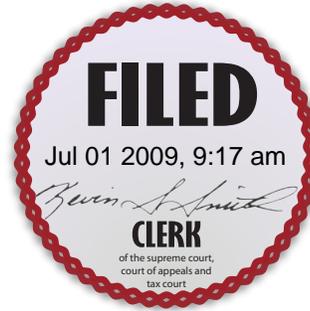


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

DAVID A. HAPPE
Lockwood Williams & Happe
Anderson, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT TATE,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A04-0811-CR-673
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Judge
Cause No. 49G23-0804-FA-78995

July 1, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Robert Tate appeals his conviction for Dealing in Cocaine,¹ a class A felony. He presents the following restated issues for review:

1. Did the State present sufficient evidence to prove that he knowingly possessed the cocaine?
2. Did the prosecutor commit prosecutorial misconduct rising to the level of fundamental error during his rebuttal closing argument?

We affirm.

On April 10, 2008, interdiction officer Luke Schmitt from the Indianapolis Metropolitan Police Department was summoned to a UPS hub regarding a suspicious package. The package was addressed to Diane Frank, 5115 Banbury Road, Apartment One, in Indianapolis. The phone number listed for the recipient, however, had an Oregon area code. Further, the package had been shipped through a third party shipper in Los Angeles, California. The seams of the package were sealed with heavy tape, consistent with attempts to conceal the odor of contraband when shipping illegal drugs. After Schmitt's certified drug-sniffing canine alerted twice for the presence of drugs, Schmitt obtained a search warrant for the package. Schmitt found an air purifier inside the package that had been gutted and filled with five one-kilogram bricks of cocaine, with a street value of well over \$500,000.00. Schmitt reassembled the package and prepared to make a controlled delivery later that day.

Undercover officers surveilled the area around the delivery address, which was located within the Arlington Manor Apartments, for approximately forty-five minutes before

¹ Ind. Code Ann. § 35-48-4-1 (West, PREMISE through 2008 2nd Regular Sess.).

the controlled delivery and noted no one coming or going from the area. Schmitt, dressed like a UPS delivery man, parked in front of the apartment building at 5115 Banbury Road. As Schmitt approached, Tate peered out a small window and then opened the door to the common area for Schmitt. Tate immediately asked if the package was for Diane Frank. Schmitt responded affirmatively and walked toward apartment one, which was up the stairs. When Tate informed Schmitt that Frank had gone to the store, Schmitt indicated that he had other deliveries in the area and would come back later. Tate responded that Frank was going to be gone for a while and had asked him to accept the package for her. Schmitt told Tate that he was reluctant to do that because there had been a problem with thefts in the area. Tate, however, insisted that he was to receive the package. Schmitt asked Tate where he lived, and Tate pointed to apartment two across the hall. Schmitt asked Tate for identification, but Tate said he had none on him. Tate then identified himself as John Smith.

Schmitt ultimately allowed Tate to sign for the package. Tate signed the log sheet as John Smith. Schmitt then stalled to see where Tate would take the package. There was an awkward silence as Tate went to the door of apartment two and slowly fumbled around with his keys but never opened the door. Schmitt eventually exited quickly and summoned the other officers to arrest Tate.

Upon his arrest, officers found identification in Tate's pocket, bearing his true name. Tate agreed to speak with Schmitt after being advised of his Miranda rights. He admitted that he actually lived on 31st Street, about two or three miles away. Tate first claimed that he knew nothing about the package and that he was just picking it up for Diane Frank. A short

time later, he related that he had actually met a man in a Kroger parking lot that morning and the man offered to pay him \$100 to receive the package. The arrangement was that the man would drive through the neighborhood to retrieve the package from Tate and give him the money. Tate could only identify the man as “John” and indicated that John was driving a gray utility truck. Tate informed the officers that he knew nothing more about John, whom he had apparently just met that morning, and that he had no way of getting in touch with him. Officers in unmarked cars continued surveillance in the area for about forty-five minutes to see if anyone matching John’s description or driving a gray utility truck appeared, but no one did. Subsequent investigation revealed that no one named Diane Frank lived in apartment one and that the apartment had been vacant for over a year.

On April 14, 2008, the State charged Tate with class A felony dealing in cocaine and class C felony possession of cocaine. Tate’s first jury trial was held on June 25, 2008, and ended in a mistrial when the jury could not reach a verdict. The case was retried on September 3, 2008. Tate did not testify or present evidence. His defense was based upon his lack of knowledge regarding the contents of the package. The jury found him guilty as charged. The trial court subsequently vacated the possession count and sentenced Tate to twenty years in prison for the dealing conviction. Tate now appeals. Additional facts will be provided below as necessary.

- 1.

Tate contends the State presented insufficient evidence to establish that he knew cocaine was inside the package. Tate notes that he was arrested in the common area of the

apartment building within moments of receiving the sealed package, which he never opened. While Tate acknowledges the evidence supports an inference that he had a general awareness of something “unsavory about the package”, he claims the State presented insufficient evidence that he knew the package contained cocaine. *Appellant’s Brief* at 6.

When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review “respects ‘the jury’s exclusive province to weigh conflicting evidence.’” *Id.* at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the judgment, we must affirm “‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

In order to convict Tate as charged for dealing cocaine based upon possession with intent to deliver, “the State had to prove [he] had knowledge of the nature of the substance and its presence.” *Jernigan v. State*, 612 N.E.2d 609, 613 (Ind. Ct. App. 1993), *trans. denied*. See also I.C. § 35-48-4-1. “A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” Ind. Code Ann. § 35-41-2-2(b) (West, PREMISE through 2008 2nd Regular Sess.). “Because knowledge is a mental state of the actor, the trier of fact must resort to reasonable inferences based on the examination of the surrounding circumstances to reasonably infer its existence.” *Jernigan v.*

State, 612 N.E.2d at 613.

In *Jernigan*, we found that surrounding circumstances sufficiently established knowing possession, despite the fact that the defendant had not opened the package he received during the controlled delivery. In so holding, we observed:

Jernigan called the post office twice trying to locate the parcel. When it was delivered he acknowledged he was the addressee and he had been waiting for the package to arrive. Once he received the package, Jernigan left his house with the unopened package and drove off rapidly. This and the other evidence previously mentioned in this opinion raises a reasonable inference Jernigan knew what the package contained. There was substantial evidence having probative value from which the jury could find beyond a reasonable doubt, as it did, Jernigan was guilty of possession of cocaine with intent to deliver.

Id. The other relevant evidence appears to have been that Jernigan knew the unique package identification number when he called to check on the package and that the return address on the package was fictitious.

In the instant case, the attendant circumstances also support a reasonable inference that Tate had knowledge of the nature of the contents of the package. Like the defendant in *Jernigan*, Tate was at the delivery location anxiously awaiting the package's delivery. He knew the name and address of the fictitious addressee and concocted a story in order to be able to sign for the package using a false name and address.² Upon his arrest, he told two different stories to explain why he was there to accept the package. After initially stating that he was accepting the package for Diane Frank, Tate indicated that he met a man named John in a parking lot that morning who offered to pay him \$100 to receive the package. Tate

² The State's evidence established that the use of fictitious names is common with respect to the shipment and receipt of illegal drugs.

explained that he knew virtually nothing about this man and had no way to contact him. At trial, Officer Paul McDonald testified based upon his extensive experience as an interdiction officer that drug dealers do not recruit random strangers in parking lots to receive their drug shipments. Moreover, he emphasized the large quantity of cocaine involved in this bust. *See Transcript* at 150 (“[t]his is probably the first parcel I’ve seen with five kilos of cocaine”). Finally, the record reveals that several officers maintained surveillance at the apartment complex before, during, and after the controlled delivery and never observed John or his utility truck at the scene.

It was well within the jury’s province to find Tate’s ultimate explanation to the officers suspect and highly improbable. More importantly, the jury could reasonably infer from the evidence set out above that Tate had knowledge of the contents of the package and intended to deliver the drugs to another person or persons. Therefore, we reject Tate’s sufficiency challenge.

2.

Tate next argues that the prosecutor committed misconduct during his rebuttal closing argument. He claims the prosecutor improperly invited the jury to consider Tate’s silence as evidence of guilt and asserts that the prosecutor’s repeated comments do not amount to harmless error. The State correctly observes, however, that Tate did not properly preserve his claim of prosecutorial misconduct because he did not request a mistrial. *See Reynolds v. State*, 797 N.E2d 864, 868 (Ind. Ct. App. 2003) (“[a] defendant waives appellate review of the issue of prosecutorial misconduct when he fails to immediately object, request an

admonishment, and then move for a mistrial”).

In 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 (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.*

Where a claim of prosecutorial misconduct has not been properly preserved, as here, the appellant 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 ‘and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.’” *Baer v. State*, 866 N.E.2d 752, 763-64 (Ind. 2007) (quoting *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006)).

In order to consider the prosecutor’s rebuttal argument in context, we must first review Tate’s closing argument. Defense counsel argued that the key issue for the jury to decide was whether Tate knew the box contained cocaine as opposed to, for example, marijuana. After stating, “[l]et’s look at the facts”, counsel went on to discuss in detail Tate’s statement to police regarding picking up the package for a man named John. *Transcript* at 206. Defense counsel later stated: “Not only is there reasonable doubt but the reason is right there in the facts and it’s been there the whole time. *Mr. Tate told you what*

happened and nothing else – there’s no other theory that’s consistent with these set of facts other than *what he told you.*” *Id.* at 210 (emphases supplied).

During the State’s rebuttal argument, defense counsel objected to certain statements regarding Tate’s silence, and the trial court sustained two of the objections and admonished the jury. The relevant portion of the transcript follows:

[STATE]:There’s been a lot of talk about – by the Defense during close about the actions of the Defendant, about the things he said and about, you know, how all those lies don’t really matter much and we really shouldn’t take it into consideration.... [T]he implication was very clear. Maybe the Defendant thought there was marijuana in that package.

Well, what didn’t the Defendant say? Why are you here? Why am I being arrested? Why am I being placed in handcuffs? Why are you doing this to me? What is in this box?

[Objection overruled after discussion.]

[STATE]: Your instructions say...that statements of the attorney are not evidence, only the testimony and the exhibits that are admitted into evidence. And the Defendant – there was no statements by the Defendant. There is nothing before you to consider where the Defendant gave an alternate explanation for what was in that box. He never said, “I thought it was something else.”

[DEFENSE]: Judge, I need to approach on a separate ground.

* * *

[STATE]: He talked about it, said all these things that weren’t done and what he didn’t say. I – and I can certainly say that he never gave an alternate explanation.

[DEFENSE]: He can’t say that, Judge. He does not have to explain himself to –

[STATE]: (UNINTELLIGIBLE).

[COURT]: I think that those last statements may have overstepped the line. So I will admonish the jury to disregard the last statements that you made and...I will read to them the Court's instruction on statements by the Defendant at this time.

[STATE]: Okay.

[COURT]: Ladies and Gentlemen of the Jury, I will admonish you to disregard the last statements made by the State's attorney in this matter. I will also admonish you and advise you that no Defendant may be compelled to testify. A Defendant has no obligation to testify. The Defendant did not testify, and you may not, must not consider this in any way. I would ask you to disregard the statements made by the State's attorney, prior statements.

[STATE]: Ladies and Gentlemen, I don't want to give that inference at all. I would ask that you consider that the Defendant, when he gave his statements to the officer, never said, "I thought there was something else in the box." Only – the only evidence you are to consider is the statements of the officers and the exhibits. No evidence was presented by the Defense to proffer an alternate explanation.

[DEFENSE]: Judge, I renew my objection.

[COURT]: I don't know what else to say, Mr. Miller. I really don't. I would admonish the jury to disregard the last statement and again remind you of the Court's instruction that the Defendant in this matter may not be compelled to testify, has no obligation to testify. The Defendant did not testify. You must not consider this in any way.

I would admonish the State to not, in any further way, comment on the Defendant not testifying in this proceeding. If another comment is made, the Court will consider all of its options.

Id. at 224-30.

We agree that there was at least one comment made by the prosecutor (i.e., "No evidence was presented by the Defense to proffer an alternate explanation") that improperly implied to the jury that Tate had an obligation to present evidence. *See Pettiford v. State*, 506 N.E.2d 1088 (Ind. 1987) (a defendant is not required to present evidence and is not required

to prove his innocence). Read in context, however, this comment and the other objected-to statements set forth above reveal that the prosecutor was not focusing on Tate's failure to testify at trial. Rather, the prosecutor was referring to what Tate did not say during his voluntary statement to the officers on the scene.³ The prosecutor was also emphasizing that defense counsel's insinuation that Tate might have thought the package contained cocaine constituted argument and not evidence. Finally, the prosecutor appeared to be responding to defense counsel's repeated assertion that Tate had told *the jury* what actually happened (that is, despite the fact that his client had not testified). *See Dumas v. State*, 803 N.E.2d 1113, 1118 (Ind. 2004) (“[p]rosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor’s response would otherwise be objectionable”). To the extent the prosecutor’s comments amounted to error, we conclude that Tate has wholly failed to establish fundamental error.⁴

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.

³ Tate asserts (in one sentence) that the prosecutor’s comments were improper references to his post-arrest, post-Miranda silence. We observe, however, that Tate was not silent upon his arrest. Therefore, his rather undeveloped argument is clearly inapposite. *See Sylvester v. State*, 698 N.E.2d 1126, 1131 (Ind. 1998) (“if a defendant does not remain silent, he cannot later claim that the silence was used against him”).

⁴ In fact, although referencing fundamental error, Tate argues only that the error was not harmless.