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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL J. CABLE, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A04-1006-CR-386  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable David J. Certo, Judge  
Cause No. 49G21-1002-FD-13678

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**April 13, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Michael J. Cable appeals his convictions for three counts of intimidation, each as a Class D felony, and one count of invasion of privacy, as a Class A misdemeanor, following a jury trial. Cable raises the following three issues for our review:

1. Whether the State presented sufficient evidence to support his conviction for intimidation under count two of the State's charging information;
2. Whether the State's charge of intimidation under count three was unconstitutionally vague or overbroad; and
3. Whether the trial court abused its discretion by permitting the State to present evidence of Cable's prior incarceration.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

In late December of 2009, Cable, who was incarcerated, sent a threatening letter to Shannon Insko's residence in Marion County. Insko had testified against Cable in a prior criminal trial, but she remained friends with Cable's former girlfriend and the mother of his children, Michelle Cox. Insko was also married to Cable's cousin, Bradley Ratliff.

Although Cable's letter was addressed to Ratliff, Insko had permission to open Ratliff's mail and she did so in this instance. On the back of the envelope was a drawing of Insko's house engulfed in flames, with a woman on fire in a window and a gas can in the driveway. A padlock was drawn on the front door, and a dog chain ended in a pool of blood surrounded by bullet casings.

The letter within the envelope contained the following statements addressed to Insko:

I guess you want some glory for your good deed, but all your good deeds won't . . . get you into heaven. You probably have no such desires, anyhow. However I always treated you [a]s a result of who you portray to be [sic], a two-faced person. That's why you are a thief and . . . if I would have just taken it to trial, I wouldn't be here, because a thief's word doesn't mean shit to a jury, so remember that, bitch.

Shelly told me that Michelle told her that you two stole my things. So, face up, bitch. I saw my red vacuum at her house. As long as I'm alive, your troubles won't end, snitch. I like it where I'm at and I plan a return visit. So, buy some more dogs. While mine had no one to care for him when I was locked up [sic]. But, what comes around goes around. That's why your heart is beating faster and your blood is throbbing. Remember what you did.

Now I definitely have the papers to show my girl[']s mommy is a lying [sic] two face weak ass bitch. And, she will pay, even after she is dead. Is your heart pumping faster, bitch? This is nothing but time and getting to know very dangerous people, and they like me. Ha.

\* \* \*

Do you like upholding the law while you break it, don't you, bitch [sic]? What goes around comes around. I hope you're laughing you evil two-faced-d\*\*\*-s\*\*\*\*\* f\*\*\*\*\* c\*\*\*. Ha ha ha.

\* \* \*

. . . I want joint custody with no arguments, no contesting, she suggests it to the judge. I found some proof and a recording of my own to give her hell in that court for however long. Every picture I got doesn't show her being scared or terrified. Court documents prove also that she is fabricating her fears, not to mention her own testimony and a letter I found from her.

If I don't get what I want, and what is best for the kids, when she dies of Lupus, which looking at her the bitch looks dead[,] I will move us so far away her family will never get a peek at the zip code. If she gives me what I want, I will allow contact. Trust me, her body is dieing [sic] from the inside out. Some women don't live past 35 (some younger) and medication doesn't cure it.

. . . I have painted a pretty picture of [Cox's] hell. I hope she burns with you and [Ratliff]. . . .

\* \* \*

Unless that dirty skanky cheating slut thinks the kids and I deserve to wait another year and a half to see each other, I'm sure they will understand by then, you dead bitch.

Transcript at 67-70. In addition, the letter included the following abbreviations: IC2GUB's, W&C, YHBW, and IAG2BTFOOHWABB. Insko interpreted those abbreviations to mean, respectively, "I'm coming to get you bitches," "Watch and see," "You have been warned," and "I am going to beat the f\*\*\* out of her with a baseball bat." Id. at 74.

On February 17, 2010, Insko received three more letters from Cable, which were addressed to Cox and her two children. Those letters contained the following statements:

How many acts of violence have you witnessed me commit? None. And you can and will tell that to the judge. A piece of paper doesn't keep anyone safe anyway. Don't you read the papers?

Here's one. Man[] dresses like Santa and kills her and her family at a Christmas party. Here's another. Man breaks into house and stabs her to death while kids hide in the closet. . . .

\* \* \*

. . . Remember what you wanted me to do to people that hurt the[ children]? Do not put yourself in that category. And, trust me, you do not want to keep taking responsibilities of them from me, unless you want to have all the responsibilities, all of the blame and all of the consequences.

I will chop people up and feed them to the pigs for their pain. I just wonder who really wants to find out? Do you? Does your partner? Does your family? Who?

\* \* \*

So, grow up. Live normal. Treat me like you want to be treated. The girls is [sic] what will drive me to protect what is mine. And, they are

mine till I die or they come of age. The more you take from me, the more I am going to be forced to take from you.

Id. at 103-06. The “piece of paper” Cable referred to was a no-contact order Cox had obtained against him.

On February 24, the State charged Cable with four crimes. In count one, the State alleged that Cable had committed Class D felony intimidation against Insko. In count two, the State alleged that Cable had committed Class D felony intimidation against Cox by communicating to her that “he would harm her and/or burn her, with the intent that [Cox] be placed in fear of retaliation for a prior lawful act, to wit: speaking with the police in a prior criminal case . . . .” Appellant’s App. at 19 (capitalization removed). In count three, the State alleged the Cable had committed another Class D felony act of intimidation against Cox by telling her that “he would harm her” in order to compel Cox to “engage in conduct against [her] will, that is: tell a judge that she has never seen Michael Cable commit an act of violence . . . .” Id. at 20 (capitalization removed). The State also charged Cable with a Class A misdemeanor invasion of privacy.

At the beginning of his jury trial on May 12, Cable filed a motion in limine seeking to prohibit the State from referencing Cable’s prior incarceration. The trial court reserved judgment on the motion until trial, and Cable renewed his objection during the trial. The trial court overruled Cable’s objections and permitted the State to inform the jury of Cable’s prior incarceration.

The jury found Cable guilty as charged, and the court entered its judgment of conviction and sentences accordingly. This appeal ensued.

## DISCUSSION AND DECISION

### Issue One: Count Two

Cable first contends on appeal that the State failed to present sufficient evidence to support count two of its charging information. Specifically, Cable asserts that the State failed to prove that Cable communicated a threat to Cox “ ‘with the intent that [she] be placed in fear of retaliation for a prior lawful act, to-wit: Speaking with the police in a prior criminal case.’ ” Appellant’s Br. at 9 (emphasis and alteration original) (quoting Appellant’s App. at 19). When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside.

To convict Cable of intimidation, as a Class D felony, as alleged in count two, the State needed to prove beyond a reasonable doubt that Cable communicated a threat to Cox, with the intent that Cox be placed in fear of retaliation for a prior lawful act, and that the threat was to commit a forcible felony. See Ind. Code § 35-45-2-1. Cable’s only argument on this issue is that the State did not show that Cox had committed a prior lawful act.

According to the State’s charging information, Cox had incriminated Cable when speaking to police in a prior criminal case. But at trial, the State presented different

evidence, namely, Cable's letters to Cox, which addressed her lawful exercise of responsibilities over their children and her lawfully obtained no-contact order. Cable does not challenge the variance between the charging information and the State's actual evidence, and we, therefore, do not address it. See Ind. Appellate Rule 46(A)(8)(a); see also Robinson v. State, 634 N.E.2d 1367, 1372 (Ind. Ct. App. 1994) ("A variance will require reversal only . . . if it misleads the defendant in the preparation of his defense or if it subjects him to the likelihood of another prosecution for the same offense.").

According to Cable's letters to Cox:

How many acts of violence have you witnessed me commit? None. And you can and will tell that to the judge. A piece of paper doesn't keep anyone safe anyway. Don't you read the papers?

Here's one. Man[] dresses like Santa and kills her and her family at a Christmas party. Here's another. Man breaks into house and stabs her to death while kids hide in the closet. . . .

\* \* \*

. . . Remember what you wanted me to do to people that hurt the[ children]? Do not put yourself in that category. And, trust me, you do not want to keep taking responsibilities of them from me, unless you want to have all the responsibilities, all of the blame and all of the consequences.

I will chop people up and feed them to the pigs for their pain. I just wonder who really wants to find out? Do you? Does your partner? Does your family? Who?

\* \* \*

So, grow up. Live normal. Treat me like you want to be treated. The girls is [sic] what will drive me to protect what is mine. And, they are mine till I die or they come of age. The more you take from me, the more I am going to be forced to take from you.

Id. at 103-06. That evidence satisfied the State’s burden of proof on this issue, and Cable’s assertions to the contrary are without merit.

### **Issue Two: Count Three**

Cable next contends that Indiana’s intimidation statute, as applied against him in count three of the charging information, is unconstitutionally vague and overbroad. As our Supreme Court has discussed:

A challenge to the validity of a statute must overcome a presumption that the statute is constitutional. The party challenging the statute has the burden of proving otherwise.

Due process principles advise that a penal statute is void for vagueness if it does not clearly define its prohibitions. A criminal statute may be invalidated for vagueness for either of two independent reasons: (1) for failing to provide notice enabling ordinary people to understand the conduct that it prohibits, and (2) for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement. A related consideration is the requirement that a penal statute give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden so that “no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” In State v. Downey, 476 N.E.2d 121, 123 (Ind. 1985), this Court emphasized that “there must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur. It cannot be left to juries, judges, and prosecutors to draw such lines.” Accordingly, the statutory language must “convey sufficiently definite warning as to the proscribed conduct when measured by common understanding.”

But a statute “is not void for vagueness if individuals of ordinary intelligence could comprehend it to the extent that it would fairly inform them of the generally proscribed conduct.” And the statute does not have to list specifically all items of prohibited conduct; rather, it must inform the individual of the conduct generally proscribed. The examination of a vagueness challenge is performed in light of the facts and circumstances of each individual case.

Brown v. State, 868 N.E.2d 464, 467 (Ind. 2007) (citation sentences omitted). And under the federal overbreadth analysis, “we must determine whether the statute substantially prohibits activities protected by the First Amendment.” Jackson v. State, 634 N.E.2d 532, 536 (Ind. Ct. App. 1994).

In count three of its charging information, the State alleged that Cable committed intimidation when he threatened to harm Cox if she did not tell a judge that she had never seen Cable commit an act of violence. The State supported its allegation at trial when it produced one of Cable’s letters to Cox, in which Cable stated: “How many acts of violence have you witnessed me commit? None. And you can and will tell that to the judge. A piece of paper doesn’t keep anyone safe anyway. Don’t you read the papers?” Transcript at 103.

According to Cable, the intimidation statute, as applied to him based on that letter, is unconstitutionally vague and overbroad because he “was commanding that [Cox] testify truthfully about the lack of violent acts in his past—something she was legally compelled to do.” Appellant’s Br. at 11. Thus, he continues, “[p]roscribing this behavior criminalizes potentially innocent acts,” and renders unintelligibly vague the statute’s element that the threat compel another to act against his or her will. Id. at 11-12; see I.C. § 35-45-2-1.

We do not accept Cable’s suggestion that Cox was already legally bound to testify in his favor. As the State points out, there were no pending charges against Cable at the time he wrote his letter to Cox. Rather, it is clear from the facts and circumstances of this case that Cable was ordering Cox to recant any statements she had already provided to

law enforcement or in court against Cable, which resulted in his current incarceration or in the prior no-contact order Cox had obtained. In light of those facts and circumstances, we have no question that a person of ordinary intelligence would understand Cable's letter to Cox to be a threat for Cox to engage in conduct "against [her] will." See I.C. § 35-45-2-1; Brown, 868 N.E.2d at 467. As such, the statute, as applied, is not unconstitutionally vague. For the same reasons, it is not an overly broad prohibition against an activity protected by the First Amendment.<sup>1</sup>

### **Issue Three: Admission of Evidence**

Finally, Cable argues that the trial court abused its discretion by permitting the jury to hear evidence that he was a prison inmate. Our standard of review of a trial court's admission of evidence is an abuse of discretion. Speybroeck v. State, 875 N.E.2d 813, 818 (Ind. Ct. App. 2007). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Dawson v. State, 786 N.E.2d 742, 745 (Ind. Ct. App. 2003), trans. denied.

Cable contends that the admission of his status as an inmate was an abuse of the court's discretion under Indiana Evidence Rule 404(b). According to Rule 404(b):

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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during

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<sup>1</sup> We are also not persuaded by Cable's slippery slope argument, including his suggestion that the statute, as applied, would prevent him from compelling witnesses to appear and testify on his behalf.

trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Here, Cable's threats to Insko were based on her prior statements to lawful authorities regarding Cable's past criminal behavior. Thus, his incarceration, which resulted from those statements, was his motive for the charge of intimidation against her. Further, at least part of Cable's defense at trial was that he did not write the letters. The State rebutted that defense by linking Cable's presence at the Plainfield Correctional Facility with the return address on the letters. Accordingly, informing the jury of his incarceration was not contrary to Rule 404(b) as that evidence was used to establish his motive and identity.

### **Conclusion**

In sum, we affirm Cable's convictions. The State presented sufficient evidence to support count two of the charging information, count three of the charging information is not, on these facts, constitutionally vague or overbroad, and the trial court did not abuse its discretion in admitting evidence that informed the jury of Cable's status as an inmate.

Affirmed.

ROBB, C.J., and CRONE, J., concur.