

Dantley Layne (“Layne”) was convicted in Madison Superior Court of Class A felony possession of cocaine with intent to deliver, Class D felony maintaining a common nuisance, and Class A misdemeanor possession of marijuana and was sentenced to an aggregate term of forty years incarceration. Layne appeals and presents six issues which we reorder and restate as:

- I. Whether the trial court properly allowed the State to amend the charging information;
- II. Whether the trial court erred in admitting evidence found in Layne’s vehicle;
- III. Whether the trial court erred in admitting evidence found during a search of the house in which Layne had been staying;
- IV. Whether the trial court erred in admitting Layne’s statement to the police;
- V. Whether the prosecutor engaged in misconduct during the State’s closing argument; and
- VI. Whether the evidence was sufficient to support Layne’s convictions for possession of cocaine and maintaining a common nuisance.

We affirm.

Facts and Procedural History

Members of a Drug Task Force informed Anderson Police Department Detective Kevin Early (“Detective Early”) that Layne was dealing in cocaine in Madison and Delaware counties. This information was corroborated by an individual who himself later pleaded guilty to dealing in cocaine. This individual admitted in a videotaped statement to Detective Early that he had purchased cocaine from Layne. Other informants also informed Detective Early that they had purchased cocaine from Layne.

In November of 2003, Detective Clifford Cole (“Detective Cole”) of the Anderson Police Department observed a vehicle parked at a house on Delaware Street in Anderson, Indiana (“the Delaware Street house”). When Detective Cole performed a registration check on the vehicle, he learned that it was registered to Layne. Two or three weeks later, Detective Cole saw another vehicle registered to Layne at the Delaware Street house. On March 5, 2004, Detective Cole saw a green Dodge Intrepid parked at the Delaware Street house and performed yet another registration check. This check revealed that the license plate was registered to Layne for a different car. Detective Cole did nothing at that time, but when he drove by the residence the next morning, the Dodge was still parked there.

On March 10, 2004, at 10:30 a.m., Detective Cole noticed trash sitting outside the Delaware Street house. At 11:30 p.m. that night, Detective Cole returned and walked down the alley next to the house, where he saw a bag of trash in a trashcan located “a foot or two” off the alley in the yard behind the garage of the Delaware Street house. Tr. p. 145. Trash had also been set out at neighboring houses. Detective Cole took the bag of trash from the trashcan and returned to the office of the local Drug Task Force. When he searched the contents of the trash, he found marijuana stems, burnt marijuana cigarettes, an empty cigar box, and loose cigar tobacco. It appeared to Detective Cole that the tobacco from the cigars had been removed and placed in the trash. The following morning, Detective Cole obtained a warrant to search the Delaware Street house based upon this evidence found in the trash.

Detective Early drove to the Delaware Street house prior to the search to watch the house until the officers arrived with the search warrant. When Detective Early arrived at the house, there were no vehicles present. Soon thereafter, Layne arrived at the house in the green Dodge, exited the car, and entered the house through the garage. A few minutes later, Layne came out of the garage carrying a blue plastic shopping bag, got back into the Dodge, and drove away. Detective Early followed Layne and radioed a uniformed officer, Officer Mark Dawson (“Officer Dawson”), to assist him in making a traffic stop because the license plate on the Dodge was registered to another car.

After Layne had been pulled over, Detective Early asked him if he had any drugs or weapons on him, to which Layne responded, “no.” Tr. p. 36. Detective Early then performed a pat-down search on Layne and detected a “hard square object” in the left breast pocket of his coat. Tr. p. 42. The object in the coat pocket was a large amount of cash and a plastic bag containing marijuana. Detective Early therefore placed Layne under arrest.

The officers then prepared to tow the vehicle because it did not have a valid license plate. Before they did so, the officers performed an inventory search of the vehicle. Inside the car, the police found a shoe box containing \$15,000 in cash, marijuana, and Xanax¹ pills. At the police station, Detective Jake Brooks (“Detective Brooks”) asked Layne, before advising him of his Miranda rights, if he wanted to cooperate. Layne replied, “[M]an, all I do is weed and pills.” Tr. p. 361.

¹ Xanax is a brand name for alprazolam, a Schedule IV controlled substance. See Ind. Code § 35-48-2-10(c) (2004); *Hancock v. State*, 758 N.E.2d 995, 999 n.1 (Ind. Ct. App. 2001), *summarily aff’d in relevant part*, 768 N.E.2d 880 (Ind. 2002).

Meanwhile, Detective Cole executed the search warrant of the Delaware Street house with the assistance of other officers. Inside, they discovered that the utilities for the house were in the name of Nakia Love (“Love”). Devana Nelson, Love’s sister, and her children were in the living room while the search warrant was executed. Nelson told the police that Layne was staying at the house. The police also found two cellular phones, two boxes for scales, and a box of .32 caliber ammunition. In the master bedroom, paperwork with Layne’s name was found in a shoebox on a computer stand. Inside a laundry basket in the bedroom, police found clothes and boxes of ammunition. Several pairs of men’s tennis shoes along with men’s clothing were found on the bedroom floor. Inside a closet in the master bedroom, police found a stack of shoeboxes. The topmost shoebox contained scales and a plastic bag containing what was later determined to be 21.25 grams of cocaine. A smaller amount of cocaine was found in another plastic bag. Police found a large, gray scale in the kitchen cupboard and a black, digital scale in the drawer. An ashtray in the living room contained burnt cigars, seeds, and stems.

One of the tennis shoes found in the master bedroom contained a key, later determined to be for a storage unit located in Anderson. When the police went to the storage facility, an employee told them that the storage unit had been rented by Layne. A canine officer walked his dog down the row of storage units. The dog alerted on the unit rented by Layne. Armed with this information, Detective Cole then obtained a search warrant for the unit. When the police searched the unit pursuant to the warrant, they found a Cadillac Escalade. In the center console of the Escalade, they found \$39,000

cash, divided into \$1,000 bundles. Although the Escalade was registered to Layne's uncle, his uncle never came to claim the vehicle, and a cable television bill found in the glove box was in the name of "Dantley Lang." Tr. p. 197.

On March 12, 2004, the State charged Layne with Class B felony possession of cocaine with intent to deliver, Class D felony maintaining a common nuisance, and Class A misdemeanor possession of marijuana. On July 15, 2004, the State amended the Class B felony charge to a Class A felony. Prior to trial, Layne filed a motion to suppress, and the trial court held a hearing on his motion on February 22, 2005. At the hearing, Layne claimed that the evidence seized during the search of his person, his car, and the Delaware street house should be suppressed. The trial court denied the motion to suppress on February 22, 2005. Layne later filed another motion to suppress the evidence seized from his car, which the trial court denied immediately prior to trial.

A jury trial was held on March 1 through 4, 2005. During trial, Love claimed that Layne did not live at the house, but admitted that he stayed overnight with her on a regular basis. Love also testified that the cocaine found belonged to her and claimed she stole it from someone else. Love, however, could not say who she had stolen the cocaine from. She also admitted that she originally claimed that the police had planted the cocaine. At the conclusion of the trial, the jury found Layne guilty as charged. Following a sentencing hearing held on May 23, 2005, the trial court sentenced Layne to an aggregate term of forty years incarceration, to run consecutively to a federal sentence Layne had received for dealing 500 or more grams of cocaine, a crime Layne had committed while awaiting trial in the instant case. Layne now appeals.

I. Amended Charging Information

Layne claims that the trial court erred in permitting the State to amend the charging information to allege that he had committed a Class A felony. Layne admits that he did not object to the amendment and did not seek a continuance after the amendment. Layne claims, however, that recent case law indicates that he was required to do neither to preserve his claim of error. He is incorrect.

Fuller v. State, 875 N.E.2d 326, 331 (Ind. Ct. App. 2007), cited by Layne, held that a defendant is no longer required to request a continuance in order to preserve for appeal the issue of whether a charge had properly been amended. However, Fuller did not hold that a defendant was not required to object to an amendment of the charging information. To the contrary, the Fuller court wrote, “we conclude that Fajardo [v. State, 859 N.E.2d 1201 (Ind. 1997)] implicitly overruled Wright [v. State, 690 N.E.2d 1098 (Ind. 1997)], at least to the extent it could be read as requiring a defendant to move for a continuance, *in addition to objecting*, before being permitted to challenge an untimely substantive amendment on appeal.” 875 N.E.2d at 331 (emphasis added). The Fuller court also concluded that a defendant is “not required to move for a continuance in order to preserve *his objection* to the State’s late amendment of the charging information to include the two stalking charges.” Id. at 331-32; see also Fajardo, 859 N.E.2d at 1208 (specifically noting that the defendant objected to State’s untimely amendment of charging information).

In short, we can find no support for Layne’s contention that a defendant need not object to preserve for appeal the issue of whether an amendment of a charging

information was proper. Accordingly, since Layne admittedly did not object to the amendment of the charging information in the present case, he has failed to preserve this issue for appeal. See Absher v. State, 866 N.E.2d 350, 354 (Ind. Ct. App. 2007) (noting that failure to object to State's motion to amend charging information waives the issue for purposes of appeal).

II. Automobile Search

Layne claims that the trial court erred in admitting evidence found in his vehicle. Our standard of review on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by an objection at trial. Collins v. State, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), trans. denied. We consider conflicting evidence most favorable to the trial court's ruling, but also consider the uncontested evidence favorable to the defendant. We do not reweigh the evidence, and we will affirm the trial court's ruling if it is supported by substantial evidence of probative value. Creekmore v. State, 800 N.E.2d 230, 233 (Ind. Ct. App. 2003). In reviewing the trial court's ultimate ruling on admissibility, we may consider the foundational evidence from the trial as well as evidence from the motion to suppress hearing that is not in direct conflict with the trial testimony. Kelley v. State, 825 N.E.2d 420, 427 (Ind. Ct. App. 2005).

A. The Initial Traffic Stop

Layne first challenges the admissibility items discovered as a result of the inventory search of the green Dodge Intrepid he was driving when he was stopped by the police. Layne first claims that the uniformed officer who initiated the stop at the request

of Detective Early did not personally know why he was stopping Layne and did not observe Layne commit any traffic violations sufficient to justify the traffic stop. Layne therefore argues that the traffic stop was improper and that the evidence found in the subsequent inventory search of the car is inadmissible.

The State counters Layne's argument by noting that at the suppression hearing and at trial, Layne never presented this specific argument to the trial court. Although Layne did object to the admission of evidence discovered as a result of the inventory search, he did so based upon a claim that he was not properly under arrest at the time of the traffic stop and that an inventory search of the car was unnecessary because he should have been allowed to remove his property from the car. Layne did not base his motion to suppress or his objections on grounds that the initial traffic stop was improper and, as a result, may not now make this argument for the first time on appeal.² See Collins v. State, 835 N.E.2d 1010, 1016 (Ind. Ct. App. 2005) (noting that a party may not object on one ground at trial and raise a different ground on appeal), trans. denied.

B. *Inventory Search*

Layne next claims that inventory search of his car was improper. As explained above, Layne was placed under arrest following the pat-down search during which

² Even if Layne had properly preserved his argument for appeal, he would not prevail. Layne notes that it has been held that, in order to rely on the "collective knowledge" of police officers, the knowledge sufficient for reasonable suspicion must be conveyed to the investigating officer before the stop is made. See Jamerson v. State, 870 N.E.2d 1051, 1057 (Ind. Ct. App. 2007); State v. Murray, 837 N.E.2d 223, 226 (Ind. Ct. App. 2005), trans. denied. The present case, however, is distinguishable from Jamerson and Murray because, here the officer possessing reasonable suspicion participated in the traffic stop himself. Detective Early was behind Officer Dawson at the time of the stop and "was there, basically, at the same time" as Officer Dawson was. Tr. p. 21. Detective Early also got out of his car during the stop and spoke with Layne. Thus, although Detective Early may not have been the officer who activated his emergency lights in order to get Layne to pull over, he was an active participant in the stop.

Detective Early found marijuana in Layne's pocket. After initially indicating that it would not suppress the evidence seized from Layne as a result of this pat-down search, the trial court later reversed its course and suppressed this evidence prior to trial. Layne now argues that since the evidence found on his person was suppressed, there was no probable cause to arrest him, and therefore he should have been permitted to remove his property, including the contraband, from his car before it was towed.

In support of his position, Layne cites Bartruff v. State, 706 N.E.2d 225, 229 (Ind. Ct. App. 1999), wherein the court held that the inventory search of the vehicle was not necessary because the owner of the car was present at the scene and capable of taking custody of the property within the vehicle. However, in Bartruff, the police inventory policy specifically provided that an inventory was not necessary if the owner was present and capable of taking custody of the property within the vehicle. Id. Furthermore, Layne was under arrest at the time his car was impounded and was not capable of taking custody of the property inside the car.

Of course, Layne claims that he was improperly under arrest because the trial court later determined the pat-down search was improper. However, even if we were to agree with the trial court that Detective Early's search of Layne's person and his subsequent arrest for possession of marijuana was improper, Layne would not prevail in his argument. We agree with the State that, even if Layne should not have been placed under arrest for possession of the marijuana found during the search of his person, there was already probable cause to arrest him for dealing in cocaine at the time of his arrest.

Probable cause to arrest without a warrant exists if the facts and circumstances known to the officer would warrant a man of reasonable caution to believe that the accused has committed the crime in question. Roberts v. State, 599 N.E.2d 595, 598 (Ind. 1992). Probable cause for an arrest may exist even though a police officer's subjective evaluation of a situation leads him to the opposite conclusion. Id.; see also Whren v. United States, 517 U.S 806, 813 (1996) (subjective intent alone does not make otherwise lawful conduct illegal or unconstitutional).

As noted above, Detective Early had prior information from the local Drug Task Force that Layne was dealing in cocaine. An individual who pleaded guilty to dealing in cocaine admitted to Detective Early that he had purchased cocaine from Layne. Other informants had also informed Detective Early that they had bought cocaine from Layne. Further, Detective Early had just seen Layne leaving a house, which was the subject of a search warrant for illicit drugs, carrying a plastic bag.

We therefore conclude that, regardless of the validity of Layne's arrest for possession of marijuana, the facts and circumstances known to Detective Early would warrant a man of reasonable caution to believe that Layne had committed the crime dealing in cocaine. See Roberts, 599 N.E.2d at 598 (concluding that probable cause existed at the time detective arrived at crime scene regardless of whether detective subjectively believed there was probable cause to arrest defendant at that time). Because there was probable cause to arrest him for possession of cocaine, Layne was not free to gather his belongings from the car at the time it was towed.

Layne also attacks the manner in which the inventory search was conducted. The rationale underlying the inventory exception to the warrant requirement is: (1) the protection of private property in police custody; (2) the protection of police against claims of lost or stolen property; and (3) the protection of police from possible danger. Jackson v. State, 890 N.E.2d 11, 17 (Ind. Ct. App. 2008). The threshold question in determining the propriety of an inventory search is whether the impoundment itself was proper. Id. An impoundment is proper when it is either part of the routine administrative caretaking functions of the police or when it is authorized by statute. Id.

Here, Layne does not deny that the impoundment of his car was proper. See id. (holding that Indiana Code section 9-18-2-43(a) authorized, if not required, police to impound vehicle with expired license plate); Widduck v. State, 861 N.E.2d 1267, 1270 (Ind. Ct. App. 2007) (holding that Indiana Code section 9-18-2-43(a) required police to take into custody a vehicle which had neither license plate nor registration). Layne instead claims that the State did not properly establish that the inventory of the vehicle was conducted pursuant to standard police procedures.

Even if there is a lawful custodial impoundment of the vehicle, the constitutional requirement of reasonableness requires that the inventory search itself must be conducted pursuant to standard police procedures. Jackson, 890 N.E.2d at 17. This requirement ensures that the inventory search is not a pretext for a general rummaging in order to discover incriminating evidence. Id. The State must present more than conclusory testimony of an officer that the search was conducted as a routine inventory. Edwards v. State, 762 N.E.2d 128, 133 (Ind. Ct. App. 2002), aff'd on reh'g, 768 N.E.2d 506, trans.

denied. The circumstances surrounding the inventory search must indicate that the search was part of established and routine department procedures which are consistent with the protection of the police from potential danger and false claims of lost or stolen property and the protection of the property of those arrested. Id.

Complicating our review of this issue is the fact that Detective Early's testimony regarding the police department's standard procedures for the inventory of a vehicle is missing from the transcript. Portions of the transcript were unavailable due to a defective audio CD from which the transcript was prepared. The court reporter explained that "due to a faulty CD, there is approximately 50 minutes of testimony that is missing, including the completion of Detective Kevin Early[']s testimony], and the beginning of Detective Mike Lee's testimony." Tr. p. 259. Layne attempted to reconstruct this missing portion of the transcript by filing a Petition to Settle and Certify. See Ind. Appellate Rule 31. The trial court eventually issued an order granting Layne's petition in part, in which it stated:

Because defendant's counsel has not provided the trial court with those portions of Detective Early's and Detective Lee's testimony that were preserved, it is difficult to say within any accuracy what is missing. For reasons which are clarified later, the Court has a clear recollection of the testimony as a whole, and particularly the testimony as it relates to the search warrant issued by Judge Spencer, the search itself, the traffic stop that occurred just as the search was about to get underway, and the seizure and inventory of the defendant Layne's vehicle.

* * *

Again, while it is difficult to state with certainty what is missing in the 50 minute gap, there is no question in the Court's mind that [Layne's trial counsel] objected at every opportunity to the introduction of evidence seized from the home of co-defendant Nakia Love, and from the automobile of defendant, Dantley Layne. It is also clear to the Court that

the Dantley Layne trial evidence was consistent with the evidence heard and argued in both co-defendants [sic] pre-trial motions. Indeed, since the trial court had heard evidence and the arguments twice in the pre-trial proceedings, there would have been an immediate reaction and response, at trial, to any inconsistency.

As to the vehicle stop, Detective Early testified at the suppression hearing that he had personal knowledge that Dantley Layne's vehicle was not properly registered and that he instructed uniform officer to stop that vehicle. Detective Early further testified that the vehicle was inventoried and impounded pursuant to Anderson Police Department Policy. The Court has no recollection as to whether or not the written policy of the Anderson Police Department was offered as an exhibit, or discussed in detail. Accordingly, the Court accepts [Layne's trial counsel's] recollection that no written policy was offered or admitted and that the same should be accepted as true. Nevertheless, Detective Early did testify to the existence of such a policy and that the inventory was conducted in accordance therewith. The Court has no recollection as to any cross examination of Detective Early regarding the inventory policy including any request that said policy be produced.

Appellant's App. pp. 232-33.

At the suppression hearing, Officer Dawson testified that "Detective Early initiated an inventory of the vehicle because he wanted it towed." Tr. p. 22. He also explained that "the inventory is done when we are going to tow the vehicle so that there's a written record." Tr. p. 22. Detective Early testified at the suppression hearing that the Anderson Police Department had "a policy about inventorying vehicles that are not properly registered," and that this policy is followed for "all vehicles that are not properly registered." Tr. p. 37. At trial, Detective Early testified that when vehicles are impounded, "we have a tow-in policy where we have to complete an inventory of the vehicle." Tr. p. 243. He further testified that Officer Dawson completed the paperwork for the inventory. During the inventory of the vehicle, Detective Early found the blue

shopping bag containing a shoe box with a pair of shoes and \$15,000 in cash, marijuana, Xanax pills, a cellular phone, and some compact discs.

Thus, the State presented more than conclusory testimony. It would have been preferable for the State to have introduced into evidence the actual, written department policy. Still, the evidence did explain that it was department policy to conduct an inventory of towed vehicles, that the officers conducted the inventory in accordance with this policy, that they completed paperwork, and that they discovered more than just contraband. “[T]he touchstone of Fourth Amendment Analysis is ‘reasonableness.’” Widduck, 861 N.E.2d at 1271. Even though we are hampered by fifty minutes of missing testimony, given the trial court’s order on Layne’s petition to settle and certify and the underlying facts and circumstances of this case, there is little indication of a pretext or subterfuge for a general rummaging. See id. As noted, the decision to tow the vehicle was statutorily authorized, if not required, and there was more than the conclusory testimony of an officer that the search was conducted as a routine inventory. The trial court therefore did not err in admitting the evidence discovered during the inventory of Layne’s car.³

³ Although Layne cites Article 1, Section 11 of the Indiana Constitution in his argument regarding the validity of the initial stop of his vehicle, he does not develop a separate and distinct analysis under the Indiana Constitution with regard to the inventory stop. Therefore, his state constitutional argument is waived. See Teeters v. State, 817 N.E.2d 275, 278 n.2 (Ind. Ct. App. 2002), trans denied. Waiver notwithstanding, we do not think the officer’s behavior in the present case unreasonable under Article 1, Section 11.

III. Trash Search

Layne next claims that the trial court should not have admitted evidence seized as a result of the search of the Delaware Street house. Even though this search was conducted pursuant to a warrant, Layne claims that the warrant itself was improperly based upon evidence the police discovered as a result of a trash search. As explained, Detective Cole took a bag of trash located “a foot or two” off of the alley behind the garage of the Delaware Street house and in the bag found marijuana stems and burnt marijuana cigarettes. Layne claims that the trash search was improper because it was conducted without reasonable articulable individualized suspicion, citing Litchfield v. State, 824 N.E.2d 356 (Ind. 2005).

In Litchfield, our supreme court rejected the notion that trash searches are *per se* unreasonable. Id. at 363. The court held that, under Article 1, Section 11 of the Indiana Constitution, the reasonableness of an officer’s conduct in searching an individual’s trash does not turn on whether the police entered onto the citizen’s property:

Property lines are wholly irrelevant to the degree of suspicion of a violation or the need for enforcement and largely irrelevant to the degree of intrusion inflicted by the search or seizure. Moreover, the precise boundaries of a piece of real estate are not always apparent to one viewing the property, and various easements may well complicate the effort to identify whether trash barrels are fair game.

Id. at 362-63. But in order for a trash search to be reasonable, “trash must be retrieved in substantially the same manner as the trash collector would take it.” Id. at 363. Thus, if trash has been “placed out for collection at the usual place for collection and is easily accessible to any member of the public, in the absence of a mistake, any claim to

possessory ownership has been abandoned. The citizen expects that trash to be collected and has effectively ceded all rights in it.” Id. at 363-64. However, the court also held that random searches, or searches of those individuals whom the officers merely hope to find in possession of incriminating evidence, are unreasonable. Id. at 364. The court therefore held, “a requirement of articulable individualized suspicion, essentially the same as is required for a ‘Terry stop’ of an automobile, imposes the appropriate balance between the privacy interests of citizens and the needs of law enforcement.” Id.

Litchfield was decided on March 24, 2005. The trash search in the present case occurred on March 8, 2004. Thus, we must first address the question of whether Litchfield should apply retroactively in the present case. In Membres v. State, 889 N.E.2d 265, 274 (Ind. 2008), our supreme court held that, because the rule announced in Litchfield was “designed to deter random intrusions into the privacy of all citizens,” retroactive application of that rule would not advance its purpose “for the obvious reason that deterrence can operate only prospectively.” However, the court also wrote, “Litchfield applie[d] in Litchfield itself, and also any other cases in which substantially the same claim was raised before Litchfield was decided. But challenges to pre-Litchfield searches that did not raise Litchfield-like claims in the trial court before Litchfield was decided are governed by pre-Litchfield doctrine even if the cases were ‘not yet final’ at the time Litchfield was decided.” Id.

Layne admits that the bulk of his argument regarding the trash search was focused on his claim that the search was improper because the police entered onto the property to gather the trash. If this had been his only objection to the trash search, he would not have

raised a “Litchfield-like claim,” and could not now avail himself of the rule in Litchfield. Layne claims, however, that he did present a Litchfield-like claim in response to the State’s argument before the trial court, which relied upon the opinion of this court in Litchfield. We are unable to agree with Layne’s characterization of his argument to the trial court.

Layne’s counsel did ask Detective Cole whether he had probable cause to search the residence prior to the trash search, and he also asked Detective Cole whether he had any information, other than the information he had received from Detective Early and from the trash search, that would suggest illegal activity at the Delaware street house, to which Cole replied, “No.” Tr. p. 16. However, the entirety of Layne’s argument to the trial court regarding the trash search was that the search was improper due to the manner in which it was conducted, i.e. that the police had entered onto the property to get the trash. See tr. pp. 66-69. Because Layne did not present a Litchfield-like argument to the trial court, he cannot present this argument on appeal.

This was precisely the case in Bowles v. State, 891 N.E.2d 30, 31-32 (Ind. 2008), wherein the defendant argued to the trial court that the search of his trash was illegal because a police officer may have stepped onto private property in order to retrieve his trash. Our supreme court held that this claim “was not ‘substantially the same claim’ as one that would prevail under Litchfield.” Id. at 32. Because none of the defendant’s pre-Litchfield attacks on the trash search “anticipated any claim remotely aligned with” the rule articulated in Litchfield, the court held that a Litchfield claim was unavailable to him. Id.; see also Belvedere v. State, 889 N.E.2d 286, 288 (Ind. 2008); Jefferson v. State,

891 N.E.2d 77, 81 (Ind. Ct. App. 2008), trans. denied (both holding that where Litchfield-based claim was first presented only after the Litchfield decision, Litchfield claim was unavailable on appeal).

Layne argues in the alternate that, even if Litchfield is not applicable, the trash search in the present case was unreasonable. “[C]hallenges to pre-Litchfield searches that did not raise Litchfield-like claims in the trial court before Litchfield was decided are governed by pre-Litchfield doctrine.” Belvedere, 889 N.E.2d at 288 (quoting Membres, 889 N.E.2d at 274). Layne claims that the search of his trash was unreasonable, focusing, as he did at the trial court, on his claim that the officers entered onto the property of the Delaware house when they seized the trash bag. Once again, we disagree.

The law regarding trash searches before Litchfield was governed by our supreme court’s opinion in Moran v. State, 644 N.E.2d 536 (Ind. 1994). See Belvedere, 889 N.E.2d at 288. In Moran, the court looked to the totality of the circumstances to evaluate the reasonableness of the search and seizure of the defendant’s trash and ultimately upheld the search of trash which had been left in front of the defendant’s house, noting that the police conducted themselves as trash collectors, did not disturb the defendant or his neighbors, and did not trespass. 644 N.E.2d at 541. Subsequent decisions from this court interpreted and refined the Moran holding. One case, State v. Stamper, 788 N.E.2d 862 865-66 (Ind. Ct. App. 2003), trans. denied, established a bright-line rule that the police act unreasonably if they enter onto the defendant’s property to retrieve the trash. Layne claims that Detective Cole violated this bright-line rule by retrieving trash which was located “a foot or two” from the back alley.

We first observe that the holding in Stamper was specifically abrogated in Litchfield, which held that “the reasonableness of officer conduct in searching a citizen’s trash does not turn on whether or not the police entered onto the citizen’s property.” 824 N.E.2d at 362. Although the Litchfield requirement that trash searches be supported by reasonable suspicion is not applicable to the present case, we cannot ignore that Litchfield specifically disapproved of the holding in Stamper. Further, even if we did turn a blind eye to Litchfield, other opinions of this court took a limited view of the bright-line rule in Stamper.

Specifically, in Bowles v. State, 820 N.E.2d 739, 744 (Ind. Ct. App. 2005), trans. denied, the court affirmed the trial court’s denial of the defendant’s motion to suppress even though the evidence was discovered as a result of a trash search. The court held that, even if the detective did step onto the defendant’s property, “he would have only had to have gone one or two feet onto the property to retrieve the bags.” Id. at 745; see also Mast v. State, 809 N.E.2d 415, 420 (Ind. Ct. App. 2004) (trash search held to be valid even though officer entered onto defendant’s property in the cab of trash truck in order to retrieve defendant’s trash), trans. denied.

Here, Detective Cole observed a trash bag located in a trashcan one or two feet from the alley. Neighbors had similarly placed their trash along the alley for collection. Detective Cole removed the trash at night, when his actions were unlikely to cause any disturbance. Considering the totality of the circumstances, the fact that Detective Cole stepped a foot or two onto the Delaware Street property does not by itself render the trash search unreasonable. See Bowles, 820 N.E.2d at 745; Mast, 809 N.E.2d at 420. Because

the search of the trash was not unreasonable, Layne's attack on the search warrant which was issued based upon the evidence discovered in the trash fails.

IV. Admission of Statement to Police

Layne argues that the trial court erred in admitting into evidence his statement, "all I do is weed and pills," which he made in response to Detective Brooks's question of whether Layne was going to cooperate with the police. We reiterate that questions regarding the admission of evidence are within the sound discretion of the trial court, and we review the court's decision only for an abuse of that discretion. Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2008), trans. denied.

A. Miranda

Layne claims that his statement was made before he was advised of his Miranda rights and should therefore be inadmissible. The State first notes that Layne did not object to Detective Brooks's testimony in which he relayed Layne's statement to the jury. Generally, the failure to object at trial results in waiver of an issue for purposes of appeal. Herron v. State, 801 N.E.2d 761, 765 (Ind. Ct. App. 2004). Layne responds by arguing that he did not fail to object, noting that, immediately prior to Detective Brooks's testimony, the parties had a lengthy hearing outside the presence of the jury with regard to the admissibility of Detective Brooks's testimony. After this hearing, the trial court ruled that the evidence would be admissible.

Even if we were sympathetic to Layne's claim that his argument at the hearing relieved him of his duty to object to the evidence, he would not prevail. At the hearing, the trial court stated, "you do not have to do a Miranda rights advisement before you ask

the question, are you gonna cooperate with us or not.” Tr. p. 335. To this, Layne’s trial counsel stated, “And I agree with that up to that point, Your Honor. I agree completely . . . that there’s no requirement up to that point.” Id. Thus, even at the hearing, Layne did not object to the statement of which he now complains. He has therefore waived this issue for purposes of appeal.

Waiver notwithstanding, Layne would still not prevail. A police officer is required to give Miranda warnings only when a defendant is both in custody and subject to interrogation. Furnish v. State, 779 N.E.2d 576, 578 (Ind. Ct. App. 2002), trans. denied. Not every question a police officer asks a person in custody constitutes interrogation. Id. at 579. “Interrogation” includes both express questioning of the defendant and words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the defendant. Id.

Here, Detective Brooks asked Layne if he was going to cooperate. This question, which required a yes-or-no response, was not reasonably likely to elicit an incriminating response from Layne. In fact, Layne’s statement, “all I do is weed and pills,” was non-responsive to the question asked. Therefore, Layne’s statement was not obtained in violation of his Miranda rights. See United States v. Hunt, 372 F.3d 1010, 1012-13 (8th Cir. 2004) (concluding that defendant’s statement attempting to bribe police was “not made in response to police interrogation or its functional equivalent” where police simply asked defendant if he would be “willing to cooperate.”).

B. Evidence of Prior Uncharged Misconduct

Layne also claims that his statement should have been deemed inadmissible pursuant to Indiana Trial Rules 403 and 404(b). Again, however, he did not make a contemporaneous objection to the admission of this evidence, and therefore failed to preserve any issue for appeal. See Herron, 801 N.E.2d at 765. Even if Layne’s argument at the hearing held before the admission of this statement preserved this issue for purposes of appeal, we would find no error in the admission of this statement.

Layne claims that his admission that he “d[id] . . . weed and pills” is inadmissible evidence of prior misconduct. Indiana Evidence Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, *knowledge*, identity, or absence of mistake or accident[.]

Evidence Rule 404(b) was designed to ensure that the State, relying upon evidence of uncharged misconduct, does not punish a person for his character. Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997). The effect of Rule 404(b) is that evidence is excluded only when it is introduced to prove the “forbidden inference” of demonstrating the defendant’s propensity to commit the charged crime. Herrera v. State, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999).

Layne claimed that he “d[id] . . . weed,” i.e. marijuana. The State charged Layne with possession of marijuana. To this extent, his statement is therefore not evidence regarding prior, uncharged misconduct. It is instead evidence of the charged crime, and Evidence Rule 404(b) is inapposite. Still, Layne’s statement also admitted that he “d[id] .

. . . pills,” and the State did not charge Layne with possession of any sort of pill. This, Layne claims was evidence of prior misconduct prohibited by Evidence Rule 404(b). The State argues that this evidence was “inextricably bound up” with the charged offense. See Herrera, 710 N.E.2d at 935 (evidence of uncharged misconduct which is inextricably bound up with the charged offense is admissible under Evidence Rule 404(b)). We are inclined to agree. Layne admitted to the police that he “d[id] . . . weed and pills.” As noted, Layne was charged and convicted of possession of marijuana. His statement admitted that he used both marijuana and pills. Thus, his admission of use of the pills was bound up with his admission that he used marijuana.

Moreover, Layne argued at trial that he did not constructively possess the cocaine and attacked the State’s evidence which indicated that he knew it was there. Layne’s statement that he “d[id] . . . weed and pills” was obviously an attempt to deny involvement with the cocaine found at the Delaware Street house. As such, his statement was admissible to show his knowledge of the cocaine found in the house. See Samaniego-Hernandez v. State, 839 N.E.2d 798, 803 (Ind. Ct. App. 2005) (where defendant’s theory at trial was that he had nothing to do with cocaine found at his home, evidence regarding his involvement in previous controlled buy of cocaine was admissible to show his knowledge of cocaine at his home), abrogated on other grounds, Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007).

Even though Layne’s statement is admissible to show his knowledge, it may still be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. See id. (citing Evid. R. 404(b); Evid. R. 403). This decision is entrusted to the

sound discretion of the trial court, whose decision is afforded a great deal of deference on appeal. Id. We will reverse the trial court’s decision only upon a showing that the trial court manifestly abused its discretion and the defendant was denied a fair trial. Id. Here, we cannot say that the court manifestly abused its discretion by admitting Layne’s statement. As explained, his statement was an admission that he used marijuana, the possession of which he was charged with, and it was also relevant to show his knowledge of the cocaine found at the house. As such, we cannot say that its probative value was substantially outweighed by any potential of unfair prejudice. See id. at 803-04. In short, the trial court did not abuse its discretion in admitting Layne’s statement into evidence.

V. Prosecutorial Misconduct

Layne argues that the prosecuting attorney made improper statements during the State’s closing statement to the jury. Specifically, the prosecuting attorney made the following statement regarding why Love would claim that the cocaine at the Delaware Street house belonged to her and not Layne:

Why would Nakia not roll over on Dantley Layne? It has nothing to do with love. It has everything to do with fear. She’s got two small children. That’s two reasons not to roll over on the dealer who came into your house. That’s two very good reasons to claim

Tr. p. 515. At this point, Layne objected, and a bench conference, which was not transcribed, was held. The trial court indicated that the objection was overruled, and that Layne would be able to make his objection on the record at a later time. The prosecuting attorney then continued, “Those are two good reasons to come in and claim that it’s all

your cocaine. Again, it's very convenient for her to say that right now." Tr. p. 515. On appeal, Layne claims that the prosecuting attorney's statements constitute misconduct.

In reviewing a claim of prosecutorial misconduct, we determine first whether the prosecutor engaged in misconduct; if so, we determine whether that misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. Waldon v. State, 829 N.E.2d 168, 178 (Ind. Ct. App. 2005), trans. denied. The gravity of peril is measured not by the degree of impropriety of the misconduct, but instead by the probable persuasive effect of the misconduct on the jury's decision. Id. "When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, then he or she should move for mistrial." Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006) (citations omitted). Failure to request an admonishment or to move for mistrial results in waiver of the issue on appeal. Id. Here, Layne did object to the prosecuting attorney's statement, but there is no indication in the record that he ever requested that the jury be admonished. As such, he has waived this argument for purposes of appeal.⁴ See id.

Layne claims that the prosecuting attorney's statement constituted fundamental error. Where a claim of prosecutorial misconduct has not been properly preserved, the defendant must establish not only the grounds for the misconduct but also the additional

⁴ In his reply brief, Layne claims that because he was not permitted to argue his objection until later, we should excuse his failure to request an admonishment. However, we see no reason why Layne could not have requested an admonishment at the same time that he objected to the prosecuting attorney's statement. That the trial court did not allow Layne to fully develop his objection until later did not prevent him from requesting an admonishment when he made his initial objection.

grounds for fundamental error. Cooper, 854 N.E.2d at 835. 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 constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. Id. Layne, however, presented his claim of fundamental error for the first time in his reply brief. We will not address an issue raised for the first time in a reply brief.⁵ James v. State, 716 N.E.2d 935, 940 n.5 (Ind. 1999).

VI. Sufficiency of the Evidence

Layne also claims that the evidence was insufficient to support his conviction for Class A felony possession of cocaine with intent to distribute. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge witness credibility. Klaff v. State, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). We instead consider only the evidence which supports the conviction, along with the reasonable inferences to be drawn therefrom. Id. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id. Contrary to Layne's claim, where circumstantial evidence is used to establish guilt, we do *not* determine whether the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence; we instead determine whether

⁵ Regardless, even if we addressed Layne's claim, we do not agree that fundamental error occurred. Layne argued to the jury that Love was not lying when she testified that the cocaine was hers, asking the jury, "is there someone that you love enough that you are going to lie and go to prison for 20 years for?" Tr. p. 506. Thus, the prosecutor attorney's argument regarding why Love would claim that the cocaine was hers was simply in response to Layne's argument.

inferences may be reasonably drawn from that evidence which supports the verdict beyond a reasonable doubt. *Id.* at 275 (Ind. Ct. App. 2008) (citing Bustamante v. State, 557 N.E.2d 1313, 1318 (Ind. 1990)).

A. *Constructive Possession*

Layne first claims that the State presented insufficient evidence to establish that he constructively possessed the cocaine found at the Delaware Street house. The State charged Layne, in relevant part, as follows:

On or about March 11, 2004, in Madison County, State of Indiana, DANTLEY L. LAYNE did knowingly or intentionally possess, with the intent to deliver cocaine, pure or adulterated, in an amount greater than three (3) grams.”

Appellant’s App. p. 37. This substantially tracks the statute defining this offense. See Ind. Code § 35-48-4-1(a)(2)(C), (b).

A conviction for possession of cocaine may be supported by proof of constructive possession. Armour v. State, 762 N.E.2d 208, 216 (Ind. Ct. App. 2002), trans. denied. In order to prove constructive possession, the State must show that the defendant has both (1) the intent to maintain dominion and control and (2) the capability to maintain dominion and control over the contraband. *Id.* To prove the “intent” element of constructive possession, the State must demonstrate the defendant’s knowledge of the presence of the cocaine. *Id.* Where, as here, the defendant’s control over the premises containing the contraband is non-exclusive, such knowledge may be inferred from evidence of additional circumstances pointing to the his knowledge of the presence of the contraband. *Id.* Additional circumstances which support such an inference include: (1)

incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) drugs in plain view; and (6) the location of the drugs in close proximity to items owned by the defendant. Ladd v. State, 710 N.E.2d 188, 190 (Ind. Ct. App. 1999). A substance can be possessed jointly by the defendant and another without any showing that the defendant had actual physical control thereof. Armour, 762 N.E.2d at 216. When possession is non-exclusive, the State must demonstrate that the defendant had actual knowledge of the presence and illegal character of the substance. Id.

To prove the second element of constructive possession, that the defendant had the capability to maintain dominion and control over the contraband, the State must demonstrate that the defendant is able to reduce the controlled substance to his personal possession. Armour, 762 N.E.2d at 216. Proof of a possessory interest in the premises in which the illegal drugs are found is adequate to show the capability to maintain dominion and control over the items in question. Id.

Regarding Layne's capability to maintain dominion and control over the contraband found at the Delaware Street house, the State presented evidence that Layne was staying at that house with Love on a regular basis. Specifically, Love's sister told the police that Layne was staying at the house. And on several occasions prior to the execution of the search warrant, the police observed vehicles which were registered to Layne parked at the Delaware Street house. Thus, there was evidence that Layne had a possessory interest in the premises where the contraband was found, which is sufficient to show that he had the capability to maintain dominion and control over the contraband.

See Gee v. State, 810 N.E.2d 338, 341 (Ind. 2004) (noting that a defendant may be found to be in control of drugs discovered in house whether he is the owner, a tenant, or merely an invitee).

With regard to the intent element of constructive possession, there was evidence of “additional circumstances” pointing to Layne’s knowledge of the presence of the cocaine at the house. First, Layne made the incriminating statement, “all I do is weed and pills,” in which he attempted to distance himself from the cocaine in the house. Also, there was evidence that the house was a drug manufacturing setting. The police discovered several digital scales, plastic baggies, and over twenty-one grams of cocaine. Further, the cocaine was found in a shoebox in a closet in the master bedroom in proximity to Layne’s items. Other shoeboxes in the room contained paperwork with Layne’s name. In one of several pairs of men’s tennis shoes found in the room, the police found a key which led them to a storage unit rented by Layne which contained a car. Inside the car was a bill with Layne’s name and \$39,000 in cash. From these additional circumstances, the jury could reasonably infer that Layne actually knew about the presence of the cocaine.

This case is different than that present in Gee, where our supreme court held that there was insufficient evidence to establish that the defendant constructively possessed cocaine found in a container in a laundry cabinet. The court held that there was no evidence that the cocaine was found in plain view. Gee, 810 N.E.2d at 343. Here, however, we do not base our decision on any claim that the cocaine was in plain view. Further, in Gee, the defendant’s items were not found in close proximity to cocaine. Instead, receipts and invoices with Gee’s name were found in the kitchen, and personal

items were located in an upstairs bedroom. Id. However, no contraband was found in these areas. Id. Although photographs of Gee were found in the room, there was no indication who owned the photographs. Id. at 343-44.

In contrast, the cocaine in the present case was discovered in the bedroom closet, and items tied to Layne were found in the bedroom, including a key to a storage unit rented by Layne and containing a large amount of cash. Another shoebox in the bedroom contained paperwork with Layne's name. Furthermore, unlike in Gee, here there was the presence of additional circumstances, including Layne's statement and what appeared to be a drug manufacturing setting. In sum, the evidence, although not overwhelming, was sufficient to establish that Layne constructively possessed the cocaine found at the Delaware Street house.

B. Maintaining a Common Nuisance

Layne also claims that the State did not present sufficient evidence to support his conviction for maintaining a common nuisance. The State, tracking the language of Indiana Code § 35-48-4-13(b) (2004), alleged that Layne “did knowingly or intentionally maintain a building or structure, to-wit: the [Delaware Street house]; that is used one (1) or more times for unlawfully keeping controlled substances, to-wit: marijuana and/or cocaine.” Appellant's App. p. 38.

To be convicted for maintaining a common nuisance, a defendant need not own or legally possess the building or structure. Jones v. State, 807 N.E.2d 58, 66-67 (Ind. Ct. App. 2004), trans. denied. “Rather, we apply the plain, ordinary definition of ‘maintain,’” which includes: “[t]o keep up or carry on; continue . . . [t]o keep in an

existing state; preserve or retain . . . [t]o keep in a condition of good repair or efficiency[.]” Id. (citing *The American Heritage Dictionary* 1084 (3d ed. 1996)).

Layne argues that there was no proof that he “maintained” a building or structure, claiming that he did not live at the Delaware Street house and was seen there only a few times. This argument, however, overlooks the evidence that Layne was staying at the house. Love’s sister testified that Layne was staying at the house at the time the drugs were found, and cars registered in Layne’s name were seen at the house over a period of four months. Although Layne now claims that he was seen there only three times in four months, the State rightly notes that the house was not under constant surveillance. Instead, Layne was seen at the house on numerous occasions when the police observed the house. More importantly, Layne had been at the house the day the search warrant was executed and the drugs were discovered, and items belonging to Layne were found in the bedroom of the house. In short, the evidence establishing Layne’s constructive possession is sufficient to prove that he maintained the residence as required by statute. See id.

Conclusion

By failing to object, Layne waived his argument regarding the State’s amendment of the charging information. The trial court did not err in admitting evidence obtained as a result of the search of Layne’s car. Because the trash search was not improper under the law as it existed at the time the search was conducted, the trial court did not err in admitting evidence obtained as a result of the search warrant based upon the evidence found during the trash search. The trial court did not abuse its discretion in admitting

Layne's statement to the police. Layne waived his argument regarding prosecutorial misconduct by not requesting that the jury be admonished. Lastly, the evidence was sufficient to support Layne's convictions for possession of cocaine with intent to deliver and maintaining a common nuisance.

Affirmed.

BAILEY, J., and BARNES, J., concur.