APPENDIX - A

Sixth Circuit's Opinion

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Case No. 20-5577

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL J. ZULAWSKI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

OPINION

Before: GUY, COLE, and STRANCH, Circuit Judges.

COLE, Circuit Judge. Defendant Daniel Zulawski was convicted for attempted enticement of a minor under 18 U.S.C. § 2422(b) after he arranged to have sex with an undercover agent posing as a "taboo mom" and her two fictitious minor children during a sting operation conducted in January 2018. He raises five issues on appeal, including whether the district court improperly denied his request for a *Franks* hearing and his motion to suppress, erroneously admitted inappropriate character evidence, and incorrectly applied an obstruction of justice enhancement to his sentence. Finding no error, we affirm.

I. BACKGROUND

A. Factual Background

In January 2018, Sergeant Zulawski left his post at Fort Campbell to attend a week-long pre-deployment training in Lexington, Kentucky. Though preoccupied with training and other

activities with his fellow soldiers most of the day, Zulawski spent his evenings at a hotel using his Google Pixel cell phone to solicit sexual encounters online.

On January 15, 2018, Detective Heather D'Hondt with the Kentucky Attorney General's office posted an advertisement on Craigslist under the heading "[t]aboo/incest mom in Lex for 2 days only[.]" (PSR, R. 141, PageID 1856.) D'Hondt's advertisement described her as a 30-year-old divorced "mom" "[l]ookin for serious inquires" to engage in "taboo/incest" with her and her "two guests." (*Id.* at PageID 1856, 1858–70.) Zulawski responded to the advertisement, claiming that he "[a]bsolutely love[d] incest" and "always had an interest in seeing it or experiencing it for real." (*Id.* at PageID 1857.) D'Hondt replied to his message the next day. She clarified that her "two guests" were her 11-year-old daughter and 13-year-old son. She then initiated a conversation with Zulawski on the instant messenger application, Kik.

D'Hondt and Zulawski discussed meeting for sex. When D'Hondt reiterated that she intended to bring her children with her, he said "[t]hat sounds like it would be hot =)" and asked if she felt "comfortable sending pics." (*Id.* at PageID 1859.) D'Hondt replied "I can send selfies, [but] I don't do nudes till I meet." (*Id.*) She sent pictures of herself and the children—who, unbeknownst to Zulawski, were also law enforcement officials—and Zulawski complimented the family, calling her "absolutely gorgeous" and the children "[a]dorable." (*Id.* at PageID 1859–60.) The two discussed their "hard limits" for sexual activity, and Zulawski eventually asked "what/how/where would you like to do this." (*Id.* at PageID 1860.)

Though Zulawski offered to host the family in his hotel room, D'Hondt requested they meet at a neutral location instead. She asked Zulawski to clarify whether he was "wanting all of us" or "just certain ones," to which Zulawski replied that he "[f]igure[d] you and me could watch them go at it while we play and then me and ur son use you both[.]" (*Id.* at PageID 1861.)

Zulawski wrote that he was "pretty excited for this" and asked whether the "[k]ids [were] as excited as we are." (*Id.* at PageID 1863.) D'Hondt confirmed that they were, especially her son. Zulawski asked how the children came to be involved in taboo sexual activity. She told him "[s]ince 4 and 6." (*Id.* at PageID 1864.) He responded "Awesome =)[.]" (*Id.*) She then asked Zulawski: "So you're serious. Not wasting my time?" (*Id.*) Zulawski replied he was "[d]ead serious" and he had "never found a taboo family before," confessing he had "always wanted to find one to watch and play with." (*Id.* at PageID 1865.) He described their planned encounter as "a dream come true =)[.]" (*Id.*) They agreed to meet on January 17, 2018.

The day of their intended rendezvous, Zulawski and D'Hondt discussed how excited they were for that evening. Zulawski confirmed that they were "definitely" still on and he "[couldn't] wait" to meet. (*Id.* at PageID 1867–68.) The two also discussed logistics, including the 11-year-old's latex allergy and the location of their meeting. Before Zulawski began the roughly 30-minute drive to Frankfort, Kentucky, D'Hondt warned him to "[b]e careful" driving due to the wintery weather. (*Id.* at PageID 1869.) Zulawski arrived at the arranged hotel just before 7 p.m.

Zulawski was arrested just outside of the hotel room where he was supposed to meet D'Hondt and her children. Officers seized the phone Zulawski used "to do all [his] talking, texting, and emailing"—the Google Pixel—and retained it for examination. (*Id.* at PageID 1873–74.)

When asked why he had come to Frankfort, Zulawski initially said that he was responding to an advertisement for "a mother who had . . . sexual relations with her child, with her children" and it "interest[ed] [him] a little bit." (*Id.* at PageID 1873.) But then, his story changed. He claimed that he had previously helped children "that ha[d] been subjected to" "stuff like this" when he worked as an EMT. (*Id.* at PageID 1873–74.) According to Zulawski, he hoped to "talk some sense into the mother" after "build[ing] some rapport." (*Id.* at PageID 1874–75.) Zulawski then

told the officers he had a wife, a 9-year-old stepdaughter, and a 2-year-old daughter. The next day, D'Hondt asked Christian County's Department of Community Based Services to check in on Zulawski's children. Because Zulawski was currently on active duty, D'Hondt also notified the Army of Zulawski's arrest.

After D'Hondt called, the Army's Criminal Investigative Division went to Zulawski's residence at Fort Campbell to investigate. Zulawski's wife then gave investigators permission to search their home. During the consent search, investigators noticed a cell phone in a locked cage in the garage. Zulawski's wife claimed it was her husband's phone and he had it on him before leaving for Lexington. They then sought, obtained, and executed a warrant from a military magistrate to search and seize the "cage phone."

Once law enforcement officials decided to prosecute Zulawski in civilian courts, Army investigators surrendered the cage phone to individuals in the Kentucky Attorney General's office. As an additional precaution, the Attorney General's office also sought a warrant from a state magistrate in Franklin County to search the phone's contents and the contents of 12 other electronic devices found in Zulawski's home. To support probable cause, D'Hondt swore an affidavit detailing: (1) the events leading up to Zulawski's arrest; (2) the Army's seizure of the cage phone; and (3) her communications with the Christian County Department of Community Based Services, which had advised her that Zulawski's 9-year-old stepdaughter had recently told authorities he had sexually abused her. Specifically, Zulawski's stepdaughter told officials that Zulawski made her lie on a bed naked and then used his cell phone to photograph himself touching her "no no square." (Mot. to Suppress (Attorney General Warrant), R. 31-5, PageID 555.) She also accused Zulawski of taking a photograph of her while she was unclothed after a shower.

The Franklin County magistrate authorized the search of the electronics and their contents. The Attorney General's office conducted a forensic search of the cage phone, obtaining a series of sexually explicit chats between an anonymous user and several other individuals claiming to be minors.

Zulawski was indicted on state charges in Franklin County Circuit Court five days after his arrest. Officials dismissed those charges in May 2018, after the United States Attorney's Office for the Eastern District of Kentucky charged him under 18 U.S.C. § 2422(b) for attempting to entice a minor to engage in unlawful sexual activity. Zulawski pleaded not guilty.

B. Procedural History

Before trial, Zulawski moved to suppress the evidence obtained from the cage phone by attacking the probable cause foundation of both warrants. As to the Army warrant, Zulawski principally argued that the warrant contained an intentionally false statement: namely, that he told his mother that "any evidence against him would be found on his old cellular devices." (Mot. to Suppress, R. 31, PageID 259–60 (quoting Mot. to Suppress (Army Warrant), R. 31-5, PageID 545).) He claimed that inaccuracy merited a *Franks* hearing and the warrant was void for lack of probable cause. He then argued that the deficiencies in the Army warrant doomed the Attorney General warrant because the latter relied on the former. He also contended that the Attorney General warrant lacked a sufficient nexus between the alleged criminal conduct and the cage phone, so it plainly lacked probable cause.

After the parties presented witnesses and arguments at a hearing, the magistrate judge recommended that the district court deny Zulawski's motion to suppress. *See United States v. Zulawski*, No. 3:18-CR-005-GFVT-MAS, 2019 WL 7594181, at *8 (E.D. Ky. Aug. 26, 2019). The magistrate judge also recommended denying Zulawski a *Franks* hearing because he failed to

demonstrate that the statement paraphrasing his jail phone call to his mother was intentionally or even recklessly misleading. *Id.* at *4–5. Instead, the magistrate judge reasoned that "[t]he various law enforcement officers in this case ended up in a proverbial game of 'telephone' wherein the exact wording of Zulawski's statements to his mother was lost." *Id.* at *4. The magistrate judge then concluded that the Attorney General warrant was supported by probable cause because the stepdaughter's allegations—coupled with the underlying crime—supported searching the cage phone for evidence. *Id.* at *5–6. The district court largely adopted the magistrate judge's recommendations over Zulawski's objections, denying his motions to suppress and his request for a *Franks* hearing. *See United States v. Zulawski*, No. 3:18-CR-005-GFVT-MAS, 2019 WL 5388524, at *4–5 (E.D. Ky. Oct. 22, 2019).

After the district court denied his suppression motion, Zulawski filed numerous objections to the government's evidence in the run-up to trial, including a motion in limine to exclude the sexually explicit text messages from the cage phone. Zulawski argued these conversations were inadmissible because they were hearsay, improper res gestae evidence, and impermissible character evidence. The government opposed, and the district court granted the motion in part, limiting the introduction of the cage phone text messages to "just that section that addresses the age" of the purportedly underage users. (Trial Tr. Day 1, R. 159, PageID 2795–97.) The court also allowed the government to put the sexual nature of the conversations "into context." (*Id.*)

Before trial, the government also advised Zulawski that it intended to admit eight text chats from Zulawski's Pixel phone into evidence. For the most part, these conversations occurred during Zulawski's time in Lexington and showed his attempts to schedule sexual encounters with strangers while there. Zulawski raised no objection to the introduction of these messages before or during trial.

At trial, Zulawski testified in his own defense and claimed he was not a party to the cage phone conversations. But after a three-day trial and four hours of deliberation, the jury returned a guilty verdict. Less than two weeks later, Zulawski moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. After "[w]eighing the evidence in favor of the prosecution," the district court held a reasonable juror could conclude that Zulawski committed the charged crime beyond a reasonable doubt. (Mot. for J. of Acquittal Or., R. 108, PageID 1164–66.)

As Zulawski's case proceeded to sentencing, the presentence investigation report ("PSR") ultimately recommended a two-point sentence enhancement for obstruction of justice based on Zulawski's testimony that he did not send the text messages on the cage phone. Zulawski objected to the enhancement, arguing that there was insufficient evidence to support that he knew he was testifying falsely. But the district court concluded that the government had shown by at least a preponderance of the evidence that Zulawski was the one texting from the cage phone, and consequently, the obstruction enhancement was justified. The court adopted the PSR without modification.

Although the court's sentencing calculation rendered a range of 292 to 365 months, it reduced Zulawski's sentence to 192 months in light of Zulawski's age, military service, and non-violent status. "A significant period of incarceration is required due to the harm to the community," the court wrote, but "[i]ncarceration is not necessary to protect the public." (PSR, R. 142-1, PageID 1919.) Rather, "[t]he defendant needs help[,] and resources will be provided to him while incarcerated and while on supervised release." (*Id.*) Zulawski appealed.

II. ANALYSIS

On appeal, Zulawski asks this court to vacate his conviction and remand for further proceedings for four reasons. First, he argues the district court erred when it denied his request for a *Franks* hearing and his motion to suppress the contents of the cage phone. He claims that he made the showing required to merit a *Franks* hearing and he attacks both warrants' probable cause. Next, he asserts that the lower court erred by admitting the cell phone evidence from the cage and Pixel phones under Rule 404(b), Rule 403, and other rules of evidence. He contends that the cumulative effect of these errors violated his due process right to a fair trial, so he requests a new one. He also argues that the district court erred by denying his motion for judgment of acquittal because there was insufficient evidence of his intent. And finally, even if his conviction withstands scrutiny, he requests we remand for resentencing because the district court improperly applied an obstruction of justice enhancement to his sentence. We consider each in turn.

A. Motion to Suppress/Franks Hearing

We review a "district court's denial of a *Franks* hearing under the same standard as for the denial of a motion to suppress: the district court's factual findings are reviewed for clear error and its conclusions of law are reviewed de novo." *United States v. Bateman*, 945 F.3d 997, 1007 (6th Cir. 2019) (internal quotations and citations omitted).

The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. Const. amend IV. Generally, searches that occur pursuant to a valid warrant are per se reasonable. *United States v. Crawford*, 943 F.3d 297, 305 (6th Cir. 2019). "For a warrant to be validly issued, however, it must have been based on 'probable cause' justifying the search." *Id.* (citation omitted). Probable cause requires "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Normally, affidavits explaining the basis for probable cause are afforded "a presumption of validity." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). But if probable cause is predicated on intentionally false information, it invalidates the warrant and a court can suppress the evidence gleaned from its execution through a *Franks* hearing. *Crawford*, 943 F.3d at 309. "A defendant is entitled to a *Franks* hearing if he: 1) makes a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement or material omission in the affidavit; and 2) proves that the false statement or material omission is necessary to the probable cause finding in the affidavit." *United States v. Young*, 847 F.3d 328, 348–49 (6th Cir. 2017) (internal quotations and citation omitted). "This substantial showing is necessary because a challenge to the veracity of the search warrant affidavit must overcome the presumption that the affidavit is valid." *United States v. Rodriguez-Suazo*, 346 F.3d 637, 648 (6th Cir. 2003).

Zulawski challenges the validity of both the Army warrant and the Attorney General warrant. Much like he did below, he argues he made a sufficient showing that the Army warrant's probable cause was based entirely on an intentionally misleading paraphrase of a conversation between him and his mother following his arrest. Consequently, he claims the district court erred by denying his request for a *Franks* hearing. Along the same vein, he argues the Attorney General warrant lacked sufficient probable cause because his 9-year-old stepdaughter's allegations of sexual abuse against him were too unreliable and they lacked a sufficient nexus to the charged crime in any event. Accordingly, the evidence obtained from that search—specifically the contents of the cage phone—should have been suppressed. We disagree with Zulawski on both fronts.

1. Franks Hearing Denial

First, the district court properly concluded Zulawski was not entitled to a *Franks* hearing because he failed to make a substantial showing that the Army warrant contained statements made with intentional or reckless disregard for the truth. The Army warrant included (1) details from the underlying investigation, including that Zulawski was suspected of "communicat[ing] via his mobile device that he 'wanted sex' with an 11 and 13 (y/o) son and daughter"; (2) information from Zulawski's wife, specifically her acknowledgment that the cage phone was "one of [Zulawski's] old cellular phones" and he had it "on him before leaving"; and (3) a statement paraphrasing a phone call between Zulawski and his mother after his arrest that "SGT Zulawski told his mother that any evidence against him would be found on his old cellular phones." (Mot. to Suppress (Army Warrant), R. 31-5, PageID 545.)

The magistrate judge concluded—and the district court agreed—that Zulawski made a preliminary showing sufficient to satisfy *Franks*' second prong because "Zulawski's statement about the 'evidence' on old cellular phones clearly supported the probable cause to issue the [Army] Search Warrant." *Zulawski*, 2019 WL 7594181, at *3; *see Zulawski*, 2019 WL 5388524, at *2–3. The government does not contest that determination on appeal. Assuming without deciding that was correct, the only question before us then is whether Zulawski made a substantial showing that the Army warrant contained statements made with intentional or reckless disregard for the truth. *Young*, 847 F.3d at 348–49. To do so, he must "point to specific false statements" and "accompany his allegations with an offer of proof." *United States v. Cummins*, 912 F.2d 98, 101 (6th Cir. 1990) (internal quotations and citation omitted). Even then, it is insufficient to show that some of the information contained in the search warrant is false. *Rodriguez-Suazo*, 346 F.3d at 648. Rather, the defendant must show by a preponderance of the evidence that the affiant

"*intentionally* or *recklessly* misrepresented facts in order to secure the search warrant." *Id.* (emphasis added).

Zulawski failed to carry his burden here. True, the statement in the affidavit was "not a precise recitation of his statements on the jail calls." *Zulawski*, 2019 WL 7594181, at *4, *adopted in relevant part by* 2019 WL 5388524, at *3. It did, however, "capture[] the essence of Zulawski's statement[s]." *Zulawski*, 2019 WL 7594181, at *4 *adopted in relevant part by* 2019 WL 5388524, at *3.

As the lower court stressed, there were "several law enforcement agencies, military and civilian," involved in this investigation. *Zulawski*, 2019 WL 7594181, at *4 *adopted in relevant part by* 2019 WL 5388524, at *3. At the suppression hearing, a Franklin County Regional Jail investigator testified that he called D'Hondt after listening to conversations between Zulawski and his mother. The investigator told D'Hondt that Zulawski had expressed concern about investigators finding an old cellular phone, a laptop, and unregistered weapons in his home. After the investigator called her, D'Hondt testified that she phoned her Army contacts and told them "there would be devices at his home that had evidence possibly." (Suppression Hr'g Tr., R. 52, PageID 369.) Ultimately, that became "SGT Zulawski told his mother that any evidence against him would be found on his old cellular phones." (Mot. to Suppress (Army Warrant), R. 31-5, PageID 545.)

Zulawski also argues that call logs show D'Hondt was listening to his phone calls contemporaneously, so any oversimplification on her end was reckless at the very least. But even if D'Hondt had listened to the phone calls contemporaneously, that does not show or prove that the paraphrased statements of the jail calls were misleading or untrue. Rather, it is consistent with the reality that warrant affidavits "'are normally drafted by nonlawyers in the midst and haste of a

criminal investigation.'" *United States v. Brooks*, 594 F.3d 488, 490 (6th Cir. 2010) (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)). For this reason, although an affidavit's "sloppiness may raise flags," it is normally not "fatal" to the warrant itself. *Id.* Because Zulawski failed to produce evidence that D'Hondt "intentionally or recklessly misrepresented facts in order to secure the search warrant," the district court correctly denied his request for a *Franks* hearing. *See Rodriguez-Suazo*, 346 F.3d at 648. And, even if the statement was intentionally or recklessly misleading, the subsequent Attorney General warrant resolved any concerns with the Army warrant.

2. The Attorney General Warrant

Zulawski also contests the probable cause foundation of the Attorney General warrant, acquired after the authorities involved determined that Zulawski would be prosecuted through civilian courts. The warrant requested authorization to seize 13 electronic devices—including the cage phone—and search the contents of each. Probable cause for this warrant relied in part on Zulawski's stepdaughter's claim that he had sexually abused her. In his suppression motion, Zulawski argued that this warrant was invalid because his stepdaughter's allegations were not sufficiently credible to support probable cause, and even if they were, they lacked a sufficient nexus to the sting operation to support a search of the cage phone. Again, we disagree.

Zulawski principally relies on *Wesley v. Campbell*, 779 F.3d 421 (6th Cir. 2015), to suggest his stepdaughter's history of behavioral issues rendered her unreliable and her allegations against him suspect. In *Wesley*, we addressed whether the plaintiff's complaint "stated a claim for false arrest" under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 429–30. Accepting the plaintiff's allegations as true, we concluded that a counselor's arrest for the sexual assault of a 7-year-old student 84 days after the allegations were made was without probable cause because the student's

allegations were unreliable for reasons that became apparent in the weeks after the accusations were made. 779 F.3d at 424–26, 430. These reasons alleged in the complaint included the fact that the place where the abuse allegedly occurred was "within the line of sight of other adult staff members" at the school, the student's medical examination "showed no evidence consistent with his allegations of sexual abuse," and the officer's own investigation "failed to uncover any evidence corroborating any aspect of the abuse [he] alleged." *Id.* at 430.

Zulawski's argument, however, fails to appreciate the significant differences between that case and the facts presented here. For one thing, Zulawski's stepdaughter alleged that he photographed her in private, rather than a public-facing office. *Cf. Wesley*, 779 F.3d at 424–25. For another, the aftereffects of the conduct alleged—taking photographs of himself inappropriately touching her while she laid on the bed unclothed—would not have been evident through a medical examination. *Cf. id.* at 430. And even then, the warrant here was to support a search of Zulawski's devices—not his arrest, as in *Wesley*—because he was already in custody. As we recently explained, "[t]he probable-cause standard applies differently in different contexts." *United States v. Baker*, 976 F.3d 636, 645 (6th Cir. 2020). "The test for an arrest asks whether there is a reasonable ground for belief of guilt specific to the suspect." *Id.* (internal quotations and citation omitted). The probable cause standard for *searches*, though, requires courts to ask "whether a nexus exists between a crime and the place to be searched and whether information in an affidavit is sufficiently timely to think that the sought-after evidence still remains at the identified location." *Id.* at 645–46 (internal quotations and citation omitted).

That brings us to Zulawski's second argument: that his stepdaughter's allegations lacked a sufficient nexus to the sting operation to support a search of the cage phone. It fares no better than the first. As Zulawski notes, for probable cause to exist, there must be "a nexus between the place

to be searched and the evidence sought." *United States v. Rose*, 714 F.3d 362, 366 (6th Cir. 2013). To establish that nexus, "there must be reasonable cause to believe that the items sought are located on" (or within) the item to be searched. *Id.*

Zulawski argues that because the sting operation produced no evidence that he viewed or created child pornography, there was no nexus between it and his stepdaughter's allegations. What he fails to appreciate, however, is that the warrant was not specifically limited to the sting operation. Rather, it sought to search and seize 13 specifically named electronic devices that could "tend[] to show that a crime has been committed." (Mot. to Suppress (Attorney General Warrant), R. 31-5, PageID 554.) Because his stepdaughter's allegations were sufficiently credible, the affidavit included evidence that Zulawski had committed another crime: producing child pornography with an electronic device. Consequently, the officers had sufficient probable cause to search Zulawski's phone. *See United States v. Neuhard*, 770 F. App'x 251, 253 (6th Cir. 2019) *cert. denied*, 140 S. Ct. 570 (2019).

Since both warrants were properly supported by probable cause, we affirm the district court's denial of Zulawski's request for a *Franks* hearing and his motion to suppress.

B. Admissibility of the Cage Phone Chats

After his motion to suppress was denied but before trial began, Zulawski objected to the admission of the contents of the cage phone. The district court granted the motion in part, mostly limiting the conversations to the individuals' ages. On appeal, Zulawski argues that this was an error because the cage phone chats should have been excluded in full under Rule 404(b) and Rule 403 of the Federal Rules of Evidence. Because Zulawski objected to the admission of this evidence at trial, we review the district court's decision to introduce it under three different standards of review: "(1) for clear error the district court's determination that the other act took place; (2) de

novo for the district court's legal determination that the evidence was admissible for a proper purpose; and (3) for an abuse of discretion the district court's determination that the probative value of the other acts evidence is not substantially outweighed by its unfairly prejudicial effect." *United States v. Emmons*, 8 F.4th 454, 473 (6th Cir. 2021) (internal modifications, quotations, and citation omitted). "The decision to admit relevant but potentially unfairly prejudicial evidence is a nuanced one traditionally committed to 'the sound discretion of the trial court.'" *United States v. France*, 611 F. App'x 847, 850 (6th Cir. 2015) (quoting *United States v. Zipkin*, 729 F.2d 384, 389 (6th Cir. 1984)).

Zulawski mounts both procedural and substantive attacks on the district court's decision to admit the cage phone chats. Procedurally, he argues the district court erred by not making an explicit finding that Zulawski was a party to the cage phone conversations. Substantively, Zulawski contends the cage phone chats were not probative of any permissible evidentiary purpose under Rule 404(b) and, in any event, their prejudicial effect substantially outweighed their probative value under Rule 403. Neither argument carries the day.

The relevant inquiry is "whether 'there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.'" *United States v. Yu Qin*, 688 F.3d 257, 262 (6th Cir. 2012) (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988)). And here, there was. The district court admitted the cage phone chats only after it had spent a significant amount of time reviewing them. Even before trial, the district court contemplated the admissibility of these chats through a motion to suppress and a motion in limine. The court had the benefit of full briefing on the issues and a magistrate judge conducted a hearing—with witnesses—on the cage phone's contents. The district court's exhaustive contemplation of the admissibility of the cage phone chats

gives rise to the inference that the district court found he was a party to the conversations, even if it did not explicitly say so. *See United States v. Lattner*, 385 F.3d 947, 956 (6th Cir. 2004).

Zulawski's substantive objections fare no better. The government introduced the cage phone texts to demonstrate Zulawski's interest in pursuing sexual relations with minors and his intent to entice D'Hondt's children to engage in unlawful sexual conduct with him the night of the sting operation. Assuming for the purposes of argument that he was a party to the chats, Zulawski argues that they were not probative of his intent for two reasons. First, he notes that the age of consent in Kentucky is 16. Because § 2422(b)'s language reaches only conduct that would be unlawful under the law of the state where it would have occurred, conversations between him and anyone over 16 would not be probative. Second, he contends that the cage phone chats were neither substantially similar to the charged crime nor reasonably near in time because they did not involve an adult intermediary and they occurred 14- to 16-months before his arrest.

As to Zulawski's first argument, the district court correctly noted that the probative value here does not turn on whether the anonymous users were *actually* underage—what matters is that Zulawski *believed* them to be, and yet continued to pursue them. Other courts have confirmed that evidence like this is admissible in § 2422(b) cases to show "intent, or lack of mistake, in arranging sex with a minor," even when the communication involved is separate from the charged conduct. *United States v. Cooke*, 675 F.3d 1153, 1157 (8th Cir. 2012) (concluding a sexually explicit email chain between the defendant and a purportedly 16-year-old Craigslist user was admissible under Rule 404(b) to show intent to entice a 13- and 15-year-old); *see also United States v. Harmon*, 593 F. App'x 455, 460 (6th Cir. 2014) (holding defendant's claims that he had previously engaged in sexual acts with minors were admissible under Rule 404(b) to show state of mind). The

statements' truth was insignificant—only the evidence of the perpetrator's intent was. *Harmon*, 593 F. App'x at 460.

It is irrelevant, moreover, whether the government proved that the prior conversations occurred or were unlawful under the law of a particular jurisdiction. *See Huddleston v. United States*, 485 U.S. 681, 686–89 (1988) (holding that Rule 404(b) does not require "a preliminary finding by the trial court that the act in question occurred"). Indeed, other courts have determined technically lawful conversations with individuals under 18 are still probative of a defendant's intent to engage in sexual activity with those even younger. *See, e.g.*, *United States v. Dhingra*, 371 F.3d 557, 566 (9th Cir. 2004) (reasoning defendant's prior communications with a 17-year-old were "highly probative" of his intent to engage in sex with a 13-year-old, notwithstanding the fact that "it was legal to engage in sexual activity with a 17-year-old" in New Mexico).

Zulawski's second argument—that the chats were neither substantially similar nor reasonably near in time to be probative—is equally unpersuasive. He suggests that because the cage phone chats involved no adult intermediaries and contained only generalized discussions of sexual activity with no concrete plans to meet, they lack a substantial similarity to the charged crime. But we have repeatedly held that "there is no requirement that the prior act must be identical in every detail to the charged offense." *United States v. LaVictor*, 848 F.3d 428, 447 (6th Cir. 2017) (internal quotations and citation omitted). Instead, the prior acts need only be "part of the same scheme or involve a similar *modus operandi* as the present offense." *Emmons*, 8 F.4th at 475 (internal modification, quotations, and citation omitted). In each of the cage phone chats, Zulawski is flirtatious, unfailingly persistent (and flexible), and extremely complimentary of the other after he initiates a photo exchange. The parallels between the cage phone chats and the conversation with D'Hondt are substantially similar.

Finally, Zulawski's argument that the time between the cage phone chats and his arrest renders the cage phone conversations less probative is not supported by case law. Under our precedent, "there is no absolute maximum number of years that may separate a prior act and the offense charged." *LaVictor*, 848 F.3d at 447 (internal quotations and citation omitted). Indeed, the 16-month span between the start of cage phone chats and Zulawski's arrest is quite near in time comparatively. *See, e.g.*, *Emmons*, 8 F.4th at 476 (uncharged conduct in 2011 was "reasonably near in time" to 2014 offense); *United States v. Hardy*, 643 F.3d 143, 152 (6th Cir. 2011) (observing this court has previously allowed four-year-old prior act evidence). Again, Zulawski's arguments come up short.

That leaves the Rule 403 balancing. To be admissible under Rule 404(b), the probative value of the cage phone chats cannot be substantially outweighed by its potentially prejudicial effect. Again, the district court retains "very broad discretion" in making this determination and we "take[] a maximal view of the probative effect of the evidence and a minimal view of its unfairly prejudicial effect," meaning we "will hold that the district court erred only if the latter outweighs the former." *United States v. Libbey-Tipton*, 948 F.3d 694, 701 (6th Cir. 2020) (internal quotations and citations omitted).

Zulawski argues that the portions of the cage phone conversations admitted were unnecessarily lurid and inflammatory and could have influenced the jury to convict him because they disapproved of sexually explicit conversations or because he was unfaithful to his wife. And—for the first time—he also argues the court's limiting instruction to the jury was insufficiently particularized. Here, however, the district court spent a considerable amount of time considering whether to admit the contents of the cage phone. When it did, the district court ordered the government to redact irrelevant portions—and even then, it double-checked that the

government complied with its order. The district court used its broad discretion to admit the evidence, but only for the relevant, permissible purpose it identified.

Additionally, the district court reinforced the evidence's limited use just before deliberations, when it instructed the jury to consider the cage phone texts only for Zulawski's "intent or motive, preparation, plan, knowledge, or identity." (Trial Tr. Day 3, R. 158, PageID 2649.) Together, the district court and the parties considered the court's pattern language for Rule 404(b) jury instructions and eliminated the irrelevant purposes (such as opportunity, absence of mistake, or absence of accident). At that point, Zulawski was amenable to the instruction provided. Though he now argues the court's jury instruction was improper because it did not sufficiently focus the jury's attention on the disputed issue, Zulawski cannot establish plain error because "[o]ne use listed by the jury instructions"—intent—"was actually at issue," which "compel[s] the conclusion that the district court did not commit plain error." *United States v. Newsom*, 452 F.3d 593, 606 (6th Cir. 2006). The cage phone chats were properly admitted under Rule 404(b).

C. Admitting Evidence from the Pixel Phone

For the first time on appeal, Zulawski argues that the Pixel phone chats also should have been excluded from trial. He argues the chats (1) do not qualify as res gestae; (2) are not probative of a material non-character issue under Rule 404(b); and (3) carry prejudicial effects that substantially outweigh their probative value. He also argues the Pixel phone's browser history was erroneously admitted, although again, he did not object to its admission at trial. Because Zulawski raised no objection below, we review the admission of both pieces of evidence for plain error. *United States v. Cromer*, 389 F.3d 662, 672 (6th Cir. 2004). To establish plain error, Zulawski must show "(1) error (2) that was obvious or clear, (3) that affected defendant's

substantial rights and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Wallace*, 597 F.3d 794, 802 (6th Cir. 2010). This, he cannot do.

At the top, Zulawski argues that the Pixel phone chats are neither res gestae evidence nor probative of any permissible non-character purpose. He also contends their admission was procedurally deficient because the district court failed to make the necessary findings to introduce the evidence for one of those purposes, though he cites no case law in support of that contention. The evidence need only be admissible as either res gestae or under Rule 404(b) for the district court's decision to survive his challenge—either one is sufficient to merit its introduction. *See, e.g.*, *Emmons*, 8 F.4th at 473–74; *United States v. Ramer*, 883 F.3d 659, 671 n.1 (6th Cir. 2018) ("Because we conclude that the evidence was admissible under Rule 404(b), we need not examine its admissibility as *res gestae*."). But even if the evidence is admissible, however, it must be properly admitted under Rule 403. *See United States v. Churn*, 800 F.3d 768, 779 (6th Cir. 2015).

Res gestae evidence—also known as background evidence or intrinsic evidence—is admissible "in limited circumstances" at trial "when the evidence includes conduct that is 'inextricably intertwined' with the charged offense." *Id.* (citation omitted). The evidence must have a "causal, temporal, or spatial connection with the charged offense." *Id.* (citation omitted). This tends to include evidence that "is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of the witness's testimony, or completes the story of the charged offense." *Id.* (internal quotations and citations omitted). The Pixel chats' close temporal and spatial proximity is undisputed. Consequently, the parties mainly contest whether the Pixel chats sufficiently relate to the charged offense or whether they have any other probative value.

Zulawski argues the Pixel chats are not a "prelude" to the § 2422(b) charge because they purportedly transpired between consenting adults. His argument, however, is both speculative and immaterial. Much like the cage phone chats, none of the users' ages were verified. But even more to the point, the lawfulness of the underlying conduct does not matter because "even unindicted activity can be 'inextricably intertwined' with the actual charges." *Churn*, 800 F.3d at 779.

As we have observed, "[t]he jury is entitled to know the setting of a case. It cannot be expected to make its decision in a void–without knowledge of the time, place and circumstances of the acts which form the basis of the charge." *United States v. Vincent*, 681 F.2d 462, 465 (6th Cir. 1982) (internal quotations and citation omitted). With that in mind, these chats served to complete the story behind Zulawski's charged offense in several ways. For one thing, the timing (and explicit content) of Zulawski's messages suggest he was singularly focused on finding sexual partners, rather than planning a rescue mission (as he claims). As the government highlights, Zulawski's messages show he was flirting with another stranger within minutes of the point when he claims to have figured out that D'Hondt was abusing her children, requiring his intervention. For another, Zulawski's discussions with others about the winter weather and severe road conditions highlight what a significant step it was for him to then drive twenty-seven miles to meet the family for sex. Because we conclude the evidence was admissible under res gestae, we need not consider whether it was admissible under 404(b). *Emmons*, 8 F.4th at 473–74.

Finally, the evidence was properly introduced under Rule 403. *See Churn*, 800 F.3d at 779. The conversations admitted—lurid as they may be—all pertain to Zulawski's intent to engage in sexual acts. Thus, they carry "legitimate probative force" to the charge of attempted enticement under § 2422. *Newsom*, 452 F.3d at 604 (citation omitted). Consequently, they do not surmount the "high standard of review" reserved for reversing a district court's Rule 403 calculation. *Id.*;

see also United States v. Asher, 910 F.3d 854, 860 (6th Cir. 2018) (noting "[t]he test is strongly weighted toward admission").

For the foregoing reasons, the district court did not err by introducing any of the contested evidence. Consequently, Zulawski's request to remand for a new trial under the cumulative error doctrine falls flat because "[w]here . . . no individual ruling has been shown to be erroneous, there is no 'error' to consider, and the cumulative error doctrine does not warrant reversal." *United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012).

D. Sufficiency of the Evidence

Following trial, Zulawski moved for judgment of acquittal under Federal Rule of Criminal Procedure 29, arguing that the government failed to prove Zulawski intended to entice the minors to engage in unlawful sexual acts. We review the denial of a motion for judgment of acquittal de novo. *United States v. Howard*, 947 F.3d 936, 947 (6th Cir. 2020). The question before the court is "whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citation omitted). The jury's verdict receives "the benefit of all inferences which can reasonably [be] drawn from the evidence, even if the evidence is circumstantial." *United States v. Rozin*, 664 F.3d 1052, 1058 (6th Cir. 2012) (citation omitted). The defendant bears the "very heavy burden," *United States v. Sease*, 659 F.3d 519, 523 (6th Cir. 2011) (internal quotations and citation omitted), of convincing us that the judgment against him "is not supported by substantial and competent evidence upon the record as a whole." *United States v. Barnett*, 398 F.3d 516, 522 (6th Cir. 2005) (citation omitted).

Zulawski was convicted of one count of attempting to entice a minor to engage in unlawful sexual activity under 18 U.S.C. § 2422(b). "To convict a defendant under § 2422(b), the government must show that the defendant (1) 'use[d] the mail or any facility or means of interstate

or foreign commerce'; (2) to 'knowingly persuade[], induce[], entice[], or coerce[]' or 'attempt[] to' persuade, induce, entice or coerce; (3) a person who the defendant believed to be under the age of eighteen; (4) 'to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense.'" *United States v. Vinton*, 946 F.3d 847, 852 (6th Cir. 2020) (citations omitted, alterations in original). Because Zulawski is charged with attempt, the government must show that he "intended to persuade or entice a minor to participate in unlawful sexual conduct" and "took a substantial step toward persuading or enticing a minor." *Id.* (citation omitted).

Of the essential elements, Zulawski argues only that the second—the intent to entice or persuade—is lacking. Specifically, he argues that the evidence against him was insufficient because it demonstrated only his "intent to engage in sexual contact with minors, not the 'clearly separate and different intent[]' to persuade" them to do so. (Appellant Br. at 20 (quoting *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000)).) He contends there were two main deficiencies in the prosecution's case: (1) a lack of evidence that he made any effort to use D'Hondt as an intermediary to gain the minor's assent and (2) no physical evidence that would suggest that he intended to persuade or entice the minors at the rendezvous. These arguments, however, find little support in our case law. In both *United States v. Roman*, 795 F.3d 511 (6th Cir. 2015) and *United States v. Vinton*, 946 F.3d 847 (6th Cir. 2020), we rejected a defendant's efforts to dismiss § 2422(b) indictments because we found that a defendant's communications with an adult intermediary could satisfy the statute's enticement requirement.

In *Roman*, the defendant posted an advertisement on Craigslist seeking to have sex with younger women. 795 F.3d at 513. A special agent responded, claiming to be a father who was sexually active with his 11-year-old daughter. *Id.* The two discussed the sexual acts the defendant

wished to perform with the minor and the defendant agreed to abide by any parameters her father set. *Id.* at 513–14. The defendant requested the minor's photograph, asked about the minor's sexual preferences, and asked what gifts he could bring with him to "break the ice." *Id.* at 514. When the defendant arrived at the meeting location with—among other things—the minor's favorite candy, he was arrested. *Id.*

We emphasized these facts when describing how the defendant satisfied § 2422(b)'s intent requirement. First, we explained the defendant's representations that he would be respectful of the minor and not cause her harm were designed to influence her father to help the defendant secure the minor's assent. *Id.* at 517–18. We then considered what steps the defendant took to secure the daughter's assent individually and found that the defendant's questions about her sexual and general preferences were also aimed at acquiring her assent. *Id.* at 518.

We built upon *Roman*'s foundation in *Vinton*. There, we reversed a district court's dismissal of a § 2422(b) indictment because we determined that the government could carry its burden on the intent requirement. *Vinton*, 946 F.3d at 849. Much like the instant case, the defendant corresponded with a purportedly 36-year-old mother about having sex with her and her 12-year-old daughter. *Id.* at 850. He asked in graphic detail about the sexual acts the daughter could and would perform and "suggested that the [mother] could help him be gentle with the girl and help him make sure the girl enjoyed the sexual encounter." *Id.* at 850–51, 855. Relying on *Roman*, the defendant asserted the indictment against him should be dismissed in part because he did not "use the adult intermediary"—in this case, the girl's mother—"as a messenger to convey the defendant's own enticing messages to the minor." *Id.* at 853.

We clarified that our decision in *Roman* does not require that a defendant use an adult intermediary as a messenger or that "the specific means of inducing or enticing the child must

come from the defendant himself." *Id.* Rather, it was sufficient for a defendant to "rel[y] on the expertise of the parent in determining how best to entice the child." *Id.* Ultimately, we stressed a reasonable juror could find that the defendant was "aware of the special influence of parents over their children" and intended to exploit it when the time came. *Id.* at 855. Accordingly, we reversed the dismissal of the indictment.

Although Zulawski's approach differed from both *Roman* and *Vinton* in material respects, the ultimate result is the same: a reasonable juror could find that he intended to rely on the expertise of the minors' mother to entice them into performing unlawful sexual activities. This saga began when Zulawski responded to an advertisement for "taboo/incest" with a 30-year-old divorced "*mom*." (PSR, R. 141, PageID 1856 (emphasis added).) He knew at the outset that she was related to the children and was thus likely "aware of the special influence" she had over them. *Vinton*, 946 F.3d at 855. This suspicion was likely only bolstered by D'Hondt's startling admission that the children had been engaging in incest since they were four and six years old. Then, reminiscent of *Roman*, Zulawski claimed to be free from sexually transmitted diseases to put the mother's mind at ease. *See* 795 F.3d at 517. He also agreed to abide by the mother's terms, even though that meant driving 30 miles on icy roads to meet the family at a neutral location. *Id.* at 514. And perhaps most importantly, much like *Roman* and *Vinton*, Zulawski asked about the minors' sexual histories and whether they were "as excited" for the rendezvous as the adults purported to be. (PSR, R. 141, PageID 1863); *Vinton*, 946 F.3d at 850–51; *Roman*, 795 F.3d at 513–14. Under these facts, a rational factfinder could determine Zulawski possessed the requisite intent.

Zulawski's second argument—that lack of physical evidence undermines his intent—is also unsupported. Although we noted that a reasonable jury *could* have concluded that Vinton brought cash with him to the meeting to help convince the minor to engage in sexual acts with

him, we by no means placed dispositive weight on this fact. *See Vinton*, 946 F.3d at 854. We are not the only court to arrive at this conclusion. Indeed, *United States v. Nitschke*, 843 F. Supp. 2d 4 (D.D.C. 2011)—the same case that Zulawski holds out as bolstering his first argument—severely undercuts his second. Though not binding on this court, *Nitschke* stresses § 2422(b) criminalizes "an intent to persuade *using a means of interstate commerce*" rather than "an intent to persuade at some later point in person." 843 F. Supp. 2d at 11 (emphasis added). Though physical evidence can certainly support an individual's intent to persuade, its absence does not present a bar to proving intent.

After affording the government the benefit of all inferences that can be drawn from the record, we conclude a reasonable juror could have found Zulawski intended to use D'Hondt to gain the minors' assent. We affirm the district court's denial of Zulawski's motion for judgment of acquittal.

E. Obstruction of Justice Sentence Enhancement

Finally, Zulawski argues that the district court improperly applied a two-level sentence enhancement for perjury because it did so without first finding that he falsely testified when he claimed he did not send the text messages on the cage phone. Although we have recently acknowledged that "[t]he precise standard of review for a district court's decision to impose the obstruction of justice enhancement is unclear," we need not resolve the dispute because Zulawski's challenge fails even under de novo review, the one most-favorable to him. *United States v. Bailey*, 973 F.3d 548, 572 (6th Cir. 2020) (citing *United States v. Thomas*, 933 F.3d 605, 608–10 (6th Cir. 2019)).

When a defendant has "willfully obstructed or impeded . . . the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction," his Total Offense Level is increased by two. U.S.S.G. § 3C1.1. "[C]ommitting, suborning, or attempting to suborn perjury" constitutes obstruction of justice for the purposes of the enhancement. U.S.S.G. § 3C1.1 cmt. 4(b). The parties agree that the district court must "identify those particular portions of the defendant's testimony that it considers to be perjurious" and "make specific findings for each element of perjury" to support the enhancement's application. *United States v. Sassanelli*, 118 F.3d 495, 501 (6th Cir. 1997) (citation omitted). Zulawski contends the district court failed to do either.

At the outset, Zulawski argues that the district court's identification of his allegedly perjurious statements was too general, but his contention is not supported by the record. First, the PSR explicitly stated that Zulawski obstructed justice when he testified that "he did not send previous text messages from [the cage] phone." (PSR, R. 141, PageID 1843.) Then, at the sentencing hearing, the government clarified that the enhancement rose and fell on the same. During the hearing, the district court described in detail what it understood the government's basis for an enhancement to be:

> [W]ith regard to that phone, there were text messages sent from a designation of anon, A-N-O-N, as well as text messages there were sent from – and – well, the question with that particular phone is whether that was in fact the defendant or somebody else. And the evidence that the government put on were – was based on the content of those text messages, which the government argues ties your client to those text messages, in essence, and, of course, he's denied that that was him, and the government says that is a willful lie; that's perjury, and it's a matter that's material here to the jury making their determination. So I think I've framed the issue; is that fair?

(Sentencing Tr., R. 162, PageID 2940.) All the parties agreed that this was correct. Consistent with that mutual understanding, defense counsel highlighted the specific portions of testimony in question:

> Mr. Zulawski addressed [whether he was the sender of the text messages] head-on at trial. . . . His response was he had two potential people that had access to [the phone], as well as anybody else that was in the home. . . . So anybody that knew his code into his phone or knew his Kik app name [was] zulu828, and had a picture, presumably could go in there and do exactly these text messages, and that was the client's testimony.
>
> . . .
>
> [W]hat Mr. Zulawski testified is, it could have been Ms. Zulawski, very upset with the whole situation and text, and put these text messages on there. But again, that was his testimony.

(*Id.* at PageID 2947–48.) And the court further specified the reason for the enhancement on the record:

> [T]he very specific fact [at issue] is, did he send these text messages or not? He knows whether he sent these text messages or not. And he may maintain that he didn't, but we have to kind of objectively look at it and determine whether or not his – you know, he's continuing to maintain that those text messages were his is in fact perjurious because the evidence shows that they could not have been someone else's.

(*Id.* at PageID 2943–44.) After "consider[ing]" Zulawski's "testimony under oath" and the government's evidence, the district court concluded that the government had demonstrated "by at least a preponderance of the evidence that that was [Zulawski] texting" and applied the enhancement. (*Id.* at PageID 2950–51.) Therefore, the record shows that the district court properly identified the perjurious portion of Zulawski's testimony for purposes of applying the enhancement. *See Sassanelli*, 118 F.3d at 501.

Zulawski's second argument—that the district court failed to make specific findings for each element of perjury—is also belied by the record. "Perjury is (1) a false statement under oath

(2) concerning a material matter (3) with the willful intent to provide false testimony." *United States v. Kamper*, 748 F.3d 728, 747 (6th Cir. 2014) (citation and internal quotation marks omitted). As we have explained, in an ideal world, the district court would explicitly "explain[] why the facts satisfied each element of perjury." *United States v. Thomas*, 272 F. App'x 479, 488 (6th Cir. 2008). We have, however, previously affirmed on less "so long as the record below is sufficiently clear to indicate . . . that the district court found that those statements satisfied each element[.]" *Sassanelli*, 118 F.3d at 501. The district court stated that it must "find those elements here." (Sentencing Tr., R. 162, PageID 2950.) The portions of the transcript excerpted above confirm that the district court found that Zulawski willfully gave a false statement under oath. The only question remaining, then, is whether the court found that the statements were material.

The record supports that it did. The district court acknowledged it was the government's contention that the identity of the person responsible for the cage phone texts was "a matter that's material here to the jury making their determination." (Sentencing Tr., R. 162, PageID 2940.) And the government agreed, explaining at length that the cage phone texts had every potential to "crumble [Zulawski's] case" by severely undermining his rescue defense and convincing the jury of his true intent. (*Id.* at PageID 2944–47.) Ultimately, the court concluded that "given the strength of what the government has identified, both in their written filings and then in the argument here in court," the enhancement properly applied. (*Id.* at PageID 2951.)

We have never required district courts to "parrot" back the government's recitation of the relevant facts so long as the court "makes clear that it has independently adopted the government's version" of events. *Sassanelli*, 118 F.3d at 501. And we will not start here, although we remind district courts of our court's explicit preference for making specific findings on the record. *See United States v. Roberts*, 919 F.3d 980, 990 (6th Cir. 2019). Because the district court properly

identified the perjurious portions of Zulawski's testimony and found each element of perjury satisfied, we affirm the district court's obstruction of justice enhancement.

III. CONCLUSION

We affirm the district court's judgments in full.

APPENDIX - B

En Banc / Panel Rehearing Denial

No. 20-5577

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 14, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL J. ZULAWSKI,

Defendant-Appellant.

ORDER

BEFORE: GUY, COLE, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Thapar recused himself from participation in this ruling.

Appendix - C

District Court's Denial of Acquittal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Crim No. 3:18-CR-00005-GFVT
	)	
V.	)	
	)	
DANIEL J. ZULAWSKI,	)	**ORDER**
	)	
Defendant.	)	
	)	

*** *** *** ***

In November 2019, Defendant Daniel Zulawski was tried on one count for attempting to use a facility of interstate commerce to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, in violation of 18 U.S.C 2422(b). After three days of trial, Zulawski was found guilty by a jury. He now seeks a judgment on the basis that the Government presented insufficient evidence at trial to sustain the conviction. [R. 104.] For the reasons set forth below, Zulawski's motion will be **DENIED**.

I

In May 2018, Daniel Zulawski, a former Sargent in the United States Army, was indicted by a federal grand jury and charged with one count of online solicitation of a minor. [R. 1.] Throughout January 2018, Mr. Zulawski was a soldier in an active-duty Army unit that was based in Fort Campbell, Kentucky. [R. 31-1 at 282.] Around mid-January, Mr. Zulawski traveled to Lexington, Kentucky for a temporary training duty. [*Id.*] On or about January 16, 2018, Zulawski responded to an online Craigslist advertisement that stated "Taboo/incest mom in Lex for 2 days only-w4mw (Lexington)." [*Id.*] Over the next couple of days, Zulawski exchanged messages through the Kik messenger application with Detective D'Hondt, who was

posing as a mother of two minor children, ages 11 and 13. [*Id.*] Zulawski agreed to a meeting in Frankfort, Kentucky at the Best Western Hotel, on the evening of January 17, 2018 with Detective D'Hondt and her children. [*Id.*] When the Defendant arrived at the hotel and knocked on the door, he was placed under arrest. [*Id.*]

The United States alleged that Zulawski attempted to persuade the children, through the purported mother, to engage in illegal sexual activity. [R. 104 at 1.] However, Mr. Zulawski maintains that he did not intend to entice or persuade the children to engage in illegal sexual activity, but instead his "intent was to obtain a meeting to confront the purported mother about this activity in hopes of getting her help." [*Id.* at 1–2.]

During the jury trial in November 2019, the United States introduced into evidence the initial Craigslist advertisement, Mr. Zulawski's response to the advertisement, and the subsequent Kik chat conversations. [R. 105 at 2.] Several messages found on Mr. Zulawski's smart phones were introduced into evidence. [*Id.*] The jury also heard Mr. Zulawski's interview with Detective D'Hondt after he was taken into custody. [*Id.*] Multiple jail calls between Mr. Zulawski and his spouse and mother following his arrest were also introduced into evidence and played for the jury. [*Id.*] Finally, Mr. Zulawski also testified on his own defense during trial in order to share his side of the story. [*Id.*]

At the conclusion of the trial, the jury convicted Mr. Zulawski for violating 18 U.S.C. § 2422(b). Now, Mr. Zulawski has filed a motion for acquittal on the grounds that a reasonable jury could not have found beyond a reasonable doubt that the communications between the Defendant and purported mother sought to overcome the will of the children based upon the substance of the text messages introduced into evidence. [R. 104 at 4.]

II

After a jury has reached a verdict, a defendant is permitted to file a motion for judgment of acquittal challenging the sufficiency of the evidence pursuant to Federal Rule of Criminal Procedure 29. *See* Fed. R. Crim. P. 29(a), (c). "A defendant making such a challenge bears a very heavy burden." *United States v. Tocco*, 200 F.3d 401, 424 (6th Cir. 2000). When undertaking such a review, the court "must decide whether, after viewing the evidence in a light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gardner*, 488 F.3d 700, 710 (6th Cir. 2007). Moreover, courts are precluded from weighing the evidence, considering witness credibility, or substituting its judgment for that of the jury. *United States v. Chavis*, 296 F.3d 450, 455 (6th Cir. 2002). "A judgment is reversed on insufficiency-of-the-evidence grounds 'only if [the] judgment is not supported by substantial and competent evidence upon the record as a whole.'" *Gardner*, 488 F.3d at 710 (quoting *United States v. Barnett*, 398 F.3d 516, 522 (6th Cir. 2005); *United States v. Beddow*, 957 F.2d 1330, 1334 (6th Cir. 1992)).

A

A person is guilty of committing coercion or enticement of a minor when the government shows that the defendant,

> us[ed] the mail[] or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuade[d], induce[d], entice[d], or coerce[d] any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempt[ed] to do so....

18 U.S.C § 2422(b). Since the minors in the case were fictional, Zulawski was charged with *attempting* to persuade a minor. To prove attempt, the government must show that (1) the defendant intended to persuade or entice a minor to participate in unlawful sexual conduct and

(2) the defendant took a substantial step toward persuading or enticing a minor. *United States v. Roman*, 795 F.3d 511, 517 (6th Cir. 2015).

With these legal standards in mind, the Court considers whether Defendant Zulawski is entitled to an acquittal. As stated above, Zulawski was charged and convicted of attempting to persuade or entice a minor in violation of 18 U.S.C § 2422(b). The crime of enticement of a minor has four elements. Mr. Zulawski challenges element two, which is that the Defendant intended to attempt to persuade a minor. [R. 105 at 5–7.] In addition, Zulawski argues that his actions did not constitute a substantial step towards persuading, enticing, inducing, or coercing a minor via a means of interstate commerce. [*Id.*] However, the Government adequately proved all elements and Zulawski is not entitled to the relief he seeks.

1

Mr. Zulawki recognizes the holding in *United States v. Roman* that "a defendant need not communicate directly with a minor to violate 2422(b); a defendant who works through an adult intermediary to persuade or entice a child still violates the statute." *United States v. Vinton*, 2020 WL 21165, at *10 (6th Cir. Jan. 2, 2020) (citing *Roman*, 795 F.3d at 516). However, Defendant argues that his communications through the text messages to the purported mother are not enough to prove that Zulawski "intended to seek to transform or overcome the will of a minor." [R. 104 at 6.] In *United States v. Vinton*, the Court rejected the Defendant's argument that the defendant must utilize the adult intermediary as a messenger to convey the defendant's own enticing messages to the minor. 2020 WL 21165, at *7. Therefore, the specific means of enticing the child does not have to come from the defendant himself and must not be directly to or directed at the minor. *Id.*

"The gravamen of the attempt offense under § 2422(b) is the intent to achieve the minor's assent." *Roman*, F.3d at 513. Following 6th Circuit precedent, assent can be accomplished through contacting the defendant directly, by sending the minor enticing messages through an adult intermediary, or even by enlisting an adult intermediary to persuade the minor. *Vinton*, 2020 WL 21165 at *12–13. Therefore, it does not matter whether Zulawski did not contact the children directly or indirectly in this case because assent can be reached by soliciting an adult intermediary to persuade the minor.

2

As previously stated, Mr. Zulawski was charged with attempting to persuade a minor. Therefore, the government must show two elements: (1) the defendant intended to persuade or entice a minor to participate in unlawful sexual conduct; and (2) the defendant took a substantial step toward persuading or enticing a minor. *Roman*, 795 F.3d at 517. Defendant argues that the communications and pictures between himself and the purported mother are not sufficient to satisfy the element of a substantial step. [R. 104 at 7.] The government disagrees because they argue that Defendant attempts to minimize the influential impact of Defendant's communications and actions. [R. 105 at 8.]

The Sixth Circuit has "described both communicating with an adult intermediary and traveling to meet the minor as a substantial steps under § 2422(b), if paired with the requisite intent to persuade or entice a minor." *Vinton*, 2020 WL 21165, at *9 (citing *Roman*, 795 F.3d at 517; *United States v. Harmon*, 593 F. App'x 455, 465 (6th Cir. 2014)). The Court noted that "engaging in communications with an adult intermediary who can exert influence to help achieve the child's assent" is an example of a substantial step. *Id.* (citing *Roman*, 795 F.3d at 517). Also, the Court has found a Defendant's arrival at the motel, which was the agreed upon meeting

place, to be "a substantial step that went beyond 'mere preparation'" that "satisfie[d] the requirement for attempt under 18 U.S.C. § 2422(b)." *Id.* (citing *Harmon*, 593 F. App'x at 465). Since Zulawski took both steps of communicating with an adult intermediary and traveling to meet the minors, "the substantial step element collapses into the intent element in this case." *Id.* Since a reasonable juror could conclude that Zulawski intended to persuade or entice the minors when he messaged the purported mother and he actually traveled to meet the mother and her children at a hotel, then Zulawski took a substantial step toward enticing a minor.

3

Weighing the evidence in favor of the prosecution, this Court concludes that a rational trier of fact could infer Zulawski committed the crimes he was charged with beyond a reasonable doubt pursuant to Fed. R. Crim. P. 29(a). Defendant disagrees with the government that ample evidence was produced at trial in order to establish a violation of § 2422(b). [R. 104 at 5.] After weighing the following evidence, this Court concludes that the government proved that Zulawski intended to persuade or entice the fictional minor children. Specifically, a juror could reasonably conclude that Zulawski communicated with the purported mother with the intent of using the mother's influence on her children to persuade the minors to have sex with him. *Vinton*, 2020 WL 21165 at *13.

A reasonable juror could find that Zulawksi responded to the purported mother's advertisement on Craigslist because he wanted to find minors for sex. Zulawski was the one who sent the first private message, responding to an advertisement from a thirty-year-old "mom" interested in "taboo/incest" who had two "guests" with her. [R. 105 at 6.] In his initial response to the advertisement, Zulawski shared personal information that seems to show an attempt to entice the mother and her guests. [*Id.*] For example, Defendant shared that he was a young 25

year-old soldier staying at a hotel in Lexington, that he was available all week, he is "clean," had transportation, and most importantly he "[a]bsolutely love[s] incest and has always had an interest in seeing it or experiencing it for real." [*Id.* at 6–7.] Also, the messages produced from the Kik chat communications made clear to the Defendant that the "guests" mentioned in the advertisement were two children, ages 11 and 13. [*Id.*] Zulawski proceeded to respond to the purported mother by saying he thought it would be "hot" to engage in sexual intercourse with the children. [R. 104 at 6.] Therefore, it was reasonable for a juror to infer that Zulawski was specifically seeking minors for sex when he logged into Craigslist and responded the purported mother's advertisement.

A reasonable juror could also find that Zulawski continued the conversation with the mother with the goal of getting the minors' assent to have sex with him. When the purported mother confirmed that she was interested in someone having sex with her and her children, he maintained his interest and stated "figure you and me could watch them go at it while we play and then me and ur son use you both?" [*Id.*] Zulawski also sent a shirtless picture of himself laying on a pillow and a picture of his penis during his initial response to the Craigslist advertisement. [R. 105 at 7.] During the conversation on Kik with the mother, Zulawski requested pictures of the mother and her children. [*Id.* at 8.] After fictitious pictures were sent by Detective D'Hondt to Zulawski, he commented that the kids were "adorable." [*Id.* at 8.] The government also points out that while Zulawski was chatting with the mother, he indicated that he was "excited" about the prospect of meeting up for a sexual rendezvous with her and her children. [*Id.*] For instance, he asked, "Kids as excited as we are? Lol." [*Id.*] When the mother responded that her son was excited, Zulawski proceeded to ask, "[h]e get to have you guys often?" [*Id.*] These repetitive inquiries and questions regarding the children's sexual interest

suggests that Zulawski intended to persuade or entice the minors. *Vinton*, 2020 WL 21165, at * , *United States v. Harmon*, 593 F. App'x 455, 463–64 (6th Cir. 2014).

A reasonable juror could also conclude that Zulawski specifically intended to use the parent's influence to lead the minors to have sex with him. Zulawski was aware from the beginning of their conversation that the fictitious individual was the mother to two children, ages 11 and 13. Zulawski is most likely mindful of the special influence of parents over their children, and a reasonable juror could infer that he intended to exploit that influence.

Zulawski argued at trial that he was originally interested primarily in sex with the adult mother and that he later acquiesced the minors join them in order to help them out of the situation. [R. 104 at 2.] However, this does not mean that the government could not prove that Zulawski intended to persuade the minors. The fact that Zulawski was only interested in consensual sex with an adult doesn't necessarily mean that he didn't also intend to persuade the minors. After all, the conversation began with Zulawski responding to a post that referenced "mom" interested in "taboo/incest." [R. 105 at 6.] And throughout their communication, Zulawski repeatedly affirmed his interest in both the adult mother and the minors; he asked for pictures of both of them; he asked if the kids were excited as they were; and he suggested plainly "you and me could watch them go at it while we play and then me and ur son use you both?" [Id. at 7–8.] It is reasonable to conclude that Zulawski wanted to have sex with both the mother and the children and that he intended to persuade or entice the minor in order to achieve his ultimate goal.

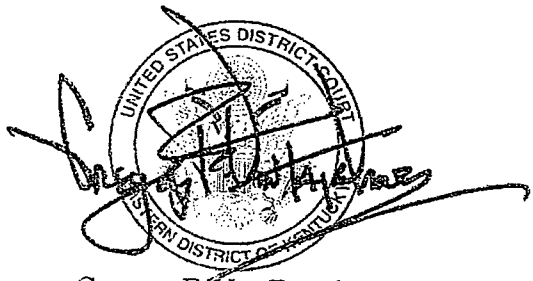
In sum, based on the evidence produced at trial, the government proved its case, specifically that Zulawski intended to persuade or entice the minors through their purported

parent. Accordingly, this Court declines to overturn the finding of the jury that Zulawski is guilty of one count of online solicitation of a minor, in violation of 18 U.S.C 2422(b).

III

Therefore, and the Court being otherwise sufficiently advised, it is hereby **ORDERED** that Defendant Daniel J. Zulawski's Motion for Acquittal **[R. 104]** is **DENIED**.

This the 27th day of January, 2020.



Gregory F. Van Tatenhove
United States District Judge

APPENDIX - D

District Court's Denial of Suppression Motion

UNITED STATES OF AMERICA, Plaintiff, v. DANIEL J. ZULAWSKI, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION
2019 U.S. Dist. LEXIS 182167
Criminal No: 3:18-cr-005-GFVT-MAS
October 15, 2019, Decided
October 22, 2019, Filed

Editorial Information: Prior History

United States v. Zulawski, 2019 U.S. Dist. LEXIS 182712 (E.D. Ky., Aug. 26, 2019)

Counsel **{2019 U.S. Dist. LEXIS 1}**For Daniel J. Zulawski, Defendant: J. Guthrie True, Philip C. Lawson, LEAD ATTORNEYS, True Guarnieri Ayer LLP, Frankfort, KY.

For USA, Plaintiff: David A. Marye, LEAD ATTORNEY, William P. Moynahan, U.S. Attorney's Office, EDKY, Lexington, KY.

Judges: Gregory F. Van Tatenhove, United States District Judge.

Opinion

Opinion by: Gregory F. Van Tatenhove

Opinion

MEMORANDUM OPINION & ORDER

This matter is before the Court upon Magistrate Judge Matthew A. Stinnett's Report and Recommended Disposition. [R. 54.] Defendant Daniel J. Zulawski filed a Motion to Suppress [R. 31] and the United States responded to the Motion. [R. 41.] The Court held an evidentiary hearing where the parties presented their arguments and witnesses. [R. 51.] The Magistrate Judge recommends that this Court deny Mr. Zulawski's Motion to Suppress. [R.31.] For the reasons that follow, this recommendation will be adopted and Defendant's objections will be denied.

I

Magistrate Judge Stinnett thoroughly outlined the facts in his recommendation. [R. 54.] Mr. Zulawski has been charged with use of a facility and means of interstate or foreign commerce to knowingly attempt to persuade, induce, entice, and coerce an individual who had not attained the age of 18 years, to**{2019 U.S. Dist. LEXIS 2}** engage in sexual activity for which any person can be charged with a criminal offense, all in violation of 18.U.S.C. § 2422(b). [R. 1.]

On January 18, 2018, the day following Defendant's arrest, U.S. Army Criminal Investigations Division ("CID") agents contacted Defendant's spouse and were given consent by her to search the marital home and seize electronic equipment found there. [R. 31-1 at 282-83.] CID agents discovered several electronic devices after searching the home, including a phone in a locked cage that was kept in the garage ("Cage Phone"). [R. 31 at 257.] However, due to the locked cage, CID obtained a search warrant from a military judicial officer ("CID Search Warrant"). [R. 54 at 496.] All of the seized items pursuant to the CID Search Warrant were then turned over to the Kentucky Attorney General Office for further investigation. *Id.*

Upon receiving such items of evidence, Officer D'Hondt pursued an additional search warrant from Franklin District Court ("Franklin Search Warrant") for the electronic items seized, including the cage phone. *Id.* On January 25, 2018, Officer D'Hondt presented an affidavit in support of a search warrant to Judge Kathy Mangeot, a state district court judge for**{2019 U.S. Dist. LEXIS 3}** Franklin County, Kentucky. [R. 31-1 at 281-84.] Judge Mangeot approved the warrant authorizing a search of the electronic items, including the contents of the cage phone. *Id.* at 285-86.

II

In Mr. Zulawski's Motion to Suppress, he presents several reasons as to why the search of the cage phone and its resulting evidence should be suppressed. [R. 31.] First, Mr. Zulawski argues that the CID Search Warrant only permitted law enforcement to seize the phone, and not search it. *Id.* Second, Mr. Zulawski argues that he is entitled to a *Franks* hearing based on discrepancies of certain facts. *Id.* If the CID Search Warrant is considered invalid, Mr. Zulawski argues that the Franklin Search Warrant lacks probable cause to search the cage phone, as well. *Id.* Finally, Mr. Zulawski points out that the *Leon,* good faith exception does not apply to either of the warrants issued. *Id.* Judge Stinnett thoughtfully considered each of these issues and determined that Mr. Zulawski's Motion should be denied.

A

First, Magistrate Judge Stinnett addressed Mr. Zulawski's argument that the CID Search Warrant authorized only seizure, and not a search of the cage phone, which he concludes is inaccurate. [R. 54 at 497.] Judge Stinnett**{2019 U.S. Dist. LEXIS 4}** concluded that the CID Search Warrant authorized both seizure and search of the Cage Phone. The Sixth Circuit has already addressed this issue in *United States v. Evers.* 669 F.3d 645 (6th Cir. 2012). The Court ruled that "the seizure of a defendant's home computer equipment and digital media for a subsequent off-site electronic search is not unreasonable or overbroad, as long as the probable-cause showing in the warrant application and affidavit demonstrate a sufficient chance of finding some needles in the computer haystack." *Id.* at 652. Similarly to Mr. Zulawski's case, the Court ruled that the warrant was "specifically designed not simply to permit the officers to seize the computer and digital camera, but to view the computer and digital camera, to have access to them." *Id.* at 653.

Mr. Zulawski did file a timely objection to this portion of the Recommended Disposition, specifically arguing that the warrant did not explicitly authorize the search of the digital contents of the Cage Phone that was seized. [R. 60 at 562.] As indicated by the magistrate judge, the affidavit, which specifically requested "authorization to conduct a full digital forensic examination of [the Cage Phone]" was properly incorporated by reference into the CID Search Warrant. [R.**{2019 U.S. Dist. LEXIS 5}** 54 at 497; R. 31-1 at 275.] The CID Search Warrant specifically authorized the search of a "locked cage in the garage for the property described as phone and other digital media belonging to SGT Daniel Zulawski within the cage in the garage." [R. 31-1 at 274.] In other words, based on this record, the law enforcement officers were where they had a right to be under the CID Search Warrant and the search of digital content within Mr. Zulawski's Cage Phone did not exceed the scope of the warrant.

As Mr. Zulawski points out, the warrant states "the affiant requests authorization to conduct a full digital forensic examination of SGT Zulawski's cellular phone." [R. 60 at 562; R. 31-1 at 273.] Mr. Zulawski argues that the remainder of the paragraphs in the warrant only authorize seizure of the Cage Phone. [R. 60 at 563.] However, the search warrant does not deny affiant's request to search the digital contents of the Cage Phone, but rather incorporates the affidavit into the warrant, authorizing such authorization to search digital contents of the Cage Phone. [R. 31-1 at 273-74.]

Therefore, this Court rejects Mr. Zulawski's argument that the search of the Cage Phone exceeded the scope of the{**2019 U.S. Dist. LEXIS 6**} CID Search Warrant and adopts Judge Stinnett's recommendation.

B

Judge Stinnett then turned to whether Mr. Zulawski is entitled to a *Franks* hearing. [R. 54.] Mr. Zulawski requests a *Franks* hearing and suppression of the evidence from the CID Search Warrant, claiming the statements in the affidavit were made with intentional or reckless disregard to the truth. [R. 31.] The Supreme Court in *Franks v. Delaware* held:

> [W]here a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). In *Franks*, the affidavit at issue stated that the affiant had interviewed several people, but those people denied ever speaking to the affiant. *Id.* at 157-58. The Supreme Court determined that the information in a warrant must be "truthful," not necessarily requiring the facts in the warrant to be accurate, but rather that the affiant believes or appropriately accepts that information to be true. *Id.* at 165.

Because the warrant is presumed valid, a{**2019 U.S. Dist. LEXIS 7**} movant must make specific allegations accompanied by an offer of proof, not mere conclusions. *Id.* at 171. "Allegations of negligence or innocent mistake are insufficient." *Id.* Any purportedly false statements must have been necessary to the finding of probable cause. *Id.* at 171-72. Only upon these requirements may a challenger receive a *Franks* hearing. *Id.* Furthermore, upon request for a hearing, the movant must make a "substantial showing that the affiant's statements were intentionally or recklessly false." *United States v. Rodriguez-Suazo*, 346 F.3d 637, 648 (6th Cir. 2003). Mere affidavits by the defendant do not meet this burden. *United States v. Giacalone*, 853 F.2d 470, 477 (6th Cir. 1988).

The affidavit incorporated into the CID Search Warrant states that while Mr. Zulawski was in the Franklin County Detention center, investigators listened to his jail calls. [R. 31-1 at 273.] In a phone call to his mother, Mr. Zulawski stated that "any evidence against him would be found on his old cellular phones." *Id.* Also, the affidavit included details regarding a phone call from Mr. Zulawski to his wife. *Id.* Mrs. Zulawski informed Mr. Zulawski that "she consented to a search of the residence by law enforcement." *Id.* Thereafter, the affidavit states "when she mentioned the cellular phone locked in the cage of the garage, SGT Zulawki became{**2019 U.S. Dist. LEXIS 8**} very upset and concerned wherein Mrs. Zulawski ended the phone call." *Id.*

Due to the flow of information through several law enforcement agencies, the precise recitation of Mr. Zulawski's statements of the jail calls were not provided in the affidavit. The contents of these calls were relayed by Investigator Wyatt to Investigator D'Hondt. [R. 52 at 435-41.] Investigator D'Hondt, in turn, relayed the information of these calls to SA Jake Hardesty of CID. *Id.* at 373-74. SA Hardesty summarized his understanding of the jail calls, not including a direct quote within the warrant affidavit presented to the military magistrate for the Cage Phone.

Even though the information regarding the jail calls in the warrant is not verbatim, this does not mean the statements were misleading since search warrant affidavits "should be reviewed in a commonsense-rather than a hypertechnical-manner." *United States v. Woosley*, 361 F.3d 924, 926 (6th Cir. 2004). Furthermore, "[a]lthough sloppiness may raise flags, it is not in any way fatal because search warrant affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation.'" *United States v. Brooks*, 594 F.3d 488, 490 (6th Cir. 2010) (quoting *United*

States v. Ventresca, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)).

Mr. Zulawski objects to Magistrate Judge Stinnett's conclusion that a *Franks* hearing is not appropriate since**{2019 U.S. Dist. LEXIS 9}** the Defendant did not prove that the paraphrases of the jail phone calls were intentionally or recklessly misleading. [R. 54 at 503.] While Mr. Zulawski largely repeats verbatim his argument in his Motion to Suppress [R. 31], Mr. Zulawski triggers the Court's obligation to conduct a *de novo* review of Judge Stinnett's analysis. 28 U.S.C. § 636(b)(1)(c).

The summary of the jail calls in the affidavit "captures the essence of Zulawski's statement and was not made by any of the officers with "'reckless disregard for the truth.'" R. 54 at 503; *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Defendant has not provided specific evidence to prove such statements in the affidavit were untrue, except a chart that shows the different times Officer D'Hondt was logged in during the relevant jail phone calls. [R. 60 at 567-78.] However, this chart does not show or prove that the paraphrased statements of the jail calls were misleading or untrue. This is simply insufficient information upon which to grant a *Franks* hearing. *Rodriguez-Suazo*, 346 F.3d at 648; *Giacalone*, 853 F.2d at 477. Nevertheless, this Court has examined the record and agrees with the Magistrate Judge's Report and Recommendation as to deny Mr. Zulawski a *Franks* hearing. [R. 54 at 503.]

C

Mr. Zulawski also contests the Franklin County Search Warrant for lacking**{2019 U.S. Dist. LEXIS 10}** probable cause. [R. 31.] As an initial matter, the Court must give deference to Franklin County District Judge Kathy Mangeot's determination of probable cause. *United States v. Abboud*, 438 F.3d 554, 571 (6th Cir. 2006). An affidavit supporting an application for a search warrant need not prove a crime occurred, rather it must demonstrate that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 214, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). So, a nexus must exist "between the place to be searched and the evidence sought." *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (quoting *United States v. Van Shutters*, 163 F.3d 331, 336-37 (6th Cir. 1998). Determination of probable cause requires an examination of the totality of the circumstances in a "realistic and commonsense fashion." *Van Shutters*, 163 F.3d at 336 (quoting *United States v. Finch*, 998 F.2d 349, 352 (6th Cir. 1993).

Judge Stinnett found that the affidavit submitted in support of the Franklin Search Warrant establishes probable cause to search the Cage Phone. [R. 54 at 503.] The affidavit supporting the Franklin Search Warrant established probable cause on a separate basis, excluding information regarding Mr. Zulawski's jail calls. *Id.* at 504. Instead, the affidavit recounted the details of the sting operation in which Mr. Zulawski allegedly arranged to have sex with children. [R. 31-1.] The affidavit also included information regarding the discovery of Defendant's Cage Phone during**{2019 U.S. Dist. LEXIS 11}** a consented search of the Mr. Zulawski's marital residence and the CID Search Warrant for the seizure and search of the Cage Phone. *Id.* Investigator D'Hondt also included information she gathered from the Christian County DCBS about an alleged sexual incident involving the Defendant and his 9 year-old stepdaughter, who accused the Defendant of using his phone to take an explicit photo of the minor. *Id.*

Finally, Office D'Hondt checked three boxes on the AOC-335 affidavit form including: "property or things used as the means of committing a crime; property or things in the possession of a person who intends to use it as a means of committing a crime, and property or things consisting of evidence which tends to show that a crime has been committed or that a particular person has committed a crime." *Id.* at 282. In checking these boxes, Office D'Hondt stated this is why there was probable and reasonable cause for seeking the electronic devices seized. *Id.* at 281. Under the

totality of circumstances, the details of the alleged sexual incident involving the stepdaughter and the details of the sting operation where Mr. Zulawski was caught trying to have sex with minor children, provided probable cause to search**{2019 U.S. Dist. LEXIS 12}** the Cage Phone.

Furthermore, despite Mr. Zulawski's arguments otherwise, the search warrant was particular in scope. [R. 54 at 504.] "A sufficiently particular warrant supplies enough information to guide and control the [executing] agent's judgment in selecting what to take." *United States v. Chaney*, 921 F.3d 572, 585 (6th Cir. 2019) (internal citations and quotation marks omitted). The search warrant particularly described the property to be searched as it listed its "physical description, make and model number, and the odd location where it was found." [R. 54 at 504.]

Mr. Zulawski also filed timely objections to Judge Stinnett's conclusion that the Franklin Search Warrant did not lack probable cause. [R. 60 at 569.] He again reiterates that the information contained in the affidavit to the Franklin Search Warrant failed to create a reasonable nexus between the allegations detailed in the affidavit and the Cage Phone that was searched. *Id.* He claims that the case cited by Judge Stinnett in his Report and Recommendation, *United States v. Neuhard*, is inapplicable in his case since the allegations given by his stepdaughter were "unsubstantiated." *Id.* at 570. However, this does not have an effect on the outcome of this motion since "Probable cause exists**{2019 U.S. Dist. LEXIS 13}** if the facts, circumstances, and 'reasonable trustworthy information' would allow a person 'of reasonable caution' to believe that a crime has been committed." *United States v. Neuhard*, 770 F. App'x 251, 253 (6th Cir. 2019). Both the allegations described by the stepdaughter involving Mr. Zulawski using a cell phone to photograph himself touching her genitals and photograph her naked on a separate occasion, in addition to the details of the sting operation described previously, establish sufficient probable cause for the search of the Cage Phone. Thus, having both probable cause and demonstrating the proper particularity, the Franklin Search Warrant did not violate the protections of the Fourth Amendment and this Court adopts Judge Stinnett's recommendation as to the presence of probable cause provided by the Franklin Search Warrant to search the Cage Phone.

D

Finally, Judge Stinnett found that even if this Court finds that the CID Search Warrant or Franklin Search Warrant were legally deficient, the *Leon* good faith exception to the warrant requirement applies. [R. 54 at 506.] Mr. Zulawski submitted timely objections to these conclusions as well, arguing that the Franklin Search Warrant was invalid and the good faith exception does not apply. [R. 60 at 571.] However,**{2019 U.S. Dist. LEXIS 14}** because this Court finds that the Fourth Amendment does not protect the information collected from the Cage Phone pursuant to both warrants, the Court declines to address these arguments. Accordingly, the Court will not adopt Judge Stinnett's alternative recommendation in his Analysis II.D.

III

Accordingly, and the Court being sufficiently advised, it is hereby **ORDERED** as follows:

1. Defendant Daniel Zulawski's Objections to the Magistrate Judge's Report and Recommendation, except those the Court declines to address, [**R. 60**] are **OVERRULED**;

2. The Magistrate Judge's Recommended Disposition [**R. 54**] is **ADOPTED IN PART** as to the Sections II.A through II.C and the Conclusion, for the reasons set forth in this Order, as and for the opinion of this Court;

3. Defendant Daniel Zulawski's Motion to Suppress Evidence [**R. 31**] is **DENIED**; and

This 15th day of October, 2019.

/s/ Gregory F. Van Tatenhove

Gregory F. Van Tatenhove

United States District Judge

APPENDIX - E

Magistrate's Report & Recommendation

To Deny Suppression

UNITED STATES OF AMERICA, Plaintiff, v. DANIEL J. ZULAWSKI, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION
2019 U.S. Dist. LEXIS 182712
Criminal Action No. 3:18-CR-005-GFVT-MAS
August 26, 2019, Decided
August 26, 2019, Filed

Editorial Information: Subsequent History

Adopted by, in part, Objection overruled by, Motion denied by United States v. Zulawski, 2019 U.S. Dist. LEXIS 182167 (E.D. Ky., Oct. 15, 2019)

Counsel **{2019 U.S. Dist. LEXIS 1}**For Daniel J. Zulawski, Defendant: J. Guthrie True, Philip C. Lawson, LEAD ATTORNEYS, True Guarnieri Ayer LLP, Frankfort, KY.

For USA, Plaintiff: David A. Marye, LEAD ATTORNEY, William P. Moynahan, U.S. Attorney's Office, EDKY, Lexington, KY.

Judges: Matthew A. Stinnett, United States Magistrate Judge.

Opinion

Opinion by: Matthew A. Stinnett

Opinion

REPORT AND RECOMMENDATION

This case is before the Court on Defendant's Motion to Suppress. [DE 31]. The district judge referred this matter to the undersigned for a Report and Recommendation. The United States responded to the Motion [DE 41] and the Court held a hearing at which the parties presented witnesses and arguments to the Court. [DE 51]. At the hearing, the parties requested permission to file additional briefing summarizing the testimony from the hearing. The United States submitted a supplemental brief. [DE 52]. The matter is ripe for decision. For the reasons stated herein, the Court recommends the District Court deny Defendant's Motion to Suppress.

I. FACTUAL BACKGROUND

On January 16, 2018, Defendant Daniel J. Zulawski responded to a Craigslist post advertising a "Taboo/incest mom" who would be in Lexington, Kentucky soon. [DE 50, Ex. 1]. Zulawski responded to the advertisement,**{2019 U.S. Dist. LEXIS 2}** stating his interest in incest and ultimately arranging a time to meet the advertiser at a hotel to have sex with her and her 13-year-old son and 11-year-old daughter. [DE 50, Ex. 3]. When Zulawski arrived at the appointed time and place, however, it turned out that this was a sting operation. The Craigslist advertiser had been an Undercover Investigator for the Kentucky Attorney General Officer Heather D'Hondt. Zulawski was arrested on the scene. [DE 52 at Page ID # 364].

At the time of his arrest, Zulawski was serving as a Sargent in the United States Army. [DE 52 at Page ID # 365]. The day after Zulawski's arrest, Officer D'Hondt contacted the United States Army Criminal Investigations Division ("CID") at Fort Campbell. She briefed them on the arrest and sought

their assistance in the investigation. [*Id.*]. CID contacted Zulawski's wife, explained the situation, and told her they would be coming by the marital residence the following day. CID instructed Mrs. Zulawski not to touch any of the electronics in the house until they arrived the following day.

When CID arrived the following day, however, Mrs. Zulawski told them she had logged onto Zulawski's laptop and "found profiles that**{2019 U.S. Dist. LEXIS 3}** had girls on them" and that his cell phone history revealed Zulawski had been going to hotels and residences in the evenings after messaging on Kik, MeetMe, Whisper, and/or SnapChat. [DE 31-1 at Page ID # 283; DE 31-1 at Page ID # 276]. CID agents, including Army Special Agent Hardesty ("SA Hardesty"), searched the home at that time pursuant to Mrs. Zulawski's consent and discovered several electronic devices, including a phone contained in a locked cage in the garage ("Cage Phone"). Mrs. Zulawski told SA Hardesty it was one of Zulawski's old phones. [DE 31-1 at Page ID # 274].

Due to the locked cage, CID decided to obtain a search warrant from a military judicial officer ("CID Search Warrant"). The items seized as a result of the consent search and CID Search Warrant were turned over to the Kentucky Attorney General Office for further investigation. Upon receiving these items, Officer D'Hondt sought and obtained a search warrant for the seized electronic items, including the Cage Phone, from Franklin District Court ("Franklin Search Warrant").

II. ANALYSIS

In his motion, Zulawski presents several arguments as to why the search of the Cage Phone and its resulting evidence should be suppressed.**{2019 U.S. Dist. LEXIS 4}** First, Zulawski argues that the CID Search Warrant merely permitted law enforcement to seize the Cage Phone, not search it. Second, Zulawski challenges that he is entitled to a *Franks* hearing based upon certain discrepancies between the facts of the affidavit in support of the CID Search Warrant and the actual, verified facts in the case at that time. Assuming the CID Search Warrant is invalidated through one of these two arguments, Zulawski next contends that the Franklin Search Warrant lacks probable cause to search the Cage Phone. Finally, Zulawski suggests that the *Leon* good faith exception does not apply to salvage the asserted problems with both the CID Search Warrant and the Franklin Search Warrant.

The Court will address each of these issues below.

A. The CID Search Warrant Authorized the Search of the Cage Phone.

Zulawski initially argues that the CID Search Warrant authorized only seizure, not a search, of the Cage Phone. This is inaccurate. The affidavit that is incorporated by reference into the CID Search Warrant specifically requests "authorization to conduct a full digital forensic examination of [the Cage Phone]." [*Id.* at Page ID # 275]. Zulawski complains that this language**{2019 U.S. Dist. LEXIS 5}** is only included in the affidavit, not the actual search warrant. Yet, the CID Search Warrant plainly states that the affidavit of SA Hardesty "is attached hereto and made a part of this authorization[] and I am satisfied that there is probable cause to believe that the matters mentioned in the affidavit are true and correct, that the offense set forth therein has been committed, and that the property to be seized is located (on the person) (at the place) to be searched, you are hereby ordered to search the (person)(place) known as SGT Daniel Zulawski's residence: 4360A Dolan Street, Fort Campbell, KY 42223 inside a locked cage in the garage for the property described as phone and other digital media belonging to SGT Daniel Zulawski within the cage in the garage . . ." [DE 31-1 at Page ID # 274].

Zulawski's argument, if adopted by the Court, would ignore the precedent of this Circuit and require law enforcement officers and judicial officers to draft warrants with technical perfection. The Sixth Circuit addressed this issue in *United States v. Evers*, 669 F.3d 645 (6th Cir. 2012), in which Evers similarly argued that a search warrant permitted only the seizure (not the search) of his computer's

hard drive, notwithstanding the search warrant's{2019 U.S. Dist. LEXIS 6} language commanding an "immediate search of the persona and premises herein described for the property: Digital Camera, Photo's [sic], Personal Computer and accessories." *United States v. Evers*, 669 F.3d 645, 651 (6th Cir. 2012). He argued that police "unlawfully exceeded the scope of the warrant when they searched the contents of the computer without obtaining a second warrant." *Id.* The Sixth Circuit rejected this argument because the warrant was, as in Zulawski's case, "specifically designed not simply to permit the officers to seize the computer and digital camera, but to view the computer and digital camera, to have access to them." *Id.* at 653.

For these reasons, the Court finds the CID Search Warrant authorized both seizure and search of the Cage Phone.

B. Zulawski Is Not Entitled To A *Franks* Hearing

The affidavit supporting the CID Search Warrant is in the record at DE 31-1, Page ID # 273. In addition to the facts described above in Section I, the affidavit in support of the CID Search Warrant goes on to state that while in the Franklin County Detention center, investigators were listening to Zulawski's jail calls. [*Id.*]. There, according to the CID Search Warrant, Zulawski told his mother "any evidence against him would be found on his old cellular{2019 U.S. Dist. LEXIS 7} phones." [DE 31-1, Page ID # 273]. The affidavit further stated that Zulawski called his wife from jail, who informed him "she consented to a search of the residence by law enforcement. Further, when she mentioned the cellular phone locked in the cage of the garage, SGT Zulawski became very upset and concerned wherein Mrs. Zulawski ended the phone call." [*Id.*].

The totality of the information in the affidavit, including the jail house calls, is sufficient to establish probable cause to issue the search warrant. Although Zulawski does not overtly argue that the affidavit did not provide probable cause if the jail calls statements were included, the Court will address it out of an abundance of caution that he has preserved this argument. The affidavit included admissions Zulawski made against his own interest during a jail call to his mother. The Sixth Circuit has held that "[a]dmissions of crime, like admissions against proprietary interests, carry their own indicia of credibility-sufficient at least to support a finding of probable cause to search." *United States v. Harris*, 403 U.S. 573, 585, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). Certainly, the admission that Zulawski believed incriminating evidence existed on his cell phone amounts to an admission against interest{2019 U.S. Dist. LEXIS 8} that supported probable cause to issue the search warrant. [DE 31-1, Page ID # 273].

Zulawski's larger objection to the CID Search Warrant is that the affidavit allegedly contains intentional or reckless misrepresentations of the statements he made during the jail call and should be suppressed after a hearing pursuant to *Franks v. Delaware*. A *Franks* hearing is appropriate

> where the defendant makes a substantial preliminary showing that [1] a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and [2] if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.*Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Taking the second element first, Zulawski's statement about the "evidence" on old cellular phones clearly supported the probable cause to issue the CID Search Warrant, satisfying the second prong of *Franks*. Thus, Zulawski made a preliminary showing as to the second prong.

Turning back to the first element, the testimony at the hearing described a situation in the days after Zulawski's arrest where numerous military and civilian law enforcement officers were obtaining{2019 U.S. Dist. LEXIS 9} information about Zulawski. These officers were sharing information between

them to further the investigation. The reason for this constant exchange was because it was unclear in the initial days of the investigation whether the state, federal, or military officials would take the lead in prosecuting Zulawski. Initially, Officer D'Hondt and her team effectuated the arrest of Zulawski when he arrived at the hotel on behalf of state officials. [DE 52 at Page ID # 365]. Upon learning he was in the Army, Officer D'Hondt contacted Agent Bradey and SA Hardesty, both with CID. Thus, it was CID who traveled to Zulawski's home and spoke with his wife because she had learned there were children in the Zulawski home. [*Id.* at 365-66].

Another layer is with Investigator Ron Wyatt, an investigator at the Franklin County Regional Jail where Zulawski was housed followed his arrest. Investigator Wyatt testified that part of his job duties includes listening to jail phone calls. [*Id.* at Page ID # 432-34]. Upon listening to Zulawski's conversations with the defendant's mother, Investigator Wyatt called Officer D'Hondt, told her "there's some phone calls I think you should listen to" and relayed to her that Zulawski**{2019 U.S. Dist. LEXIS 10}** was on the jail calls discussing a safe, old cellular phones, a laptop, and unregistered weapons. [DE 52 at Page ID # 435-441]. Officer D'Hondt testified that Investigator Wyatt told her "there would be devices at his home that had evidence possibly" based on these phone calls. [*Id.* at 369]. D'Hondt then called the SA Hardesty, who was at the Zulawski residence, and conveyed this information to him. Officer D'Hondt testified that she did not use the word "evidence" in her conversation with SA Hardesty, but, instead, that she was trying to convey to him the information that Investigator Wyatt had told her about the jail phone calls. [DE 52 *Id.* at 373-74]. Specifically, Officer D'Hondt testified she wanted to convey to the Army CID that Zulawski believed he was going to be rearrested when he found out that CID was searching his house, because he had unregistered firearms and "other" things he referenced after his mother told him they found his Cage Phone.

It is undisputed that the statement in the affidavit supporting the CID Search Warrant that "SGT Zulawski told his mother that any evidence against him would be found on his old cellular phones" is not a precise recitation of his statements on the jail calls.**{2019 U.S. Dist. LEXIS 11}** [DE 31-1 at Page ID # 273]. Zulawski's conversation with his mother, in pertinent part, was as follows:

Mother: Evidentially CID is at your house.

Zulawski: Yeah.

Mother: Finding a bunch of shit.

Zulawski: Yeah. I guess they found my guns and everything.

Mother: Yeah, but you're supposed to - you had those, and you registered.

Zulawski: They're not registered on post.

. . .

Mother: I don't know, but [Mrs. Zulawski] said [CID] found a bunch of sex toys and all kinds of stuff in the garage.

Zulawski: [inaudible]

Mother: And another cell phone that you had in your gun case or something.

Zulawski: Another cell phone?

Mother: Your old phone, that you had out last week?

. . .

Zulawski: So that - even if I fucking get out, I'm going to Fort, I'm going to go back home and I'm going to get arrested.

Mother: For what?

Zulawski: I'm going to get arrested by CID if I go home.

Mother: For what?

Zulawski: For the fucking weapons and the shit that they're finding. Even if I fucking go home, I'm going to get fucking arrested there too.[DE 50, Ex. 9, Audio of Call 5 at 3:20-4:40].

The Supreme Court has [] recognized that affidavits "'are normally drafted by non-lawyers in the midst and haste of a criminal investigation.**{2019 U.S. Dist. LEXIS 12}** Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area.'" *United States v. Pelham*, 801 F.2d 875, 877 (1986) (quoting *United States v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684, (1965)). In a case with similar facts before the Eighth Circuit, an affidavit supporting a search warrant misquoted the defendant. *United States v. Anderson*, 243 F.3d 478, 482 (8th Cir. 2001). Anderson sought to have a *Franks* hearing in an effort to suppress the evidence found during the search. As here, the district court found probable cause to issue the search warrant would not have existed absent the mis-quoted statement. *Id.* Nevertheless, that Court also refused to conduct a *Franks* hearing because it found, as here, that Anderson failed to prove the misquotation was intentional or reckless. *Id.* The Eighth Circuit affirmed the result because Anderson failed to bring forth any proof that the misquote was intentional or reckless. *Id.*

Similarly, Zulawski failed to show that the paraphrasing of the jail phone calls was intentionally or even recklessly misleading. The hearing testimony made it clear that there were several law enforcement agencies, military and civilian, and numerous agents, officers, and investigators through which information had to flow to obtain both search warrants in this case. SA Hardesty described**{2019 U.S. Dist. LEXIS 13}** being in the process of interviewing Mrs. Zulawski and conducting a consent search of the home when Agent D'Hondt called to relay to him the information about the jail calls. The various law enforcement officers in this case ended up in a proverbial game of "telephone" wherein the exact wording of Zulawski's statements to his mother was lost. What remained was a paraphrased account of Zulawski telling his mother that he was going to be arrested because of the "shit they're finding" after she told him they were looking at the Cage Phone. This paraphrasing captures the essence of Zulawski's statement and was not made by any of the officers with "reckless disregard for the truth." *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Zulawski also argues that Agent D'Hondt acted with a reckless disregard for the truth by failing to listen to the jail calls between Mrs. Zulawski and the defendant, and instead relying on Mrs. Zulawski's account of how upset Zulawski was when she mentioned the Cage Phone. [DE 31 at Page ID # 265]. The Court finds that if this this statement was excluded from the search warrant, there was sufficient other information to support a finding of probable cause. Thus, this statement does not satisfy the second prong**{2019 U.S. Dist. LEXIS 14}** required to be entitled to a *Franks* hearing.1

For these reasons, the Court recommends the District Court find that the CID Search Warrant properly authorized a search of the contents of the Cage Phone and Zulawski is not entitled to a *Franks* hearing.

C. The Franklin Search Warrant Provided Probable Cause To Search The Phone

The military ultimately turned the Cage Phone over to the Kentucky Attorney General's Officer prior

to searching it. Officer D'Hondt then sought a second search warrant for the contents of the Cage Phone and various other electronic media from the Franklin County District Court. [DE 31-1 at Page ID # 281-84]. The United States argues that the Franklin Search Warrant properly provides probable cause to search the Cage Phone independent of the CID Search Warrant and any possible *Franks* hearing. Zulawski counters that Officer D'Hondt's affidavit in support of the Franklin Search Warrant fails "to create any type of reasonable nexus sufficient for probable cause between the allegations made and the Cage Phone." [DE 49 at Page ID # 347]. After careful review, the Court believes that the affidavit submitted in support of the Franklin Search Warrant establishes probable**{2019 U.S. Dist. LEXIS 15}** cause to search the Cage Phone, albeit for different reasons.

The affidavit in question describes Officer D'Hondt's sting operation in which Zulawski allegedly arranged to have sex with children. The affidavit alleges that he had been messaging D'Hondt on the Kik messaging app throughout the day on January 18, 2018, when arranging to meet for what he thought was a sexual rendezvous. [DE 31-1 at Page ID 282]. She also included a telephone number at which Zulawski allegedly instructed her to text her about this meeting. She further described the circumstances under which the Cage Phone came into the possession of the Kentucky Attorney General's Office: Zulawski's wife gave consent to the CID investigators to seize the phone in the first place; they also obtained the CID Search Warrant for the seizure and search of the Cage Phone.

Importantly, the affidavit for the Franklin Search Warrant did **not** include or reference the jail house calls that was the center of the dispute concerning the CID Search Warrant. Rather, Officer D'Hondt included a paragraph about allegations Zulawski's nine-year-old stepdaughter made to Christian County Department for Community Based Services ("DCBS"). Officer**{2019 U.S. Dist. LEXIS 16}** D'Hondt called DCBS to advise them of the allegations against Zulawski because there were minor children living in the home with him. The affidavit included information that DCBS had "just closed an unsubstantiated case of abuse 4 days prior to [D'Hondt] calling." [DE 31-1 at Page # 283]. As reflected in D'Hondt's affidavit, the child told DCBS that Zulawski used a cell phone to photograph himself touching her genitals on one occasion and photograph her naked on another occasion. [DE 31-1 at Page ID # 283]. On both occasions, the affidavit stated the child relayed that she knew he had taken a photograph because she saw the flash on his cell phone go off.

Zulawski argues the government relied on this statement in its argument in favor of finding probable cause, despite the fact it was "unsubstantiated." [DE 49 at Page ID # 346]. This is not the case. The United States argues, and the reviewing judge reasonably relied upon, the new accusations the nine-year-old child made after Officer D'Hondt contacted DCBS. The information from the stepdaughter, considered with the fact that Zulawski had just been caught trying to have sex with minor children, provided probable cause to search the Cage**{2019 U.S. Dist. LEXIS 17}** Phone for evidence of a crime. The phone was found at his home in a locked gun cage without a SIM card. [DE 31-1 at Page # 283].

The Sixth Circuit earlier this year affirmed a case with nearly identical facts. In *United States v. Neuhard*, 770 F. App'x 251, 251 (6th Cir. 2019), forensic interviews of two children conducted by child protective services and observed by the investigating officer revealed allegations by the children that defendant Neuhard had taken a photograph of one of the children's genitals with his cell phone. *Id.* The investigating officer included these facts, as well as many others detailing the abuse Neuhard visited upon the minor victims, in the affidavit attached to the application for a search warrant. The search warrant authorized the search and seizure of numerous electronic devices generally described as "cell phones, smart phones, tablets, or any other handheld/portable electronic devices, computers, including laptops and notebooks, video game consoles, keyboards, monitors, scanners, printers, printed material . . . terminals, towers, computer hardware and software, external hard drives, modems, cables, digital cameras . . . ." *United States v. Neuhard*, 149 F. Supp. 3d 817,

821 (E.D. Mich. 2016). Neuhard argued the search warrant was overly broad and lacking in probable cause. The Sixth**{2019 U.S. Dist. LEXIS 18}** Circuit affirmed the district court's denial of his suppression motion. The Court held that the evidence that Neuhard produced child-pornography on his cell phone provided sufficient probable cause to search the cell phone. Regarding the breadth of the search warrant, Neuhard argued law enforcement should have only been able to search the cell phone and computer the minor victim mentioned in the forensic interview. The Sixth Circuit again disagreed, holding that a search warrant is "valid if it is as specific as the circumstances and the nature of the activity under investigation permit. . . . This warrant was as specific as the circumstances permitted. The police knew that Neuhard used his computer and cell phone to view videos and take pictures, but they did not know where he *stored* his child-pornography files." *Id.* (internal citations and quotation marks omitted; emphasis in original).

As in *Neuhard*, law enforcement officers could not be sure where Zulawski would have stored the evidence of his crimes. The affidavit provided evidence strongly suggesting Zulawski produced child-pornography with a cell phone and contacted an undercover agent using a cell phone to procure sex with minors.**{2019 U.S. Dist. LEXIS 19}** *See id.* at 253 ("Probable cause exists if the facts, circumstances, and 'reasonably trustworthy information' would allow a person 'of reasonable caution' to believe that a crime has been committed."). The search warrant described the property to be searched with great particularity, listing its physical description, make and model number, and the odd location where it was found.

Accordingly, the Court finds that there was probable cause to issue the Franklin Search Warrant and the evidence found on the Cage Phone as a result would not recommend its suppression.

D. The *Leon* Good Faith Exception Applies in Any Event

If, for any reason, a reviewing court finds that the CID Search Warrant or Franklin Search Warrant were legally deficient, the Court finds that the *Leon* good faith exception to the warrant requirement applies. The *Leon* good faith exception permits the admission of evidence "seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." *United States v. Leon*, 468 U.S. 897, 905, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). "[C]ourts will not exclude evidence when the costs of suppression outweigh the benefits of deterrence, such as when reasonable officers rely on a magistrate's warrant in good faith. . . . That exception comes**{2019 U.S. Dist. LEXIS 20}** with an exception of its own. An officer 'cannot reasonably presume' that a 'facially deficient' warrant is valid." *United States v. Harney*, 934 F.3d 502, 2019 WL 3808356 at *2 (6th Cir. 2019) (citing *United States v. Leon*, 468 U.S. 897, 919-21, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)). The "exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916.

Here, the Court has found there was no police or judicial misconduct in the issuance of the search warrants. The CID Search Warrant incorporated a detailed affidavit setting forth crimes against children perpetrated using cell phones, including a statement Zulawski made against his own interest, and requested authorization to conduct a forensic examination of that cell phone. The warrant only authorized searching the Cage Phone for evidence relating to soliciting sex from minors.

As for the Franklin Search Warrant, Officer D'Hondt included the Cage Phone in an application for a search warrant to search the files contained on various electronic media at Zulawski's home out of an abundance of caution. Officer D'Hondt testified she sought the Franklin Search Warrant "[t]o cover our bases, to make sure that if something were to happen with military's warrant, then we would always have ours to fall back**{2019 U.S. Dist. LEXIS 21}** on." [DE 52, Page ID # 375]. This testimony demonstrates that although Officer D'Hondt believed she could search the Cage Phone pursuant to

the CID Search Warrant, she sought another warrant to make certain she had proper authorization from a civilian judge to search the Cage Phone. Although the exclusionary rule is generally couched in terms of deterrence, D'Hondt's due diligence in seeking a second warrant is precisely the type of police behavior the Fourth Amendment's exclusionary rule encourages.

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.
>
> In short, where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.
>
> This is**{2019 U.S. Dist. LEXIS 22}** particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. *United States v. Leon*, 468 U.S. 897, 919-21, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). D'Hondt reasonably believed she had authorization from not one but two neutral judicial officers, pursuant to detailed search warrants, to conduct a forensic examination of Zulawski's Cage Phone and acted in objectively good faith in searching that device within the bounds of the search warrants. Accordingly, the *Leon* exception to the exclusionary rule applies and the evidence found on the Cage Phone should not be suppressed.

III. CONCLUSION

For reasons stated herein, the Court **RECOMMENDS** that the District Court **DENY** the Motion to Suppress [DE 31]. The Court directs the parties to**{2019 U.S. Dist. LEXIS 23}** 28 U.S.C. § 636(b)(1) for appeal rights concerning this recommendation, issued under subsection (B) of said statute. As defined by § 636(b) (1), Fed. R. Crim. P. 59(b), and local rule, within **fourteen** days after being served with a copy of this recommended decision, any party may serve and file written objections to any or all portions for consideration, de novo, by the District Court.

Entered this 26th day of August, 2019.

/s/ Matthew A. Stinnett

Matthew A. Stinnett

United States Magistrate Judge

Footnotes

1

The Court has listened to Exhibit 8, Call 4, repeatedly, both in open Court and *in camera* during consideration of this motion. The Court cannot discern from the recording what, if anything, Zulawski

says during this call about the Cage Phone, bag full of underwear and dildos, laptop, or other items Mrs. Zulawski mentions.