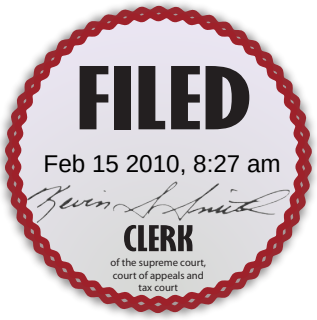

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IN THE
COURT OF APPEALS OF INDIANA

BRANDON MASON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0905-CR-407
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-0712-FA-46

February 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Brandon Mason appeals his convictions for dealing in cocaine as a class A felony,[1] possession of paraphernalia as a class A misdemeanor,[2] and maintaining a common nuisance as a class D felony.[3] Mason raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion by admitting evidence obtained from an investigatory stop; and

II. Whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error.

We affirm.

The relevant facts follow. In April 2007, Mason began dating Janai Robinson. In December 2007, Mason and Robinson were not "getting along," and Mason slept in a separate bedroom in the apartment leased by Robinson. Transcript at 124.

On December 7, 2007, at 12:13 a.m., Robinson called the police who were dispatched to Robinson's apartment regarding a "[d]omestic battery with injuries." Id. at 11.

Dispatch advised the officers that a female had reported that she had been battered by Mason. When the officers arrived on the scene, dispatch informed them that the male suspect was "still on scene and he was looking out the window." Id. at 22.

As Officer Landis approached the apartment, Mason stepped out of the front door. Mason made "furtive gestures" into his coat pocket as officers were arriving and making

[1] Ind. Code § 35-48-4-1 (Supp. 2006).

[2] Ind. Code § 35-48-4-8.3 (2004).

[3] Ind. Code § 35-48-4-13 (2004).

contact with him. Id. at 34. Officer Landis asked Mason if his name was Brandon Mason, and Mason confirmed his identity.

Mason kept reaching his hand into his pocket even after being told not to do so. Mason then attempted to go back toward the apartment, and Officer Landis and Officer Dombkowski "took a hold" of Mason and prevented him from going back into the apartment. Id. at 28.

Officer Landis then asked Mason to stand against the wall, but Mason started to pull away "trying to . . . head back towards the apartment door." Id. at 24. Officer Landis decided to conduct a pat down of Mason because of concerns regarding the safety of the officers and Robinson. Id. at 23. Officer Landis asked Mason to spread his legs for a pat down, but Mason was "making it difficult" to conduct the pat down and kept "trying to close the distance of his legs . . . which would give him better balance and make it easier for him to pull away." Id. Mason also would not take his hands out of his pockets. Lafayette Police Officer Ryan French arrived at the scene and saw Mason struggling with Officer Dombkowski and Officer Landis. Officer French assisted the other officers by "taking a hold" of Mason as well. Id. at 7.

Officer Landis placed Mason in handcuffs to limit his mobility because he kept trying to pull away and was making it difficult for the officers to perform a pat down of his outer layer of clothing. Officer Landis told Mason that he was not under arrest and that he was only being detained as being the possible suspect in a battery. At that point,

Officer Landis and Officer French performed a pat down of Mason's outer layer of clothing.

During the pat down, Officer French felt "two distinctly individually packaged bundles in differing sizes that [he] believed to be individually packaged bundles of narcotics." Id. at 10. When Officer French felt the bundles, it was "immediately apparent" to him that the bundles were narcotics. Id. at 36-37. Officer French removed one of the bundles which was identified as crack cocaine. After Officer French discovered the crack cocaine, the officers searched the rest of Mason's person and retrieved a digital scale with cocaine residue, a large amount of cash, a cell phone, and the second bundle which was identified as crack cocaine. The baggies contained 24.7 grams of crack cocaine.

The police obtained a search warrant for the apartment and retrieved a shoebox containing baggie corners, baggies, scales, a knife, scissors, some crack particles, and rubber bands. The police also discovered a glass marijuana pipe, a baggie corner, and a "roach of marijuana" in Mason's bedroom. Id. at 110.

On December 7, 2007, the State charged Mason with: Count I, dealing in cocaine as a class A felony; Count II, possession of cocaine as a class A felony; Count III, possession of paraphernalia as a class A misdemeanor; and Count IV, maintaining a common nuisance as a class D felony.

On May 27, 2008, Mason filed a motion to suppress evidence obtained as a result of the stop on the grounds that the officers had initiated an impermissible investigatory

stop under the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Mason also stated that even if the stop was valid the frisk and pat down was unconstitutional. After a hearing, the trial court denied Mason's motion to suppress.

During the jury trial, Lafayette Police Detective Daniel Shumaker testified regarding the role of scales in drug dealing and how drug dealers package drugs using baggies. Robinson testified that when Mason lived with her he was dealing crack cocaine and that he went to Chicago to obtain drugs "[o]nce a week, every two weeks." Id. at 125. Robinson also testified that Mason would talk on his cell phone "and then he'll be gone," that the conversations involved Mason telling someone where to meet him, and that she once observed Mason take drugs with him after a phone call. Id. Andrea Erwin, the property manager for Robinson's apartment complex, testified that she saw "[a] lot of people coming and going" from Robinson's apartment in the few weeks or months leading up to December 2007 and that the people "would stop and they would be in there for . . . under five minutes and then they would leave." Id. at 157-158.

During closing argument, the prosecutor informed the jury that they would receive an instruction on "[k]nowingly or intentionally" and stated that "[t]here's no evidence that someone slipped a rock --- I'm sorry, rocks of crack cocaine in to his pocket. (indiscernible) whoops, I didn't put it there. No evidence of accident, that's not an issue either." Id. at 205. The prosecutor also commented on the upcoming closing argument by Mason's counsel and stated "have him give you an explanation about this and see how

that explanation jives with all of the evidence. With Detective Shumaker's testimony. With your common sense about how drug dealers operate. Have him explain this and have him explain this." Id. at 217.

During closing argument, Mason's counsel argued that Detective Shumaker testified that drug users also package their drugs. Mason's counsel argued:

> I asked Detective Shumaker, their expert witness, isn't it easy to get a subpoena for phone records? Yeah, we do it all the time. The billing records. Think of your own cell phone bill. Spits out all the cell phone numbers. Spits out all the numbers that you've called. . . . Okay, let's do that. Let's call some of these people. Is [Mason] selling to these people?
>
> * * * * *
>
> He's young and there are people dropping by his house. . . . I don't know what they're doing, and that's the point. Nobody does. There's no evidence presented. These people returning something that they borrowed. Are they buying drugs. Tell us. You're not allowed to speculate. You're not allowed to guess. The State's asking you to guess. That's the essence of reasonable doubt.

Id. at 218.

After Mason's closing argument, the prosecutor stated in part, "When you consider that argument consider this. This is a subpoena, okay? Officers of the Court issue these. It's a court order to produce something or to do something. [Defense Counsel], here's a subpoena. Got equal access, equal power subpoena." Id. at 225. Mason's counsel objected on "[b]urden shifting" grounds. Id. The trial court sustained the objection. The prosecutor then went on to state:

> Did you notice --- you remember what I asked him to do? Give an explanation for all this. He held up this baggie and said something about

> drug user packaging. Detective Dan Shumaker's testimony was clear. This is most consistent with dealing and typically dealers package the drugs. He didn't say anything about this. He didn't say anything about this. Why would a user do this? They don't. Drug dealers do.

Id. at 225-226.

The jury found Mason guilty as charged. The trial court found that Count II, possession of cocaine as a class A felony, merged with Count I, dealing in cocaine as a class A felony. The trial court sentenced Mason to twenty-two years with four years suspended for Count I, dealing in cocaine as a class A felony, six months for Count III, possession of paraphernalia as a class A misdemeanor, and one year for Count IV, maintaining a common nuisance as a class D felony, and ordered that the sentences be served concurrently.

I.

The first issue is whether the trial court abused its discretion by admitting evidence obtained from an investigatory stop. The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs "where the decision is clearly against the logic and effect of the facts and circumstances" before the court. Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001). In making this determination, this court does not reweigh evidence and considers conflicting evidence in a light most favorable to the trial court's ruling. Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007). Moreover, this court considers evidence from

the trial as well as evidence from the suppression hearing that is not in direct conflict with the trial evidence. Kelley v. State, 825 N.E.2d 420, 427 (Ind. Ct. App. 2005).

Mason argues that the trial court improperly admitted evidence obtained as a result of the pat down search because it was conducted in violation of the Fourth Amendment of the United States Constitution.[4] Mason challenges the propriety of the initial stop, the pat down search, and the removal of the crack cocaine from his pocket.

A. Propriety of the Initial Stop

Mason argues that the officers acted on "nothing more than an uncorroborated complaint" and "had no reason to believe criminal activity was afoot" and "simply assumed the worst." Appellant's Brief at 8, 10.

The Fourth Amendment protects persons from unreasonable search and seizure, and this protection has been extended to the states through the Fourteenth Amendment. Berry v. State, 704 N.E.2d 462, 464-465 (Ind. 1998). As a general rule, the Fourth Amendment prohibits a warrantless search. Id. at 465. When a search is conducted without a warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time of the search. Id. One of the recognized exceptions is the Terry investigatory stop. Carter v. State, 692 N.E.2d 464, 466 (Ind. Ct. App. 1997).

[4] Mason notes that his motion to suppress also challenged the search under Article 1, Section 11, but states in his appellate brief that "[n]o independent argument was developed in this regard." Appellant's Brief at 13. On appeal, Mason fails to provide an independent analysis of Article 1, Section 11 of the Indiana Constitution; rather his focus is on the Fourth Amendment of the U.S. Constitution. Failure to make a cogent argument under Article 1, Section 11 of the Indiana Constitution constitutes waiver of the issue on appeal. See Ind. Appellate Rule 46(A)(8); West v. State, 755 N.E.2d 173, 181 (Ind. 2001) (citations omitted).

In Terry v. Ohio, the United States Supreme Court established the standard for determining the constitutionality of investigatory stops. 392 U.S. 1, 88 S. Ct. 1868 (1968). The Court ruled that the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based on specific and articulable facts, the officer has a reasonable suspicion of criminal activity. Id. at 27, 88 S. Ct. at 1883. Reasonable suspicion exists if the facts known to the officer at the moment of the stop, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has occurred or is about to occur. Powell v. State, 841 N.E.2d 1165, 1167 (Ind. Ct. App. 2006). In judging the reasonableness of investigatory stops, courts must strike "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law [enforcement] officers." Carter, 692 N.E.2d at 466 (quoting Brown v. Texas, 443 U.S. 47, 50, 99 S. Ct. 2637, 2640 (1979)). When balancing these competing interests in different factual contexts, a central concern is "that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Id. (citing Brown, 443 U.S. at 51, 99 S. Ct. at 2640). Therefore, in order to pass constitutional muster, reasonable suspicion must be comprised of more than an officer's general "hunches" or unparticularized suspicions. Terry, 392 U.S. at 27, 88 S. Ct. at 1883. Whether an investigatory stop is justified is determined on a case by case basis. Williams v. State, 745 N.E.2d 241, 245 (Ind. Ct. App. 2001). In making this determination, we consider the totality of the circumstances. Id. "Judicial

interpretation of what constitutes 'reasonable suspicion' is fact-sensitive." Bridgewater v. State, 793 N.E.2d 1097, 1100 (Ind. Ct. App. 2003), trans. denied.

Here, the record reveals Robinson called the police who were dispatched to her apartment regarding a "[d]omestic battery with injuries." Transcript at 11. Dispatch advised the officers that a female had reported that she had been battered by Mason. When the officers arrived on the scene, dispatch informed them that the male suspect was "still on scene and he was looking out the window." Id. at 22. Mason exited Robinson's apartment as the officers approached and made furtive gestures into his coat pocket as officers were arriving and making contact with him. Officer Landis asked Mason if his name was Brandon Mason, and Mason confirmed his identity. We conclude that the facts and circumstances set forth in the record would cause an ordinarily prudent person to believe that criminal activity had occurred or was about to occur.

B. Propriety of the Pat Down

Mason challenges the propriety of the pat down. An "exception to the warrant requirement is: when a police officer makes a Terry stop, if he has reasonable fear of danger, he may conduct a carefully limited search of the outer clothing of the suspect in an attempt to discover weapons that might be used to harm him." Williams v. State, 754 N.E.2d 584, 588 (Ind. Ct. App. 2001), trans. denied. The United States Supreme Court, in Terry, explained that police officers may employ investigative techniques short of arrest on less than probable cause without violating Fourth Amendment interests. Wilson v. State, 745 N.E.2d 789, 792 (Ind. 2001). The principal issue is whether the police

action in question was reasonable under all the circumstances. Id. (citing Pennsylvania v. Mimms, 434 U.S. 106, 108-09, 98 S. Ct. 330, 332 (1977)).

The Indiana Supreme Court has noted that Terry permits a:

> reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Wilson, 745 N.E.2d at 792 (citing Terry, 392 U.S. at 27, 88 S. Ct. at 1883). An officer's authority to conduct a pat down search is dependent upon the nature and extent of his particularized concern for his safety. Id. "[A]n individual stopped may not be frisked or patted down for weapons, unless the officer holds a reasonable belief that the particular individual is armed and dangerous." Swanson v. State, 730 N.E.2d 205, 210 (Ind. Ct. App. 2000) (quoting State v. Pease, 531 N.E.2d 1207, 1211 (Ind. Ct. App. 1988)), trans. denied.

Mason argues that "there was absolutely no evidence that he was armed or dangerous requiring a pat down search." Appellant's Brief at 9. We disagree. Officer Landis testified that he had concerns for his safety and the safety of the female caller as a result of Mason's desire to move toward the door of the apartment and because they "had been dispatched to this residence for a domestic disturbance where battery had been alleged by the caller/victim." Id. at 23. Officer French testified that he was concerned for his safety and the safety of the other officers "especially given the nature of the call."

Id. at 9. Officer French also testified that "[f]urtive gestures into pockets or waistbands, things of that nature are often indicative that their [sic] reaching for weapons." Id.

Based upon the record, we conclude that a reasonably prudent person in these circumstances would be warranted in believing that his or her safety or that of others was in danger. See Hailey v. State, 521 N.E.2d 1318, 1320 (Ind.1988) (holding that the officer was justified in conducting a search of the defendant for his own safety where the officer knew that the defendant was an identified suspect in a burglary investigation); Williams v. State, 754 N.E.2d 584, 588 (Ind. Ct. App. 2001) (holding that the defendant's behavior warranted officer's reasonable fear for his safety and the subsequent pat down search where, among other factors, the defendant kept putting his hands in his pockets despite repeatedly being told to remove his hands from his pocket and waistband area); Johnson v. State, 710 N.E.2d 925, 928 (Ind. Ct. App. 1999) (holding that it was reasonable for the officer to conduct a protective pat down of the defendant's outer garments after the defendant had been handcuffed where the defendant matched the description of a fleeing suspect reported to have fired shots just minutes before the defendant was spotted and detained by the officer); Bratcher v. State, 661 N.E.2d 828, 831 (Ind. Ct. App. 1996) (holding that a police officer was justified in feeling endangered by the situation where the officer was responding to a report of a domestic disturbance and the defendant smelled of alcohol, appeared nervous and anxious, and continued to argue with a woman at the scene). Thus, the pat down search was reasonable, and Mason's Fourth Amendment rights were not violated.

C. Removal of the Crack Cocaine

Mason argues that the seizure of the crack cocaine was not permissible. The seizure of contraband detected during the lawful execution of a Terry search is permissible if it remains within the parameters of the "plain feel" doctrine. Jackson v. State, 669 N.E.2d 744, 747 (Ind. Ct. App. 1996). The "plain feel" doctrine, adopted by the Supreme Court in Minnesota v. Dickerson, 508 U.S. 366, 375-377, 113 S. Ct. 2130, 2137 (1993), evolved from the "plain view" doctrine which authorizes a police officer, lawfully in a position to view an object of contraband, to seize the object without a warrant if the incriminating character of the object is readily apparent. Specifically, the Supreme Court held:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity *immediately apparent*, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

508 U.S. at 375-376, 113 S. Ct. at 2137 (emphasis added). Thus, "to allow the admission of contraband seized without a warrant under the 'plain feel' doctrine, two factors must be fulfilled: (1) the contraband must have been detected during an initial search for weapons rather than during a further search, and (2) the identity of the item or items must have been immediately apparent to the officer." Smith v. State, 780 N.E.2d 1214, 1217 (Ind. Ct. App. 2003), trans. denied.

Mason argues that the search was "for evidence of a crime and not a pat down search for weapons." Appellant's Brief at 12. Mason argues that "even if the pat down search was valid, the items located in his pocket were not immediately apparent as bundled narcotics." Id. at 9. Mason also argues that "[e]ven if [the officer's] search did not exceed the limited scope of the pat down, there is limited support in the record to demonstrate *why* Officer French believed the item was immediately apparent as bundled narcotics." Id. at 12.

During the pat down, Officer French felt "two distinctly individually packaged bundles in differing sizes that [he] believed to be individually packaged bundles of narcotics." Transcript at 10. Officer French testified that that the items appeared to be wrapped in plastic and that it was "immediately apparent" to him through his training and experience that the bundles were narcotics. Id. at 36-37.

Based upon the record, we conclude that Officer French's seizure of the crack cocaine was justified under the plain feel doctrine. See, e.g., Wright v. State, 766 N.E.2d 1223, 1233-1234 (Ind. Ct. App. 2002) (holding that the warrantless seizure of cocaine was justified under the plain feel doctrine). Accordingly, we conclude that the trial court did not abuse its discretion by admitting the evidence.

II.

The next issue is whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error. Mason argues that the prosecutor "made several references to the failure of the defense to provide evidence or explanations, which would provide a

defense to dealing cocaine." Appellant's Brief at 14. Mason also argues that the prosecutor's comments "continually challenged Mason to present evidence to prove his innocence – to prove or explain why he was not a dealer" and that the comments impinged his substantial rights. Id. at 15.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. Id. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. Id. If the party is not satisfied with the admonishment, then he or she should move for mistrial. Id. Failure to request an admonishment or to move for mistrial results in waiver. Id. Here, Mason objected to part of the prosecutor's closing argument but did not request an admonishment or a mistrial. Thus, he has waived the issue.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. Id. More specifically, the defendant must establish not only the grounds for the

misconduct but also the additional grounds for fundamental error. Id. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. Id. It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." Id.

Mason argues that the prosecutor impermissibly commented on Mason's failure to testify and emphasizes the following portions of the prosecutor's statements made during closing argument:

> Knowingly or intentionally, you'll get an instruction on that but all that means is a person engaged in conduct knowingly if when they do something they're aware to a reasonable probability that they're doing something. And when they do something knowingly it means that it was their conscious objective to do so. There's no evidence that someone slipped a rock --- I'm sorry, rocks of crack cocaine in to his pocket. (indiscernible) whoops, I didn't put it there. No evidence of accident, that's not an issue either.
>
> * * * * *
>
> I've got thirteen people here with their common sense and their life experiences who know what it means when people walk around with this kind of weight. Who knows what it means to carry around the kind of stuff he was carrying around. I don't need any of that stuff. Resist the urge, if that comes up during his closing. And also have him *give you an explanation* about this and see how that *explanation* jives with all of the evidence. With Detective Shumaker's testimony. With your common sense about how drug dealers operate. *Have him explain this and have him explain this.* It's like a puzzle that's what this trial is.

Transcript at 205, 217 (emphases added).

During closing argument, Mason's counsel argued that Detective Shumaker testified that drug users also package their drugs and that the State failed to provide Mason's phone records. Mason points to the following exchange made after Mason's counsel completed his closing argument:

> [Prosecutor]: Just so we're all clear. I've got the burden at all times. Proof beyond a reasonable doubt. He doesn't have to do a thing. But when you consider his argument what didn't they do. I'd like the [sic] call this the phone record argument. The evidence is so powerful against him they try to come up with all sorts of things that they didn't do. I don't know what the barometric pressure was at the time either. Sorry. When you consider that argument consider this. This is a subpoena, okay? Officers of the Court issue these. It's a court order to produce something or to do something. [Defense Counsel], here's a subpoena. Got equal access, equal power subpoena.
>
> [Mason's counsel]: Objection. Burden shifting.
>
> [Prosecutor]: I'm not shifting the burden. You don't have to do anything, I have the burden. But you do have equal access to the subpoena.
>
> [Mason's counsel]: Judge, I object for the record.
>
> BY THE COURT: Sustained. Let's move on, counsel.
>
> * * * * *
>
> [Prosecutor]: . . . [M]y responsibility is to prove something happened beyond a reasonable doubt. I don't have to prove beyond all possible doubt. I don't have to close all the doors. That's a mischaracterization of his [sic] burden. Did you notice --- you remember what I asked him to do? *Give an explanation for all this.* He held up this baggie and said something about drug user packaging. Detective Dan Shumaker's testimony was clear. This is most consistent with dealing and typically dealers package the drugs. *He didn't say anything about this. He didn't say anything about this.* Why would a user do this? They don't. Drug dealers do. Show us who he sold to. I can't, I'm sorry.

Id. at 224-226 (emphases added).

"In determining whether a prosecutor's comments are error, fundamental or otherwise, we look to see if the comments in their totality are addressed to the evidence rather than the defendant's failure to testify." Carter v. State, 686 N.E.2d 1254, 1262 (Ind. 1997). If so, there are no grounds for reversal. Id. Arguments that focus on the uncontradicted nature of the State's case do not violate the defendant's right to remain silent. Id. (citing Isaacs v. State, 673 N.E.2d 757, 764 (Ind. 1996)).

To the extent that Mason argues that the prosecutor's comments on Mason's failure to testify constituted prosecutorial misconduct, we disagree. During trial, the State introduced testimony that the police retrieved a digital scale with cocaine residue, a large amount of cash, 24.7 grams of crack cocaine, and a cell phone from Mason's person. The police also retrieved a shoebox from the apartment which contained baggie corners, baggies, scales, a knife, scissors, and some crack particles. The police also discovered a glass marijuana pipe, a baggie corner, and a "roach of marijuana" in Mason's bedroom. Transcript at 110. Detective Shumaker testified regarding the role of scales in drug dealing and how drug dealers package drugs using baggies. Robinson testified that when Mason lived with her he was dealing crack cocaine. The defense did not contradict this evidence. Based upon the record, we conclude that the prosecutor reasonably commented on the uncontradicted nature of the State's case. See Carter, 686 N.E.2d at 1262 (rejecting the defendant's argument that the prosecution's repeated

references to defense counsel's failure to offer "explanations" were impermissible indirect comments on the defendant's failure to testify).

Even assuming misconduct, we are not persuaded that the comments during the prosecutor's closing argument created "an undeniable and substantial potential for harm." Cooper, 854 N.E.2d at 835. We note that the jury was instructed that "[t]he defendant is not required to present any evidence to prove her innocence or to prove or explain anything." Appellant's Appendix at 62. The jury was also instructed that "[y]our verdict should be based only on the evidence admitted and the instructions on the law," and "[s]tatements made by the attorneys are not evidence." Id. at 74-75. Given the evidence presented at the trial and the jury instructions, we conclude that any prejudicial impact caused by the prosecutor's statements was minimal and that the prosecutor's statements do not constitute fundamental error. See Surber v. State, 884 N.E.2d 856, 866 (Ind. Ct. App. 2008) (holding that even assuming the prosecutor's comments constituted misconduct they did not constitute fundamental error), trans. denied.

For the foregoing reasons, we affirm Mason's convictions for dealing in cocaine as a class A felony, possession of paraphernalia as a class A misdemeanor, and maintaining a common nuisance as a class D felony.

Affirmed.

MATHIAS, J., and BARNES, J., concur.