "knowingly pointed a gun at Joseph Ross (the victim), thereby placing [the victim] in reasonable apprehension of receiving a battery."

¶ 5 Pursuant to a local ordinance, the officers investigating defendant for alleged AAUW and aggravated assault, towed and impounded defendant's vehicle that was parked in the driveway of defendant's residence. Prior to towing defendant's vehicle away from the residence, officers conducted an inventory search of the contents of that vehicle. Defendant was not on the premises at the time of the search. During this search, an officer discovered a, .380 caliber firearm in a case in the back pouch of the driver's seat. The firearm had ammunition in the magazine but no round in the chamber. The State intended to introduce the firearm as direct evidence corroborating the State's witness' testimony that defendant not only carried the loaded, uncased, firearm in his vehicle while present at another address, but actually pointed the firearm at the victim before driving back to his residence.

¶ 6 On February 22, 2016, defendant filed a motion to suppress evidence (motion to suppress) arguing the officers conducted an improper, nonconsensual, warrantless "inventory search" of the 2006 Jeep Grand Cherokee while the vehicle was parked in defendant's driveway. On March 14, 2016, the trial court conducted a hearing on defendant's motion to suppress. Defendant testified that on January 10, 2016, at approximately 4 p.m., defendant went to his ex-girlfriend Amy's home to pick up his nine-year-old daughter (the minor) for regularly scheduled visitation. Defendant placed the minor in the back seat of his vehicle, but at some point she moved to the front seat. At approximately the same time, Amy's boyfriend, the victim, "came out and said some profanity, something about not parking in his grass, and [defendant] waived, said okay, and drove away." Defendant returned to his residence with the minor and parked his vehicle in his driveway.

¶ 7 Defendant explained to the court that once inside his home, defendant "grabbed [his] weapon from [his] drawer, put it in [his] vehicle, [and] started to play a game with [his] children." Defendant stated that he has three children, ages four, seven, and nine, with whom he has regularly scheduled visitation at the same time on certain weekends. Defendant usually removes his .380 caliber firearm from the top drawer in his bedroom and places it in his vehicle when his children are around so they are not exposed to the weapon.

¶ 8 Defendant testified that as he started to play a game with his children inside his residence, law enforcement knocked on his door. The officers asked him about the very recent incident at his ex-girlfriend's residence where defendant "pointed a weapon at [the victim]," according to a complaint from the victim. Defendant was arrested, placed in handcuffs in the back of a police car, and driven away from his home. Before removing defendant from his residence, the arresting officers confiscated defendant's car keys. Defendant testified that officers searched his

vehicle after removing defendant from the property. Defendant stated that the vehicle was locked and alarmed at the time of the search.

¶ 9 Officer Timothy Williams of the Bradley Police Department testified that on January 10, 2016, he was dispatched to defendant's home based on a report that defendant pointed a gun at the victim at defendant's ex-girlfriend's residence. After receiving this report, Officer Williams drove to defendant's home. Defendant allowed the officer to enter his residence. During a conversation inside defendant's residence, defendant advised the officer that defendant had two weapons and that the weapons were in a storage unit at that time. While Officer Williams spoke to defendant, another officer, Officer O'Connor, spoke with defendant's minor child. Officer O'Connor relayed to Officer Williams that the minor stated:

> "that [defendant] was picking her up from her mother's house and [the victim] came outside yelling at [defendant] about where he was parked. Apparently he was parked on the grass and that she stated that [defendant] grabbed a pistol from behind his seat or grabbed — I don't know her exact words. Grabbed a gun from behind the driver's seat and put it on a box pointing it at [the victim]."

¶ 10 During cross-examination, Officer Williams admitted that his written police report did not indicate that the minor reported that her father pointed a firearm at anyone. Williams clarified that his testimony about the minor's statement was a mistake and that he needed to reflect back to his report. Officer Williams stated that he took the minor's statement into consideration when he chose to arrest defendant because her story matched the victim's. Officer Williams testified that the time from the 911 call to defendant's arrest was approximately 30 minutes.

¶ 11 Following defendant's arrest, officers inventoried defendant's vehicle as part of an administrative seizure and tow without first obtaining a search warrant to search defendant's

vehicle. Officer Williams did not believe a search warrant was necessary because of the department's inventory policy. He explained as follows:

> "Our ordinance had admin seizure policies. UUW, unlawful use of a weapon, falls under that ordinance where if the vehicle is used in the commission of a felony which is UUW that we tow the vehicle administratively. In other words, there's a fine on the vehicle before the vehicle can be released. Prior to towing any vehicle we inventory the vehicle. We write down on a sheet, on the tow sheet, what's in the vehicle."

Officer Williams testified that he did not discover the firearm until he searched the vehicle. However, before the search, someone told Officer Williams that the firearm was behind the driver's seat in a pouch.

¶ 12 According to Officer Williams's testimony, he "could see the handle of a gun prior to even opening the [car] door through the back window." Officer Williams indicated that the vehicle's back window was tinted, but he could still see the silver handle of the firearm through the window. Again, Officer Williams admitted that his report did not reflect that he first observed the firearm in plain view before opening the door to the vehicle. Officer Williams could not explain why he omitted this observation from his police report.

¶ 13 With regard to the "administrative seizure," the following conversation took place:

> "THE COURT: If you don't mind, I have a question.
>
> Is this administrative seizure procedure that is in the form of an ordinance, do you have — is that a written procedure?
>
> [WILLIAMS]: Yes, we have — we have a sheet that has all of our violations on there for instances where we would administratively tow a vehicle.
>
> THE COURT: Do you have a copy of the ordinance with you?

[WILLIAMS]: I do not, no, I don't.

THE COURT: Do you have a copy of the ordinance?

MR. PENTUIC: I do not, Judge.

THE COURT: Do you have a copy of the ordinance?

MR. RIDGE: I don't have it, Judge, with me.

* * *

THE COURT: Well, if we're going to talk about the administrative search, I'd like to see a copy of the ordinance, right?"

¶ 14 Next, the defense published several photographs to the court depicting the scene and the vehicle in question. After viewing the photographs tendered by the State, the court stated that the sun appeared to be setting in the photographs. Officer Williams claimed one of the photographs showed it was possible for him to see the outline of the passenger's seat and the house through the tinted back window of the vehicle.

¶ 15 Officer Williams also testified that the photograph with the rear driver's side door open showed the silver handle of the firearm in a black case behind the driver's seat. Officer Williams believed the firearm may have been discovered "about an hour after we got the initial call that those pictures were taken." The officer explained that the vehicle was on defendant's property, was not blocking traffic, and did not pose any danger to law enforcement before the search. The trial court took judicial notice that there were judges available to grant a search warrant on the date in question.

¶ 16 Sergeant Brandon Jenson testified that he spoke to the victim at the home he shared with defendant's ex-girlfriend on the date in question. The victim explained to Jenson that defendant parked on his lawn. The victim told Jenson that the minor was stepping into the back seat when

defendant told her to sit in the front seat. As the child moved to the front seat, the victim saw defendant pointing a gun at him while defendant was seated in the driver's seat of the vehicle. The victim described the firearm as a black firearm with a sliver tip. Sergeant Jenson testified it was light out at the time he spoke with the victim. Sergeant Jenson relayed the victim's version of events to officers on the scene at defendant's home.

¶ 17 Sergeant Jenson explained to the court that the Village of Bradley had a local ordinance that provides for the towing of vehicles for certain traffic and criminal offenses. The State introduced an exhibit that Jenson described as "our guide sheet for certain criminal offenses that fall under our administrative tow [policy]." The "guide sheet," presented to the trial court, listed the local ordinance numbers associated with certain offences.

¶ 18 Next, the State introduced what Sergeant Jenson described as the Bradley Police Department's "general order for our vehicle and inventory." Sergeant Jenson explained that when the department is tasked with taking custody of property, the officers follow the department's inventory policy in order to document the items located in the vehicle and/or damage to the vehicle for the purpose of safeguarding the department from any claims of loss or damage to the vehicle. Sergeant Jenson testified the department followed this inventory policy in a uniform fashion.

¶ 19 According to Jenson, defendant's vehicle was declared a "public nuisance" under the local ordinance. The nuisance vehicle is towed but car owners have 24 hours to appeal the tow. Officer Jenson stated that an owner must pay a $500 administrative fee plus the towing fees to "bond out" the towed vehicle, and that one purpose for the ordinance was to act as a deterrent.

¶ 20 Officer Brandon O'Connor of the Bradley Police Department testified he was dispatched to defendant's residence at approximately 4:30 p.m. on January 10, 2017. Officer O'Connor

spoke with the minor outside defendant's home. The minor told O'Connor that she was afraid during the incident, "that [defendant] has a gun in the car," and "that [defendant] took [the firearm] out and [defendant] pointed it at [the victim] and then told me to get in the car and we got in the car and we left." Officer O'Connor relayed the minor's statements to Officer Williams.

¶ 21 Following the hearing, the trial court found Officer Williams's statements regarding his plain view of the firearm to be less than compelling. The court noted that Officer Williams's testimony conflicted with his written report. The trial court found Officer Williams had been impeached on the matter pertaining to the visibility of the firearm and stated "I cannot find from the evidence that the officer in fact observed that firearm inside the vehicle from outside the vehicle."

¶ 22 After questioning Officer Williams's credibility, the trial court stated "I don't think Bradley can pass an ordinance saying we can tow for — we can tow for certain purposes a vehicle that happens to be properly parked in somebody's driveway and that that would trigger a lawful inventory search. I don't think that that could happen." The trial court found the officers had no right to inventory defendant's vehicle and that the search was not valid on that basis.

¶ 23 However, the trial court found that the search was lawful on other grounds pertaining to the automobile exception to a warrant requirement. Before announcing this ruling, the trial court asked each attorney whether the attorneys knew whether the automobile exception to the warrant rule extended to searches involving vehicles parked in a driveway. Neither attorney could provide the court with any authority or a definitive answer. Thereafter, the trial court ruled that the minor's statement to the officers corroborated the victim's statement and gave officers probable cause to arrest defendant. Consequently, the court found the *Carroll* doctrine allowed

law enforcement to search defendant's automobile and lawfully seize defendant's firearm. On this basis, the trial court denied defendant's motion to suppress.

¶ 24 On November 7, 2016, the case proceeded to a jury trial. The victim testified that on the day in question, defendant pulled his vehicle up onto the victim's lawn. The victim stated:

> "I — I have recently have asked [defendant] — and I've asked Amy to text him and let him know to please stopping [*sic*] parking in my yard. I — especially when it snows outside, the yard gets all muddy if you park your car in the driveway. It's all a respect factor to me. One time [defendant] was dropping [the minor] off at the house. [Defendant] had him, his ex-wife, and the kids in the car. Amy and I parked across the street where I normally park my car at, and I get out of the car. [The minor] jumps out of the backseat of his car. And I yell to him to stop parking in my yard, because again he — instead of just dropping her off on the alleyway and letting her walk into the yard, he pulled into the yard. I got an F you and a bird thrown, too. I mean, they drove away.
>
> * * *
>
> Well, when [defendant] got [the minor] I — I saw when — we opened the door to let [the minor] outside with him. He was pulled up — his car was close to my house. So he was pulled into the driveway. So I — or into the yard. I'm sorry. And I walk out on to the porch and I yell — I yelled his name first. I said, hey, [defendant] — you know, at that moment [the minor] had the back door passenger but the back of it — that door opened. He tells — I heard him. He was so close I could hear him tell her to get in the front seat. As she closed — she closes the door, she openings [*sic*] the passenger seat to get in, I have a pistol pointed at me. I am on my porch. [Defendant] is in my yard.
>
> * * *

Well, when she opened the passenger-side door I noticed the pistol was pointed in my direction. It was still light outside so I caught the reflection of the silver on the — on gun and I noticed it was a black and silver pistol.

***

[Defendant was] pointing it right — he's pointing it at me — in the direction of me and he is lowering it as [the minor] is opening the front door. He's lowering it down and he sets it down on the center console of his car."

¶ 25 Following this testimony, the State displayed People's exhibit No. 3 to the victim. The victim stated that People's exhibit No. 3 was "the pistol that [defendant] had pulled out on me."

¶ 26 The minor testified for the prosecution. During her testimony she stated as follows:

"So I was going out to [defendant's] car to go to my grandma's house like usual, and then I was going to the back of the car, but [defendant] insisted — that I go in the front. So I went in the front. And right when I opened the door — the front door, I saw the gun pointing straight at [the victim], and [defendant] was slowly lowering it down like this. And then when I was finally sitting down it was — [defendant] was still holding it and pointing it at [the victim], but [defendant] was holding it like this in the middle console.

* * *

[The victim] was like cursing because he didn't like that [defendant] was parking in [the victim's] yard again.

* * *

After [defendant] pointed the gun we finally drove away a little bit into that little second part of the alley right there and he said something like, that was brutal wasn't it,

and then he put the gun away in the little pouch behind his front seat and then we drove away to grandma's house.

* * *

Like I saw [defendant] pointing the gun at [the victim], and it was in the middle console like this, but then we drove away with — and [defendant] put the gun — [defendant] let go of it and [defendant] put it right here, and just drove off to a little part of the alley over there. The second part of it."

The minor also identified People's exhibit No. 3 as the firearm her father possessed at her mother's residence.

¶ 27 During the jury trial, Officer Williams testified that when he retrieved the firearm from the back of defendant's vehicle it was inside a case. The firearm had a full magazine in it but no round in the chamber. At this time, Officer Williams identified People's exhibit Nos. 4 and 5, photographs of the firearm, which were admitted into evidence and published to the jury. Officer Williams also identified People's exhibit No. 3 as the firearm he located in defendant's car, and the State admitted the firearm into evidence.

¶ 28 Kurt Kibbons, defendant's stepfather, testified for the defense. Kurt testified that defendant lived with him and owned one firearm.

¶ 29 Kelly Kibbons, Kurt's wife and defendant's mother, explained she resided with her husband and defendant on the date in question. She testified that defendant's three children were at the home on that date. Kelly testified she saw defendant bring his firearm up from his room and heard him say he was "bringing it to his car." Kelly watched defendant put the firearm in his vehicle through her window. Kelly testified that defendant often takes his gun to his car when the kids are around.

¶ 30 Defendant testified in his own defense. Defendant told the jury that when he picked up the minor on January 10, 2016, his firearm was not in his vehicle but was located in his home. Then, defendant testified:

> "I mean, from the start — I pull up, I get out of my car, walk around the back of my car across the yard to the sidewalk to the front door, I knock, I get a just a minute. Okay. [The minor] comes out. Door shuts — screen door shut. I walked back to the passenger rear, let me [the minor] in, shut the door, walked around, got in the driver seat. About that time she said, dad, can I sit in the front? So like — yeah, I guess. She got out. About the time she opened the front door, [the victim] came out, screamed some profanities. [The minor] shut the door. I just kind of, you know, had to lean forward so he'd see me and I pulled off. Went home."

Defendant testified that when he returned to his home he removed his firearm from his dresser drawer and walked the firearm outside to his car.

¶ 31 The jury found defendant guilty of AAUW but not guilty of aggravated assault. On January 17, 2017, the trial court sentenced defendant to 6 consecutive weekends in jail and 24 months of probation. Defendant appeals.

¶ 32 II. ANALYSIS

¶ 33 On appeal, relying on the very recent United States Supreme Court decision in *Collins v. Virginia*, 138 S. Ct. 1663 (2018), defendant challenges his conviction.[1] After *Collins* was decided, defendant contends that the current state of the law prevents law enforcement from conducting warrantless searches of motor vehicles located in the driveway of one's home. On

[1]The hearing on defendant's motion to suppress took place on March 14, 2016, and the Supreme Court issued the *Collins* decision on May 29, 2018, more than two years after the trial court's ruling denying defendant's motion to suppress.

this basis, defendant argues the firearm discovered during the warrantless search should not have been presented to the jury.

¶ 34 In response, the State argues the trial court's ruling should be affirmed for at least three reasons. First, the State asserts that even if the officers conducted an impermissible warrantless search under *Collins*, the officers acted in good faith on the date of the warrantless search, January 10, 2016. Second, the State submits that the warrantless search of defendant's vehicle was proper under the plain view doctrine. Third, the State argues the warrantless search of defendant's vehicle constituted a lawful inventory search based on a local ordinance. Finally, the State submits that even if this court finds the trial court erred, defendant has forfeited the review of this suppression issue by failing to file a posttrial motion. In support of this contention, the State claims defendant's forfeiture may not be excused as plain error because the evidence at trial was not closely balanced.

¶ 35 The Fourth Amendment of the United State Constitution serves to guarantee the right of the people against unreasonable searches and seizures. U.S. Const., amend. IV. Generally, warrantless searches are considered unreasonable. *People v. Pitman*, 211 Ill. 2d 502, 513 (2004). In Illinois, the exclusionary rule exists to bar evidence obtained in violation of the Illinois Constitution's prohibition against unreasonable searches and seizures. *People v. Krueger*, 175 Ill. 2d 60, 74 (1996). However, exceptions to the exclusionary rule exist. *Pitman*, 211 Ill. 2d at 513.

¶ 36 A trial court's ruling on a motion to suppress presents a mixed question of law and fact. *People v. Jones*, 215 Ill. 2d 261, 267 (2005). On appeal, reviewing court's afford great deference to the trial court's factual findings, and such findings will be upheld on review unless they are against the manifest weight of the evidence. *Id.* at 268. A factual finding is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the finding is

arbitrary, unreasonable, or not based in evidence. *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007). The ultimate question of whether the evidence should have been suppressed is subject to our *de novo* review. *Jones*, 215 Ill. 2d at 268.

¶ 37 A. *Carroll* Doctrine/Good-Faith Exception

¶ 38 For historical reference, a brief discussion of the *Carroll* doctrine is in order. In *Carroll v. United States*, 267 U.S. 132 (1925), the United States Supreme Court first articulated the so-called automobile exception to the warrant requirement, deeming warrantless searches of vehicles permissible where probable cause exists to believe a vehicle contains incriminating evidence. The *Carroll* court explained that a "necessary difference" existed between searching a vehicle and searching a home, for instance, because vehicles are readily mobile, *inter alia*. *Id*. at 153. Later justifications of the automobile exception centered around a reduced expectation of privacy resulting from "the pervasive regulation of vehicles capable of traveling on the public highways." *Collins*, 138 S. Ct. at 1670 (quoting *California v. Carney*, 471 U.S. 386, 392 (1985)).

¶ 39 Significantly, in 2018, the United States Supreme Court in *Collins* clarified that the automobile exception to the warrant requirement did not apply to searches of automobiles when the vehicle is within the curtilage, the land immediately surrounding and associated with one's home. See *Collins*, 138 S. Ct. 1663. More specifically, the Supreme Court held that a vehicle parked in the driveway next to the defendant's home was within the curtilage of the home, thus, a warrantless search of that vehicle would be unreasonable even if officers had probable cause to believe the vehicle contained incriminating evidence. *Id*. For purposes of this appeal, the State concedes that defendant's vehicle, parked in defendant's driveway, was within the curtilage of defendant's home.

¶ 40 We note that the State has not requested this court to determine whether or not *Collins* applies retroactively to the date of the warrantless search on January 10, 2016. Instead, since *Collins* had not been decided at the time of the search in this case, the State argues the good faith exception to the exclusionary rule based on the automobile exception to the warrant requirement should be applied in this case. 725 ILCS 5/114-12(b)(1), (b)(2) (West 2016); See *Davis v. United States*, 564 U.S. 229, 241 (2011).

¶ 41 The good faith exception to the exclusionary rule includes law enforcement's good faith reliance on binding appellate precedent which specifically authorizes a particular law enforcement action or practice. *People v. Bonilla*, 2018 IL 122484, ¶ 37. The State relies on *United States v. Hines*, 449 F.3d 808 (7th Cir. 2006), in support of its good faith contention. In *Hines*, the Seventh Circuit Court of Appeals upheld the warrantless search of the defendant's vehicle, parked in the driveway of the defendant's residence, pursuant to the automobile exception. *Id*. The State argues *Hines* was the applicable law in Illinois in 2016, and that based on the holding in *Hines*, and its progeny, the officers in this case had a good faith belief that their conduct was lawful.

¶ 42 It is well accepted that "[d]ecisions of a United States court of appeals, while persuasive, are not binding on state courts. *People v. LeFlore*, 2015 IL 116799, ¶ 116. Contrary to the State's argument on appeal, the *Hines* decision has never constituted binding judicial precedent for our state courts.

¶ 43 We recognize that Illinois jurisprudence with regard to a warrantless search of an unoccupied vehicle parked in a private driveway was admittedly scant when the officers conducted this search in 2016. However, in *Redwood v. Lierman*, 331 Ill. App. 3d 1073, 1083 (2002) the Fourth District held that "[t]he curtilage, the land immediately surrounding and

associated with the home, 'warrants the Fourth Amendment protections that attach to the home' " and "[b]y parking a vehicle in the driveway or yard of one's home, one brings the vehicle within the zone of privacy relating to one's home." In the absence of guidance from our supreme court and without prior precedent from this court, we observe that the Fourth District's precedent in *Redwood* seems to be the only Illinois decision involving similar facts at the time of the search here. We recognize that decisions of the Fourth District are not binding on this court but have persuasive value. See *O'Casek v. Children's Home and Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008). Hence, we account for this Fourth District precedent when measuring the officer's good faith here.

¶ 44 When determining whether officers acted in good faith, the relevant inquiry for this court is when " 'police acted with an objectively reasonable good-faith belief' that their conduct [was] lawful, or when their conduct involved only simple, isolated negligence.' " *Bonilla*, 2018 IL 122484, ¶ 35 [citations]. The case law provides that "Where state courts are silent on the constitutionality of a particular police practice, law enforcement officers who engage in that practice without first obtaining a search warrant from a neutral magistrate must knowingly accept the risk that their conduct will be found unconstitutional." *LeFlore*, 2015 IL 116799, ¶ 116.

¶ 45 We would be remiss if we did not recognize that the experienced trial court judge in this case properly identified the issue regarding the application of the *Carroll* doctrine to the search of a vehicle parked in a private driveway.[2] In fact, the trial court directly asked the parties whether any case law existed on this precise set of circumstances. At the time the trial court made the inquiry of counsel in 2016, the decision in *Collins* had not yet been issued. We also

[2]The record also shows that officers had confiscated defendant's keys to the vehicle and that defendant was not on scene when the search was conducted.

note that our supreme court adopted the *Collins* decision in *Bonilla*, 2018 IL 122484, ¶¶ 28-32, two years after the suppression hearing now before this court for review. Therefore, it should be emphasized that the trial court did not have the benefit of *Collins* or *Bonilla* at the time of the suppression hearing.

¶ 46 Ultimately, we reject the State's contention that the officers were relying, in good faith, upon binding, well established, precedent thereby justifying the warrantless search of defendant's unoccupied automobile parked within the curtilage of his home on January 10, 2016. Thus, the good faith exception to the exclusionary rule does not apply.

¶ 47 B. Plain View

¶ 48 Next, the State argues the search of defendant's vehicle was proper on other grounds, namely, the plain view doctrine. The plain view doctrine applies where: (1) the officer can view the object from a lawful position; (2) the officer has a lawful right of access to the object; and (3) the incriminating nature of the object is readily apparent. *Jones*, 215 Ill. 2d at 271-72. The plain view doctrine is a well-known exception to the prohibition against warrantless searches which allows officers to seize incriminating evidence observed in plain view without first obtaining a search warrant. *People v. Rucker*, 294 Ill. App. 3d 218, 223 (1998).

¶ 49 At the suppression hearing, Officer Williams testified that someone advised him the firearm was tucked behind the driver's seat. However, during his testimony the officer did not identify the name of the person that told him where the firearm could be found in the parked automobile. Based on this information, Officer Williams said that he first looked inside the vehicle and "could see the handle of a gun prior to even opening the [car] door." Yet, in contrast to this testimony, Officer Williams admitted that his report did not indicate that he first observed the firearm, in plain view, before opening the door to the vehicle.

¶ 50 Here, the trial court noticed that Officer Williams's testimony conflicted with the contents of his written report. Consequently, the trial court found that the officer's credibility had been successfully impeached by the defense and stated "I cannot find from the evidence that the officer in fact observed that firearm inside the vehicle from outside the vehicle."

¶ 51 The trial court will always be in the best position to evaluate the credibility of the witnesses, including police officers. *People v. Shepherd*, 2015 IL App (3d) 140192, ¶ 28. The record demonstrates Officer Williams's inconsistent statements were certainly sufficient to give the trial court pause. The photographs of the scene also support the trial court's skepticism about whether Officer Williams could actually observe a partially concealed weapon in the back seat of this particular vehicle.

¶ 52 Since the trial court found the officer was not credible, we have no basis to conclude the officer testified truthfully when he claimed the firearm had been in plain view. Therefore, like the trial court, we conclude that the plain view exception to the exclusionary rule does not apply in this case.

¶ 53 C. Inventory Search

¶ 54 Next, the State argues the warrantless search of defendant's vehicle was lawful as an inventory search prior to towing and pursuant to standard police procedures. A valid inventory search may be established where: (1) the original impoundment of the vehicle is lawful; (2) the purpose of the inventory search is to protect the owner's property and to protect the police against claims of lost, stolen, or vandalized property; (3) the inventory search is conducted in good faith pursuant to reasonable standardized police procedures and not as a pretext for an investigatory search. *People v. Hundley,* 156 Ill. 2d 135, 138 (1993).

¶ 55 With regard to the purported inventory search here, officers testified that the Village of Bradley had a local ordinance providing for the administrative tow of vehicles when certain offenses, including AAUW, take place and involve the use of a vehicle. It is undisputed that the State presented the trial court with a "guide sheet," which listed the local ordinance numbers associated with certain offenses.

¶ 56 On appeal, the parties devote a significant portion of their arguments to the fact that a copy of the ordinance was never presented to the trial court. Without delving into each parties' respective burdens of proof at the suppression hearing, we note that even if a police department has a written inventory policy, the State is not required to submit the written policy to the court in order to prove a lawful inventory search. *People v. Gipson*, 203 Ill. 2d 298, 308-09 (2003). Inventory searches can be upheld solely on an officer's unrebutted testimony. *Id*. at 309. In the same vein, then, it would be erroneous to argue the State had to admit a copy of the ordinance to establish a legal inventory search where an officer's testimony concerning the department's inventory procedure, based on the ordinance, would be sufficient under *Gipson*. Consequently, we conclude that the failure to introduce the text of the actual ordinance into evidence is insignificant.

¶ 57 While the State was not required to introduce the actual ordinance into evidence to justify the search, the trial court astutely stated "I don't think Bradley can pass an ordinance saying we can tow for — we can tow for certain purposes a vehicle that happens to be properly parked in somebody's driveway and that that would trigger a lawful inventory search." This court shares the trial court's observations and concerns about the parameters of the Village's ordinance and the police department's policies based thereon.

¶ 58 The case law provides that "Where the police impound a vehicle based on a cognizable reason, an inventory search pursuant to the tow is justified." *People v. Mason*, 403 Ill. App. 3d 1048, 1054-55 (2010). "An inventory intrusion into a vehicle is tested for its constitutionality by the application of the fourth amendment standard of reasonableness." *Id*. "Where police inventory procedures are reasonable and administered in good faith, the inventory search will be deemed reasonable." *Id.* "The existence of a police policy, city ordinance, or state law alone does not render a particular search or seizure reasonable or otherwise immune from scrutiny under the Fourth Amendment." *United States v. Cartwright*, 630 F. 3d 610, 614 (7th Cir. 2010); See *Sibron v. New York*, 392 U.S. 40, 61 (1968).

¶ 59 As such, the question here is not whether law enforcement's conduct complied with the mandates of the Village's ordinance or departmental policy, but rather whether the department's inventory policy and search, based on the provisions of the ordinance, satisfied the reasonableness requirement of the fourth amendment. Ultimately, we find the department's inventory policy was unreasonable as applied to this set of facts.

¶ 60 We first emphasize that the trial court found there were judges available to determine whether probable cause existed for the issuance of a warrant to search defendant's car. In addition, defendant's car keys were in the possession of the police at the time of the search, making it unlikely that the vehicle was readily mobile. Perhaps, most importantly, defendant's unoccupied vehicle was situated on private property and parked in the driveway of defendant's residence. The unoccupied vehicle was not impeding traffic or threatening public safety and convenience. As such, officers were not acting pursuant to any community caretaking function here. *Mason*, 403 Ill. App 3d at 1054. Moreover, the location of the unoccupied vehicle on

private property does not support the labeling of the parked vehicle as a "public nuisance," the apparent justification for the towing of vehicles under the local ordinance.

¶ 61 It appears the scope of the ordinance blindly empowers law enforcement to tow vehicles involved in certain offenses, regardless of whether such action is necessary or reasonable. Before towing, law enforcement must conduct an inventory search of the vehicles. Once towed away as a "public nuisance," the Village requires the owner of a towed vehicle to pay a $500 administrative fee to "bond out" their vehicle. As such, the department's broad-sweeping inventory policy appears to focus on raising money for the Village and serves as a pretext for investigatory searches. Accordingly, the inventory search exception to the exclusionary rule is inapplicable in the case at bar.

¶ 62 To conclude our discussion concerning exceptions to the warrant requirement, we note that we may affirm a trial court on any basis supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010). However, after careful consideration, we find no basis on which to affirm the trial court's decision denying the motion to suppress. Because no exceptions to the exclusionary rule relied on by the State apply in this case, the trial court erred when it failed to suppress evidence of the firearm.

¶ 63 D. Forfeiture and Plain Error

¶ 64 Having determined that defendant's motion to suppress should have been granted on fourth amendment grounds, we agree with the State that defendant failed to properly preserve the issue for our review. It is well settled that to preserve an alleged error for review, the defendant must raise a timely objection at trial and raise the error in a written posttrial motion. *People v. Cosby*, 231 Ill. 2d 262, 271 (2008). As the State alleges, defendant failed to file a posttrial motion challenging the admission of the evidence pertaining to the unlawfully seized firearm.

Hence, we necessarily find forfeiture, and our analysis shifts to the doctrine of plain error, which serves as a bypass to the typical consequences of forfeiture. *People v. Piatowski*, 225 Ill. 2d 551, 564-65 (2007). Plain error may be established, thus excusing forfeiture, where defendant shows: (1) the evidence was so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or (2) a structural error is present in the record. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 65 Under plain error, defendant bears the burden of persuasion with respect to prejudice. *Id.* When assessing prejudice arising from the closely balanced nature of the evidence, we are tasked with making a "commonsense assessment" of the evidence based on the circumstances of the instant case. *People v. Effinger*, 2016 IL App (3d) 140203, ¶ 23. By way of review, we note that the jury was required to decide whether defendant was guilty of count I, AAUW. 720 ILCS 5/24-1.6(a)(1)(3)(A-5) (West 2016).

¶ 66 A person commits the offense of AAUW when he or she knowingly:

> "Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm."

And where,

> "the pistol, revolver or handgun possessed was uncased, loaded, and immediately accessible at the time of the offense and the person possessing the pistol, revolver, or handgun has not been issued a currently valid license under the Firearm Concealed Carry Act." *Id.*

¶ 67 Here, neither the minor nor the victim testified or could have accurately speculated that defendant's firearm was loaded at the time of the alleged offense. In order to find defendant guilty of AAUW, the jurors had to be convinced beyond a reasonable doubt that the gun was loaded while in defendant's possession when he picked up the minor.

¶ 68 Officer Williams represented the State's only witness that described whether or not the gun was loaded. After the State rested, defendant testified that the firearm "had a clip in it," but defendant did not consider that loaded and said "I don't make definitions." Without Officer Williams's description of details about the firearm, that would not have been visible absent the unlawful seizure of the firearm, the jury could not have convicted defendant of AAUW. Without taking a logical leap, we surmise that when holding the State to this burden of proof on each element of the offense of AAUW, the jury simply filled in a missing piece in the victim's and the minor's testimony, namely, whether the gun was loaded, based on Williams's testimony.

¶ 69 Further, with respect to count II, the jury heard testimony by the minor and the victim. Both witnesses agreed defendant pointed a gun at the victim. However, defendant denied pointing a weapon at the victim. The jury resolved this "he said, she said" credibility contest between the observations of the State's eyewitnesses and defendant in defendant's favor and returned a not guilty verdict on the charge of aggravated assault.

¶ 70 Similarly, on count I, without the seizure of the firearm, the jury would have been faced with a similar "he said, she said" credibility contest regarding whether defendant held a weapon in his hands while present at his ex girlfriend's home. Defendant denied having a firearm at that location, but the State's witnesses consistently testified he did possess a firearm in the vehicle. Again, without the seized firearm that contained ammunition, the jury could have easily resolved the credibility contest in defendant's favor.

¶ 71 Plausible, conflicting, eyewitness accounts, without physical evidence, gives rise to a closely balanced case. See *People v. Sebby*, 2017 IL 119445, ¶¶ 60-63. We recognize that witness credibility is an important consideration here. Certainly, whether or not the minor's testimony was the subject of undue parental influence is up for debate. Similarly, defendant's witnesses were also his close family members subject to bias. Obviously, the jury must have questioned the credibility of both parties' witnesses before finding defendant guilty of AAUW and not guilty of aggravated assault.

¶ 72 To conclude, "We deal with probabilities, not certainties; we deal with risks and threats to the defendant's rights. When there is error in a close case, we choose to err on the side of fairness, so as not to convict an innocent person." *Herron*, 215 Ill. 2d at 193. Since the case excluding the unlawfully seized firearm turned on the jury's credibility determination of the closely balanced testimony, we conclude the trial court's error denying the motion to suppress the firearm prejudiced defendant and a new trial is required. Accordingly, we reverse and remand the case for a new trial.

¶ 73 III. CONCLUSION

¶ 74 The judgment of the circuit court of Kankakee County is reversed and remanded.

¶ 75 Reversed and remanded.