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ATTORNEYS FOR APPELLANT:

ANDREW M. BARKER
ANNE E. BRANT
Campbell Kyle Proffitt LLP
Noblesville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

FREDRICK MICHAEL BAER,)
)
Appellant-Defendant,)
)
vs.) No. 29A02-0604-CR-361
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0403-FA-36

February 6, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Fredrick Michael Baer appeals his convictions of rape as a class A felony; two counts of criminal deviate conduct as class A felonies; sexual battery as a class C felony; burglary as a class B felony; robbery resulting in bodily injury, as a class B felony; and criminal confinement as a class B felony; and his adjudication as an habitual offender.

We affirm.

ISSUES

1. Whether the trial court erred when it denied Baer's motion to suppress evidence found during execution of a defective search warrant that was issued without probable cause.

2. Whether the trial court erred in admitting into evidence (a) a ring stolen from the victim and recovered from Baer's residence during the execution of the defective search warrant and (b) evidence concerning Baer's DNA because such evidence was obtained as a result of an illegal search or seizure.

2. Whether the trial court erred when it denied Baer's motion for a mistrial.

FACTS

In early February of 2004, twenty-year-old C.N. was living by herself in the western half of a duplex at 1107 East 105th Street in Hamilton County. On February 4, 2004, there was construction work going on in C.N.'s neighborhood. A man knocked on C.N.'s back door and advised her that the work could affect her water pressure. The encounter made C.N. nervous because no one had ever come to her back door before, and she went to her friend Tasha's house to spend the night. On February 8th, her uncle invited her to a party at his house; C.N. went to the party and did not return home until about 2:00 a.m. on February 9th. As C.N. pulled in her driveway, she noticed in the snow

very close to her house a path of footprints that had not been there earlier. She went inside and checked for footprints near the back door, but she saw none. C.N. undressed, put on pajamas, and went to bed.

C.N. was awakened by a "man putting his full body weight on . . . [her] back and pushing [her] face into the pillow[,] with a knife to [her] throat and being told that if [she] were to do anything, say anything, he was going to kill [her]." (Tr. 161-62). C.N. "immediately started crying" and "couldn't move." (Tr. 63). Clad in a ski mask, the man "told [her] undress and . . . asked [her] where [she] had been all night." *Id.* C.N. asked him if he was going to kill her, and he "told [her] to shut up" and to close her eyes. (Tr. 163). C.N. took off her shirt and pajama bottoms. The man told her to lie on her back. He then "put the knife underneath the sides" of her underpants "and cut both sides." (Tr. 164).

C.N. heard him walk to the light switch and turn the bedroom light on. She then heard him dump the contents of her purse on the floor. He "said it was 'f***ing pathetic" that she only had a dollar. (Tr. 165). She next heard him rummaging in her dresser drawers and throwing the contents on the floor. He "came and stood in front of [her] and asked [her] to masturbate." (Tr. 166). She complied. C.N. then heard the sound of "a zipper," and "what [she] thought to be undoing his pants" and "what sounded to be a condom wrapper opening." (Tr. 166, 167). The man lay "on top of" C.N., inserted his penis in her vagina, and moved it "in and out." (Tr. 168). The man "pulled out" and "inserted . . . his penis into [her] rectum." (Tr. 169). C.N. screamed and cried; he "told [her] to shut up." *Id.* After "a few minutes . . . he pulled out and inserted" his penis

"vaginally again." (Tr. 170). Then C.N. believed he ejaculated – because "he slowed down and his breathing . . . got heavier." (Tr. 171).

The man "picked [her] up by [her] arms" and took her to her bathroom. (Tr. 171). "He placed [her] in the bathtub and told [her] to turn on the water." (Tr. 172). He handed her the soap and told her to wash herself. She complied, and "[h]e then proceeded to wash [her] with his gloves on." (Tr. 172).

The man "had [her] let the water out and he picked [her] up and took [her] back into the bedroom." (Tr. 173). The man hugged her, "told [her she] felt good, and he said that Mr. Willy was waking up again." (Tr. 173). He took her "back to the bed and had [her] lay [sic] on her back," and she "heard what sounded to be another condom." *Id.* "He had [her] masturbate again and at this point in time he removed his gloves and inserted his fingers into [her] vagina and then he inserted vaginally with his penis." (Tr. 177). The man then "had [her] flip over" and "inserted his penis in [her] rectum again." (Tr. 174). She cried again because of the pain. The man "had [her] get back over on [her] back and . . . inserted vaginally again." *Id.* During this penetration, the man lifted his ski mask "and was kissing [her] on [her] mouth." (Tr. 175). C.N. "felt facial hair." *Id.* He "proceeded to kiss [her] neck and was licking . . . both of [her] ears." *Id.* C.N. "opened [her] eyes" and "saw his skin," which was white. *Id.*

After what C.N. believed to be his second ejaculation, the man moved her "in front of him" to her kitchen. (Tr. 178). Later, the man took her back to her bedroom and stood by her dresser, in front of a mirror. C.N. "opened [her] eyes slightly." (Tr. 180). The man "saw [her] open [her] eyes" and "told [her] if [she] opened [her] eyes again it

would turn into a f****ing picnic." *Id.* C.N. then heard the man rummaging in the drawers of her dresser, on top of which was her jewelry box. He asked C.N. if she had a telephone; she "told him all [she] had was a cell phone." (Tr. 183). After C.N. "told him where it was," she "heard him rip it apart" and throw it. *Id.* He then left.

C.N. left her house and drove to her friend Tasha's house, where she banged on the door screaming. When Tasha opened the door, C.N. told her that she had been raped. Tasha called 9-1-1. To the responding officer, C.N. described her attacker as a "white male, five foot eight inches, 150 pounds" and "armed with a knife." (Tr. 234). C.N. was taken by ambulance to St. Vincent's Hospital. A forensic nurse completed a rape kit and examined C.N.'s body with a special black light, which causes body fluids to "fluoresce . . . shine real bright." (Tr. 289). Tasha stayed with C.N. for the examination, and she observed "a lot of coloration going down from her ear" when the light was shined on C.N. (Tr. 134). An evidence technician took swabs of C.N.'s ears.

When C.N. returned to her home later on February 9th, she discovered that a ring was missing from her jewelry box. The ring was a family heirloom, given to her by her grandmother; it had small diamonds on it in the shape of a heart and was "very large" for a woman's ring. (Tr. 214). C.N. reported the missing ring to Detective Anderson, the officer assigned to her case.

On February 26, 2006, a search warrant was issued in a homicide case and was executed by Deputy Sheriff David Callahan at Baer's residence in Indianapolis. The warrant specified that the police were permitted to search for

> [a]ny and all clothing or shoes that may contain blood or trace evidence, to include but not limited to hair, fibers, a black or blue ladies [sic] purse, any edged weapons, any identification or property in the name of Cory or John Clark.

(Ex. B). In Baer's bedroom, Deputy Callahan observed a camouflage backpack "laying [sic] in the middle of the floor." (Tr. 697). In the "main compartment of the backpack" were numerous knives and pieces of jewelry. (Tr. 700). The deputy took the backpack, with its contents inside, to the Sheriff's Department for examination for possible trace evidence. At the Department, included among the jewelry found in the backpack was a heart-shaped ring, which was identified by C.N. as being the one stolen from her residence on February 9, 2004. Also among the jewelry in the backpack were items identified by the resident of the other unit in C.N.'s duplex as having been stolen from her in a burglary of her residence on February 4, 2004.

After execution of the initial search warrant for Baer's residence in Marion County, on that same day, February 26th, Deputy Callahan sought a search warrant to collect blood, saliva, and hair from Baer. The warrant was issued, and samples were collected. The swabs taken from C.N.'s ears were tested. One swab contained a mixture of DNA; the "major component" of that mixture "matche[d] the standard of" Baer, which means that about "1 in 15,000 in the Caucasian population would be able to contribute DNA to that mixture". (Tr. 908, 913). Other swabs and evidence collected from C.N.'s home contained only C.N.'s DNA.

On March 18, 2004, the State charged Baer with one count of rape as a class A felony; two counts of criminal deviate conduct as class A felonies; one count of sexual

battery as a class C felony; one count of burglary as a class B felony; one count of robbery resulting in bodily injury as a class B felony; criminal confinement as a class D felony; and being an habitual offender in the instant case.

On September 17, 2004, Baer filed a motion to suppress evidence. Specifically, Baer argued that a statement he made confessing to the crimes against C.N. should be suppressed because he had previously asked for an attorney in the case giving rise to the search warrant; one had been appointed for him in that matter; and the statement was therefore improperly elicited. Baer's motion further asserted that the issuing court "did not have probable cause to issue" the search warrant for his residence, and therefore C.N.'s ring and "other items unrelated to this case, should be suppressed." (App. 50). The trial court held an evidentiary hearing on Baer's motion on October 12, 2005, at which time Baer's counsel also argued, *inter alia*, that the collection of Baer's blood, hair, and saliva was "fruit of the poisonous tree" and, as a result, it too should be suppressed. (Tr. 69). At the hearing, the parties agreed that the transcript of the probable cause hearing for the issuance of the initial search warrant was dispositive of "whether the warrant should have been issued" in the first place, and it was admitted into evidence. (Tr. 14). Deputy Callahan testified about where he found the camouflage backpack during the execution of the search warrant and that he had taken the entire backpack because the search included "any type of trace evidence," and if there had been trace evidence on one of the "twenty something knives" in the backpack, that trace evidence could have been transferred to and present on other items in the backpack. (Tr. 39, 38).

On January 26, 2005, the trial court granted Baer's motion to suppress and exclude his statements of February 29, 2004, confessing to the crimes against C.N. However, on February 3, 2006, the trial court denied Baer's motion to suppress items recovered pursuant to the valid search warrant.

Baer was tried by a jury on February 6 – 10, 2006. Witnesses testified that Baer was employed as a traffic control flagger on a utility construction job in the immediate area of C.N.'s home on February 4, 2004, and that he wore an orange vest for the job. April Davis, who resided in the unit immediately behind C.N.'s and whose back door was mere feet from C.N.'s back door, testified that on the afternoon of February 4th, a man wearing an orange "construction vest" came to her door and advised her that her water pressure might be low as a result of construction work. (Tr. 646). Davis saw the man walk toward C.N.'s unit and then heard loud knocking at C.N.'s back door. Rhonda Keller testified that on February 4th, she resided in the other half of C.N.'s duplex, and was at work all day; when she returned home that evening, her bedroom was in disarray and various items of jewelry were missing. Keller testified that she made a police report of the incident, and that two weeks later she had been called and told that her jewelry might have been recovered by authorities. Keller testified that she subsequently identified three rings, three necklaces and a watch as her stolen jewelry. She also identified these items at trial, and other testimony revealed that this jewelry was among the items contained in the backpack found lying on the floor of Baer's bedroom.

At trial, Baer objected to the admission of C.N.'s ring into evidence in addition to the expert testimony about the profile of Baer's DNA and analysis of the swab taken

from C.N.'s ear, but the trial court overruled the objections. After testimony about Baer's work on the site in C.N.'s neighborhood, the next morning a juror brought to the jury room a map that he had printed from Mapquest.com portraying the location of C.N.'s house. Baer's counsel objected and requested a mistrial. The trial court individually questioned the jurors who had seen the map. Each testified that looking at the map would have no impact, nor would it have any effect on, the juror's decision-making. The State argued that the jurors' brief exposure to the map would cause no damage because the State would be calling a witness to testify with an exhibit of an aerial view of the neighborhood, which effect would be to provide information about the location of C.N.'s house with respect to the construction work. The trial court dismissed the juror who had brought the map, and it admonished the jury that it was to base its decisions only "upon the evidence that you hear in the courtroom" and the exhibits provided. (Tr. 638). The jury found Baer guilty as charged, and he now appeals.

DECISION

1. Probable Cause for Search Warrant

Baer argues that trial court erred when it denied his motion to suppress because the warrant authorizing the search of his residence "was not supported by probable cause." Baer's Br. at 11. We cannot agree.

The Fourth Amendment to the Constitution guarantees that a search warrant will not be issued without probable cause. *Helsley v. State*, 809 N.E.2d 292, 295 (Ind. 2004). Indiana's Supreme Court has recognized that probable cause to search a premises is established when a sufficient basis of fact exists to permit a reasonably prudent person to

believe that a search of those premises will uncover evidence of a crime. *Id.* The trial court must make its determination to issue a warrant based on the sworn facts and the rational and reasonable inferences drawn therefrom. *Id.* The principles of the Fourth Amendment are codified in Indiana Code section 35-33-5-2. *State v. Spillers*, 847 N.E.2d 949, 953 (Ind. 2006). Where the warrant is sought based on hearsay information, the sworn statement must either

> (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; <u>or</u>
> (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

Id. (quoting I.C. § 35-33-5-2(b)) (emphasis added).

When the search warrant was sought, the issuing trial court heard the following sworn testimony. Deputy Sheriff Holtzleiter testified that pursuant to an initial report at 3:25 p.m. on February 25, 2004, he was investigating homicides in a house at a certain rural address where two victims had had their throats cut.[1] Deputy Sheriff Simmons specifically testified in support of the request for a search warrant as follows:

- Nadine Riffey, who lived approximately ½ mile west of the victims' house, reported that at approximately 9 to 9:30 a.m. on February 25th, a white male wearing an orange construction-type vest pulled into her driveway in a small dark-colored hatchback vehicle with a handicap sticker hanging from the rearview mirror and asked directions to Layton Road. He then asked to come inside and use her telephone. She declined to allow him entry and offered the use of her cordless telephone outside.

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[1] This testimony was heard the day before the hearing on the application for the search warrant at issue. However, the testimony of Deputy Holtzleiter was expressly incorporated at the outset of the hearing on the instant search warrant.

- At 10:20 a.m. on February 25th, Mark Lowe encountered a small dark-colored hatchback with a handicap sticker hanging from the rearview mirror and driven by a white male in his mid-20s and wearing an orange vest at an intersection about ½ mile east of the victims' house. Lowe observed the vehicle travel westbound toward the victims' house.

- Phil Metzger reported that approximately "10 to 10:30" a.m. on February 25th, a vehicle with a handicap sticker hanging from the mirror stopped behind Metzger's vehicle at an intersection on the road to the victims' residence, and the driver approached his car and asked directions to Layton Road and mentioned a construction site. (Tr. 453).

- Tonya Little talked by telephone with the adult victim at 10:30 a.m. on February 25th, at which time the woman "stated she was going to the school at 11:20 a.m." Little had been unsuccessful in reaching the woman in calls made to her house between 1:00 and 3:00 p.m. (Tr. 446-47).

- Officials at the school reported that for the adult victim to come to the school at 11:20 was "routine for her because she watches the children" at that time, that there had never before "been a problem," and that consequently they had telephoned her "house when she didn't show up." (Tr. 447).

- Early on February 26th, officers located a construction site on Layton Road. The site was 2 miles north of the victims' house. Officers asked construction workers and the foreman there about "a worker there who drove a small vehicle with a handicap sticker. Several co-workers . . . immediately knew who it was and gave the name of Fred Baer." (Tr. 446). The foreman provided Baer's home address.[2] The foreman further informed officers that Baer had arrived at the work site at approximately 8:40 to 9:00 in the morning" on February 25th, but had then "stated he needed to go to the bathroom, got in his car and left the construction site, and was gone for" approximately two hours. (Tr. 446). Further, the foreman advised that when Baer returned to the work site, he was "somewhat hyper," and when the foreman confronted him "as to why he had been gone so long, Baer "got agitated and mad about being asked." (Tr. 447). Baer had then called in the next day to say he was sick and would not be at work.

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[2] This was the address for which the search warrant was sought.

After hearing this evidence, the judge found probable cause for the issuance of a search warrant – to search Baer's residence.

The issuing court heard sworn testimony reflecting multiple sources of information from named cooperative citizens who observed facts that created the strong inference that Baer was in the immediate vicinity of the victims' house and exhibiting strange behavior at the time of the crimes. The sworn facts, and the rational and reasonable inferences drawn from them, provided a sufficient basis to allow a reasonable person to conclude that a search of Baer's residence would uncover evidence of a crime. *See Helsley*, 809 N.E.2d at 295. Therefore, the search warrant was supported by adequate probable cause. *Id.*

2. Admission of Evidence

When evidence is admitted at trial after the denial of a motion to suppress, the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *See Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). As we have recently noted,

> The admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. A decision is an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court. In reviewing the decision, we consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor.

Johnson v. State, 831 N.E.2d 163, 168-69 (Ind. Ct. App. 2005) (citing *Williams v. State*, 782 N.E.2d 1039, 1045 (Ind. Ct. App. 2005), *trans. denied*).

Baer first argues that the trial court erred in admitting into evidence the ring because it "was beyond the scope of the search warrant." Baer's Br. at 17. The search warrant stated that the officers were authorized to search for and seize from Baer's residence both "edged weapons" and items that "may contain blood or trace evidence."[3] (App. 457). The camouflage backpack was found lying in the middle of the floor in Baer's bedroom. It contained approximately twenty knives, i.e. "edged weapons." In the same "main compartment," the backpack held numerous items of jewelry and other items of personal property. (Tr. 700). Deputy Callahan testified that he had seized the entire backpack and taken it back to the Department in order to examine the contents for trace evidence. The warrant authorized the seizure of items evidencing trace evidence; there were a number of knives inside the backpack; a knife used to kill a victim could bear trace evidence of that crime; and if the knife was commingled with other items in the same compartment of the backpack, it could cross-contaminate those other items. Therefore, it was reasonable for the officer to seize the backpack with its contents for further and closer examination. The facts and circumstances before the trial court supports its ruling to admit the ring because its seizure was proper and within the scope of the search warrant.

Baer also argues that the trial court should have excluded evidence adduced pursuant to collection of his blood, saliva, and hair because it was "a result of information obtained" from his illegal confession. Baer's Br. at 24. However, the record of the

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[3] As noted earlier, the trial court had heard sworn testimony that two victims had had their throats cut.

February 26, 2004, hearing for the issuance of the search warrant to collect those items makes no reference whatsoever to the February 9, 2004, crimes against C.N. Rather, the evidence heard solely concerned the crimes of February 24, 2004. Further, Baer's statement of confession as to the crimes against C.N. was made five days after this hearing -- on February 29, 2004. Therefore, the collection of his blood, saliva, and hair was not the result of information obtained from the statement of confession as to the February 9th crimes, a statement which the trial court did suppress.[4] Consequently, the trial court's admission of the evidence flowing from the collection of Baer's blood, saliva, and hair was not an abuse of discretion.

3. Mistrial

As Indiana's Supreme Court has explained,

> A mistrial is an extreme remedy granted only when no other method can rectify the situation. The denial of a mistrial lies within the sound discretion of the trial court, and reversal is required only if the defendant demonstrates that he was so prejudiced that he was placed in a position of grave peril. The gravity of peril is measured by the probable persuasive effect on the jury's decision. The trial judge is in the best position to gauge the surrounding circumstances and the potential impact on the jury when deciding whether a mistrial is appropriate.

Oliver v. State, 755 N.E.2d 582, 585 (Ind. 2001).

[4] We also do not find that Baer made this argument to the trial court. At the hearing on the motion to suppress, Baer's counsel did argue that evidence of his blood should be suppressed, but his basis therefor was that it was "fruit of the poisonous tree" in that the initial warrant for the search of his residence "shouldn't have been issued," with the result that all "items taken from Mr. Baer would also need to be suppressed and any testing on those items subsequently should be excluded from trial." (Tr. 69). At the conclusion of the hearing on the motion, Baer's counsel summarized his request for the trial court to "grant our motion, suppress the search of the residence that revealed the ring in question that was identified by the exhibit and the statement relative to the [offenses against C.N.]." (Tr. 79).

Baer argues that the trial court abused its discretion when it failed to grant a mistrial after jurors impermissibly viewed the Mapquest map. Specifically, he asserts that because "the map allowed the jury to visualize the distance between the crime scene and Mr. Baer's work site," this information "had a probable and persuasive effect on the jury's verdict." Baer's Br. at 30. We cannot agree.

First, each juror who had viewed the map affirmed to the trial court that the sight would not affect the juror's decision-making toward reaching a verdict. Second, Detective Anderson testified using an admitted exhibit that showed an aerial view of C.N.'s neighborhood and identified the respective locations of C.N.'s house and the construction work. Thus, the jury was able to appreciate the distance between C.N.'s home and Baer's work site by properly admitted trial evidence. Third, the trial court expressly admonished the jurors to base their decision solely upon the evidence presented at trial, and we "presume the jury followed the trial court's admonishment." *Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001). The trial court did not abuse its discretion when it concluded that the brief viewing by jurors of the Mapquest map did not have a probable persuasive impact on the jury's decision and did not place Baer in a position of grave peril. *Oliver*, 755 N.E.2d at 585.

Affirmed.

BAKER, J., and ROBB, J., concur.