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IN THE
COURT OF APPEALS OF INDIANA

CARY L. PATRICK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0810-CR-614
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0708-FA-00023

JUNE 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

STATEMENT OF THE CASE

After a jury trial on July 14 through July 18, 2008, Cary Patrick was convicted of four counts of attempted murder and one count of arson, a Class B felony.[1]

Prior to trial, the state filed a notice that it intended to introduce evidence pursuant to Ind. Evidence Rule 404(b). Patrick filed a motion in limine to prohibit that evidence. On the second day of the hearing on the motion in limine, Patrick also filed a motion to suppress on the basis that some of the evidence was procured through the execution of a search warrant that had not been issued with probable cause. The court granted in part and denied both motions in part.[2] The court granted Patrick's request to show his continuing objections to this evidence when it was offered at trial.

On appeal, Patrick contends that the court erred in admitting the evidence from the search warrant that was the subject of his motion to suppress[3] as well as the evidence admitted pursuant to Evid. R. 404(b).

FACTS AND PROCEDURAL HISTORY

Robert Badgley and his family lived in St. John, Indiana. On the evening of August 18, 2007, Mr. Badgley discovered the house was on fire. He then got all those in the house outside. The fire was quickly put out. The fire department determined that the fire had been intentionally set from outside the house and that an accelerant had been used. Police Captain Johnson, who investigated the fire, asked Badgley if there was

[1] The transcript consists of five volumes plus one volume of exhibits.
[2] The excluded evidence has no bearing on the appeal.
[3] There was an additional later search warrant, which we discuss below.

anyone he should investigate. Badgley responded with the name of "Cary Patrick," a man against whom he had already secured a restraining order.

Earlier that summer a niece of Badgley's, fourteen year old K.K., was living in Chapel Hill, North Carolina. She spent a lot of time talking to her friends on the internet using the screen name "peachybeach." Someone using the screen name "Hopkins" and several other screen names talked to K.K. on the Internet and would not let her alone. At this same time, flowers and pizza the family did not order showed up at K.K.'s house.

At one point Badgley's daughter received a message from "peachybeach" asking for the Badgleys' home address. Thinking she was communicating with K.K., the girl gave the address. Sometime after that, someone spray painted K.K.'s telephone number on the Badgley's garage door.

I. First Search Warrant

We confess that our efforts to resolve the issues presented have been greatly hampered by the failure of Patrick's brief to set forth the specific items of evidence to which he is objecting. Our resolution has been further complicated by his "continuing objections" during the trial which, of course, fail to pinpoint specific questions and answers. The only contention expressed in his brief is that the improper evidence "included information from his computer that showed a possible link between Patrick and [K.K.]" and evidence "that Patrick may have known [K.K.'s] phone numbers."

The probable cause affidavit signed by Officer Hively for the November 2006 search warrant stated that "the above-named defendant, Cary Patrick, has engaged in a systematic, computer-based harassment scheme leveled against persons outside the State

of Indiana. The Defendant has also used the identifying information of another person to perpetrate and further his crimes."

This information failed to set forth facts to support probable cause as required by Ind. Code § 35-33-5-2(3). However, the trial court denied the motion to suppress on the basis that the officer executed the warrant in good faith.

That exception was established by the Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). This good faith exception does not apply if (1) the officer issuing the warrant was misled by information in the affidavit that the affiant knew was false, or would have known so except for his reckless disregard of the truth; (2) the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (3) the warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. 104 S.Ct at 3421. The Court emphasized that the officer's reliance must be objectively reasonable. *Id*. at 3419.

Our decisions have underscored the requirement that an officer's reliance on a judicial determination of probable cause must be *objectively* reasonable. *Hensley v. State*, 778 N.E.2d 484, 489 (Ind. Ct. App. 2002; *Doss v. State*, 649 N.E.2d 1045 (Ind. Ct. App. 1995). In the present case, the probable cause affidavit supporting the November 2006 search warrant is so totally lacking in factual detail that no objectively reasonable officer could have relied upon it. Therefore, the good faith exception does not apply, and

the court should have granted the motion to suppress the evidence obtained in that search and the objections to the evidence secured from that search should have been sustained.

This does not end our inquiry. Even though it was error to admit that evidence, the error will be found harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of a party. *Barber v. State*, 715 N.E.2d 848, 852 (Ind. 1999); *Fleener v. State*, 656 N.E.2d 1140, 1142 (Ind. 1995).

II. Evidence Rule 404(b)

Before making the assessment of probable impact, we must consider Patrick's other objection. Evid. R. 404(b) provides that 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 motive, plan, knowledge, etc.

Police secured another search warrant for Patrick's residence in April, 2007. Neither Patrick's principal brief nor his reply brief make any argument whatever concerning the validity of this warrant or the materials seized upon its execution. Accordingly, no error has been presented concerning the evidence produced by the second search warrant unless it was erroneously admitted pursuant to the Evid. R. 404(b) objection.

Under the April 2007 warrant, police seized another computer. When this computer was turned on, it initiated with an AOL messaging screen and the name "wellHeythere012" and a password appeared on the screen. The computer contained

some software programs to crack passwords. Other screen names on the computer included "snapcracklepop," "peachybeach," and several that included the name "Hopkins." There was a note on the computer called [K.K.'s] suicide. The police also seized Patrick's cell phone and found K.K.'s and A.S.'s telephone numbers stored in the phone. The cell phone records indicated calls and text messages made to K.K.[4]

Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid. R. 401.

Evid. R. 404(b) provides that evidence of other crimes, wrongs or acts is not admissible to merely prove the character of a person in order to show action in conformity therewith, but it may be admissible for other purposes. The examples set forth in the rule are illustrative and not exhaustive. *Hicks v. State*, 690 N.E.2d 215, 218 (Ind. 1997).

Here, the evidence from Patrick's computer and cell phone tended to show a *connection* between Patrick, K.K., and the Badgleys.[5] Patrick argues that the evidence was not relevant because it was not proved that he used the computer and cell phone to send the messages. While that is true, it fails to establish inadmissibility. The computer and cell phone were in Patrick's possession and apparently belonged to him. While the evidence was circumstantial, it nevertheless had the tendency to make the existence of Patrick's connection to the victims more probable.

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[4] K.K. testified that someone using the screen name "Hopkins" would not leave her alone.

[5] Connection was relevant due to what was otherwise a lack of relationship and the distance from Badgley's home to Warsaw, where Patrick lived.

Furthermore, we do not believe the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. The mere fact that Patrick apparently engaged in harassing K.K. on the internet and by telephone has little tendency to lead to the conclusion that he must have committed arson.

III. Totality of the Evidence

Initially, we note that the evidence produced under the 2007 warrant was substantially equivalent to that complained of by Patrick under the first search warrant. Error in the admission of evidence, which is merely cumulative of other evidence which is not challenged, does not constitute reversible error. *Wolfe v. State,* 562 N.E.2d 414, 421 (Ind. 1990).

In addition to the evidence produced from the April, 2007, search warrant, the evidence at trial disclosed the following events: Robert Badgley and his family lived in St. John, Indiana. On the evening of August 18, 2007, M.B. was playing at home with her friends, J.L., L.L. and A.S. While outside M.B. saw an old red sports car driving down her street. Since she had been told to stay away from a car such as this, she and her friends hid and then went into the house to watch a movie.

That same evening Sandra Sarsfield and her sister, Cheryl Ladowski, also saw an older model red Camaro in the cul de sac driving back and forth slowly every twenty minutes starting about 6:45 p.m. Sarsfield saw that the driver was a male with black hair.

About 8:15 p.m., while walking to a neighbor's house, Sarsfield saw the car in front of the driveway belonging to Badgley's next door neighbor. She heard the car's door slam and saw a stocky Caucasian man with dark wavy hair who was wearing dark

clothing walk up the driveway. Around 8:30 or 8:45 p.m., Ladowski, who had walked farther and was on her way back, saw a man with the same description holding two very large red gas cans. After Ladowski returned to her house, she and Sarsfield stepped out for a cigarette and saw the Camaro take off at a high rate of speed, without stopping for a stop sign.

While the children were watching television in the living room, they saw that the attached sunroom looked orange. M.B. called her father who opened the door to the sunroom and discovered the room was on fire. The fire was put out. The fire department determined that the fire had been intentionally set from outside the house and that an accelerant had been used.

Police Captain Bernard Johnson investigated the fire. When he asked Mr. Badgley if there was anyone he should look into, Badgley responded "Cary Patrick," against whom he had previously secured a restraining order.

The next day the police went to Patrick's home in Warsaw, Indiana, and discovered his red Camaro. Although it was raining heavily, the windows of the car were open and there was a strong odor of gasoline coming from the car. The officers saw Patrick inside the house and knocked on the door, but no one answered it. Officer Fryzel went to the back of the house and saw that Patrick had opened the kitchen window. He advised Patrick of the fire and told him there had been children in the house. Patrick replied that he knew that.

The police called Patrick's father, who came home and let the officers into the house. Patrick was wearing dark trousers and a dark T-shirt, and his clothing smelled of

gasoline. He was given *Miranda* warnings and was placed under arrest. When interviewed at the St. John police station, Patrick denied any involvement in the fire and denied being in St. John. The police mentioned the restraining order against Patrick, and Officer Johnsen asked why Patrick thought someone would light Badgley's home on fire. Patrick said, "Maybe that's what happens when you put out restraining orders." (Tr. at 875-76).

The police also impounded the Camaro and took it to St. John. Officers found a Schererville CVS receipt in the vehicle, dated August 18, 2007, for the purchase of a lighter, candy and Moon Pies.[6]

The police located the clerk at CVS who had made the sale and asked if she could identify the purchaser. She was shown a photographic array that included Patrick's picture. She immediately identified Patrick, who was picture number 1, then said, "Oh, wait a minute. Maybe it is number 3, but I'm leaning toward number 1." (Tr. at 418-19).

Three days after the fire, Sarsdale and Ladowski went to the police station and identified Patrick's red Camaro as the one that had been in their neighborhood.

We find the totality of the evidence, while circumstantial, clearly supports the conviction. The admission of the evidence produced under the November 2006 search warrant did not affect Patrick's substantial rights.

Affirmed.

KIRSCH, J., and BROWN, J., concur.

[6] Schererville is less than three miles from St. John.