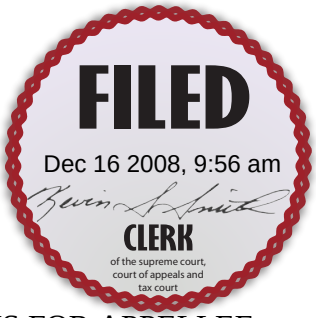

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IN THE
COURT OF APPEALS OF INDIANA

STEVEN N. GOODMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 68A01-806-CR-304
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RANDOLPH CIRCUIT COURT
The Honorable Jay L. Toney, Judge
Cause No. 68C01-0612-FC-74

December 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Steven N. Goodman appeals his convictions for Burglary,[1] a class C felony, and Theft,[2] a class D felony. Goodman argues that: (1) the trial court erroneously admitted evidence that was obtained during a traffic stop that allegedly violated Goodman's rights under the United States and Indiana Constitutions; and (2) the prosecutor committed misconduct by making certain statements during closing argument. Goodman also argues that the aggregate eight-year sentence is inappropriate in light of the nature of the offenses and Goodman's character. Finding no error, we affirm.

FACTS

At 5:30 a.m. on December 5, 2006, Jane Zell opened her back door to allow her dog to go outside. Zell was employed by the No. 1 Liquor Store (the Store), which was located just two houses away from her Winchester residence. That morning, Zell saw two people preparing to enter an older-style, light-colored Buick with a dark top that was parked at an odd angle in front of the Store, which was closed for business. Zell often saw cars at the store during off hours because patrons used the soda machines located outside the business, so she was not alarmed when she observed the Buick. At 8:30 a.m., a Winchester Police officer discovered that the Store's front door had been forced open. Further investigation revealed that the store had been ransacked, a lottery machine had been broken, and that eight cases of Crown Royal liquor, rolls of coins, and numerous cartons and single packs of cigarettes had been taken from the store.

[1] Ind. Code § 35-43-2-1.

[2] I.C. § 35-43-4-2(a).

Earlier that morning at 6:30 a.m., Officer Bill Polk of the Delaware County Sheriff's Department had received a tip from a personal friend that Kenneth Burden had contacted him and inquired if he would be interested in purchasing eight cases of Crown Royal liquor and numerous cartons of cigarettes. Officer Polk's friend was a local businessman who had supplied the officer with information in the past. Officer Polk relayed the information to his superiors, and eventually the tipster arranged to buy the contraband from Burden at 1:00 p.m. that afternoon.

After the buy was arranged, the Sheriff's Department learned of the burglary of the Store and received a description of the light-colored Buick with a dark top that Zell had observed that morning. Further investigation revealed that Burden was on house arrest at that time, that his home detention monitoring equipment had been disrupted that morning from 2:00 a.m. to 6:30 a.m., and that he had a criminal history of burglaries and thefts. The Sheriff's Department confirmed that Burden did not have permission to be away from his home.

At noon the same day, Sheriff's Department officers set up surveillance on Burden's residence in Muncie. Shortly after 1:00 p.m., officers observed a light-colored Buick with a dark top, later determined to be driven by Goodman, stop near Burden's residence. After Burden exited his home and entered the vehicle, Goodman drove away in the direction of the prearranged buy location. Officers initiated a traffic stop and observed cases of Crown Royal liquor, which were visible through the window in the vehicle's backseat. A search of the vehicle revealed eight cases of Crown Royal liquor, cartons and packs of cigarettes, rolls of coins, chisels, and screwdrivers.

On December 11, 2006, the State charged Goodman with class C felony burglary and class D felony theft. On June 22, 2007, Goodman filed a motion to suppress the evidence that the officers discovered after searching his vehicle, arguing that the traffic stop violated the Fourth Amendment to the United States Constitution and Article 1, section 11 of the Indiana Constitution. The trial court denied the motion on September 18, 2007, finding that the traffic stop did not violate Goodman's constitutional rights because it was supported by the fact that Goodman's vehicle matched Zell's description, the tip from Officer Polk's friend, and the fact that officers observed Burden violating home detention when he exited his residence and entered Goodman's car.

After twice indicating that he wished to plead guilty, only to withdraw the guilty plea at the two guilty plea hearings, Goodman's jury trial took place on April 14-15, 2008. The jury found Goodman guilty as charged. Following a May 14, 2008, sentencing hearing, the trial court found Goodman's criminal history to be an aggravator and found no mitigating circumstances. The trial court sentenced Goodman to eight years imprisonment for burglary and three years for theft, to be served concurrently, for an aggregate eight-year sentence. Goodman now appeals.

DISCUSSION AND DECISION

I. The Traffic Stop

Goodman first argues that the trial court erroneously admitted the evidence seized by the police following the traffic stop of his vehicle. A trial court has broad discretion in ruling on the admissibility of evidence, and we will reverse only when the trial court has abused its discretion. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003).

An abuse of discretion occurs when the trial court issues a ruling that is clearly against the logic and effect of the facts and circumstances before the court. Id.

The State argues that Goodman has waived this argument because, although he filed a motion to suppress the evidence before his trial began and objected to the admission of the evidence at the start of the trial, he failed to make a continuing objection to the challenged evidence. We will assume for argument's sake that Goodman has waived this argument. Given our preference to resolve issues on the merits, however, we will address the substance of Goodman's claim regarding the traffic stop in any event.

Under the Fourth Amendment to the United States Constitution, a brief investigative traffic stop may be justified by reasonable suspicion that the person detained is involved in criminal activity. Finger v. State, 799 N.E.2d 528, 532 (Ind. 2003). The police may stop an individual for investigatory purposes if, based on specific, articulable facts, the officers have a reasonable suspicion that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 21 (1968). Under Article 1, section 11 of the Indiana Constitution, the State must establish that the investigatory stop was reasonable under the totality of the circumstances. Primus v. State, 813 N.E.2d 370, 373 (Ind. Ct. App. 2004).

Here, Officer Polk had received a tip from a personal friend who had provided information in the past that someone had contacted him, offering to sell him eight cases of Crown Royal liquor and cigarettes. See Illinois v. Gates, 462 U.S. 213, 233-34 (1983) (holding that if "an unquestionably honest citizen comes forward with a report of criminal activity—which fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary"); Pawloski v. State,

269 Ind. 350, 354, 380 N.E.2d 1230, 1232-33 (1978) (holding that cooperative citizens who witness a crime and come forward with information out of the spirit of good citizenship "are to be considered reliable for the purpose of determining probable cause unless incriminating circumstances exist which cast suspicion upon the informant's reliability"). The police then learned that a burglary had occurred earlier that morning in Winchester and that the burglars had taken eight cases of Crown Royal liquor, cigarettes, and other items from the Store. Furthermore, they learned that Zell's description of the vehicle she observed outside the Store at 5:30 a.m. matched the vehicle being driven by Goodman. Most compellingly, the police knew that Burden had violated the terms of his home detention when he exited his residence and entered Goodman's vehicle; therefore, they had probable cause to arrest Burden.

We find that these specific, articulable facts gave the police reasonable suspicion that criminal activity was afoot and that the totality of the circumstances establish that the investigatory stop was reasonable. Therefore, the investigatory stop did not violate Goodman's rights under the United States or Indiana Constitutions and the trial court properly admitted the evidence.

II. Prosecutorial Misconduct

Next, Goodman argues that the prosecutor committed misconduct by making certain statements during closing argument. When reviewing a properly preserved claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct and, if so, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. Cooper v. State,

854 N.E.2d 831, 835 (Ind. 2006). The gravity of peril turns on the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

Here, Goodman did not object to any of these statements at trial, nor did he request an admonishment or move for a mistrial. Consequently, he has waived this argument and

> must establish not only the grounds for the misconduct but also the grounds for fundamental error. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. 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." Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002).

Id. (some internal citations omitted).

During closing argument, defense counsel argued that there was a paucity of evidence connecting Goodman to the offenses, suggesting that the reason stolen property had been found in Goodman's car was that he had been acting as a middle man for the sale of the stolen items. Defense counsel noted that "[o]bviously you didn't hear from Mr. Goodman today, but that is a possibility in this case." Tr. p. 177. During the closing rebuttal argument, the prosecutor argued that a substantial amount of circumstantial evidence supported Goodman's guilt:

> You know, [defense counsel] talks about the evidence except there is a whole huge body of evidence in this case he doesn't talk about folks. How in the world did this stuff get into Mr. Goodman's car? We don't talk about that do we? We don't talk about how Mr. Goodman is caught hours after the burglary with the stuff in his car. [The store's owner] wasn't there. Jane Zell wasn't there. [An officer] wasn't there. Mr. Goodman was there. Any explanation

> folks? Middle man? Where is the evidence of the middle man? [Defense counsel] says that there is no evidence that links him to the burglary. Folks what is this? The guy is caught with the stuff in his car. What else do you need?

Id. at 180-81. Later, the prosecutor again observed that

> There is no evidence of anyone other than the Defendant had any bit of this property. There is no explanation as to why it is there. No explanation how the property got there. All the investigators in the world could not put that together and folks the law is that unexplained exclusive possession of recently stolen property is more than, you can use that to convict someone.

Id. at 183. The trial court instructed the jury that Goodman was not required to testify and that it was not to consider his failure to do so as it arrived at a verdict. Additionally, the trial court instructed the jury that statements made by attorneys are not evidence and that the jurors should look to the court's instructions as the best source for determining the law. Id. at 184-85, 190.

Goodman first argues that the prosecutor improperly emphasized his failure to testify to the jury. See Moore v. State, 669 N.E.2d 733, 739 (Ind. 1996) (holding that "[t]he Fifth Amendment privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence"). We cannot agree. Nowhere during closing argument did the prosecutor mention, imply, or reference the fact that Goodman declined to testify. Instead, the prosecutor pointed out that the evidence that stolen goods were found in Goodman's car was uncontradicted by any exculpatory evidence. The rhetorical questions such as "[a]ny explanation folks?" do not reference Goodman in any way; the prosecutor was simply seeking to highlight the lack

of evidence explaining the fact that the stolen goods were found in Goodman's vehicle. Tr. p. 180-81. We do not find these comments to rise to the level of prosecutorial misconduct, much less fundamental error.

Next, Goodman argues that the prosecutor improperly invaded the province of the jury and the court by explaining that "the law is that unexplained exclusive possession of recently stolen property is more than, you can use that to convict someone." Id. at 183. Goodman acknowledges that the prosecutor's remark was an accurate statement of the law, but he argues that it was, nonetheless, improper. Even if we assume for argument's sake that the prosecutor's remark was inappropriate, we note that the trial court instructed the jury that it was not to consider Goodman's failure to testify in any way, that statements made by attorneys are not evidence, and that the jurors should look to the court's instructions as the best source for determining the law. Id. at 184-85, 190. A jury is presumed to have followed the trial court's instructions. Tormoehlen v. State, 848 N.E.2d 326, 332 (Ind. Ct. App. 2006), trans. denied. There is no evidence in the record that the jury was confused or affected by the prosecutor's remark; thus, the presumption that the jury followed the trial court's instructions has not been overcome. Under these circumstances, Goodman has failed to establish that the prosecutor's comment had a probable persuasive effect on the jury. Therefore, he has established neither that the prosecutor committed misconduct nor that any fundamental error occurred, and this claim must fail.

III. Sentencing

Finally, Goodman argues that the aggregate eight-year sentence imposed by the trial court is inappropriate in light of the nature of the offenses and his character. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Our Supreme Court has recently further articulated the role of appellate courts in reviewing a 7(B) challenge:

> Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. . . . And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. . . . There is thus no right answer as to the proper sentence in any given case. As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of evidence. . . . .
>
> The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived "correct" result in each case. In the case of some crimes, the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution. For that reason, appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Cardwell v. State, --- N.E.2d ---, 2008 WL 4868299, *5 (Ind. Nov. 12, 2008) (footnotes omitted).

Here, the trial court imposed the maximum eight-year term for Goodman's class C felony burglary conviction, Ind. Code § 35-50-2-6(a), and the maximum three-year term for his class D felony theft conviction, I.C. § 35-50-2-7(a). The trial court elected, however, to impose concurrent, rather than consecutive, terms, meaning that Goodman's aggregate sentence is eight—rather than eleven—years imprisonment.

Turning first to the nature of Goodman's offenses, he and a cohort broke into a liquor store while it was closed for business, stealing eight cases of liquor, a large quantity of cigarettes, and rolls of coins. He ransacked the business and broke a lottery machine while attempting to remove the currency inside.

As for Goodman's character, we note that Goodman has amassed six previous class B and C felony robbery convictions, five of which were either committed with a deadly weapon or resulted in bodily injury. He has also been convicted of class D felony auto theft and class A misdemeanor check deception. In 1997, he was sentenced to twenty years imprisonment for the six robbery convictions, with a concurrent eight-year term for auto theft. He served six years in the Department of Correction and was released to parole in 2004, successfully completing two years of parole.

Goodman also has a lengthy history of cocaine abuse, and although he seems to have been clean and sober during his time in prison and while on parole, he relapsed within one year of being unsupervised in society and began using drugs again. Although the reemergence of cocaine in his life appears to have been precipitated by a tragedy—his brother's death—he has been through treatment and has counseled fellow prisoners on substance abuse issues. Thus, he knew where to find help but failed to seek it.

Finally, we note that Goodman is a well-educated person who has demonstrated that he is able to earn a good living, even after he was released from prison. Indeed, from 2002-2006, Goodman earned a salary of $56,000 per year. Inasmuch as he is able to support himself, it appears that the instant offenses were not motivated by financial need. Under these circumstances, we find the aggregate eight-year sentence imposed by the trial court is not inappropriate in light of the nature of the offenses and Goodman's character.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.