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FILED
SUPERIOR COURT-STOCKTON

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN JOAQUIN

10 PEOPLE OF THE STATE OF
11 CALIFORNIA,

Plaintiff,

v.

12 LYLE BURGESS,

13 Defendant.

Case # STK-CR-FE-2016-15689

POINTS AND AUTHORITIES
SUPPORTING DEFENDANT'S MOTION
TO DISMISS INFORMATION.

14
15 **Procedural Background:**

16 The preliminary examination was held November 1, 2017, before the Honorable William J.
17 Johnson. The evidence presented by the prosecution is as set forth below in the Statement of Facts.

18 **Statement of Facts:** ¹

19 **Testimony of Jane Doe:**

20 Jane Doe testified she was seven years old and her birthday is October 12. She has a twin
21 brother named [REDACTED] and they are home schooled. (PHT 10-13.)

22 Her father worked for the Defendant and she used to go to the Defendant's house with her
23 father starting when she was six years old. (PHT 14-15.) One time they also went to Defendant's
24 cabin when she was five or six. She identified the Defendant in court. (PHT 15-17.)

25 She had talked to her mother about people not being allowed to touch certain parts of her
26 body, her pee pee and her bum. One person had touched her pee pee; that was Lyle. (PHT 16-18.)

27
28 1. References are to the Preliminary Hearing Transcript,
cited as "PHT."

1 When asked about the first time Defendant, (Lyle) had touched her, she testified, "I don't know. I
2 forgot." When asked if she had gone to Lyle's house a lot or a little bit she said, a little bit. When
3 asked if it happened when she went to Lyle's house she testified, "Sometimes it did and sometimes
4 it didn't, I think." She thought it happened three or five times, different days and different times. It
5 happened when he sat on his couch in the living room. (PHT 18-19.)

6 It happened once at Lyle's cabin. At the house and the cabin, he would call her over to where
7 he was sitting and then touch her. He touched her underneath the clothing, always underneath. (PHT
8 20-21.) He would touch her with one hand, with his finger on her pee pee. He did not touch her bum.
9 She would be wearing pants and underwear. He did not say anything when he touched her. He did
10 not touch her anywhere else on her body. Nobody else ever saw him touch her. (PHT 22-23.) She
11 remembered telling her mom about it. She told her mom at the cabin, but did not remember other
12 details about telling her mom. (PHT 23-24.)

13 She did not remember talking to a police officer about it. She only told her mom; that was the
14 only person she told. She was not afraid to tell anybody. Lyle never told her not to tell anybody.
15 (PHT 24.)

16 She remembered going to Lyle's cabin three or four times. Her mother had talked to her
17 about her privacy at the cabin, but that was not the first time. Her mother had also told her at home,
18 "People can't touch other people's parts." At that time she did not tell her mother that anyone had
19 touched her. Her mother would always tell her that, maybe a lot of times. When they talked about
20 people touching other people's parts, her mother did not bring up Lyle's name. Her father did. (PHT
21 28-31.)

22 She testified she did not remember talking to a policeman. However, she remembered an
23 officer asking her about the difference between telling the truth and a lie. He asked her if she had
24 gone to Lyle's cabin. She said yes. He asked if she knew it was wrong for anyone to touch her
25 private parts. She told him, yes. She told him it was a long drive and lots of trees on the way to the
26 cabin. She told him about playing a game with the entire family at the cabin. They were sitting at
27 a table. Her mom and dad were sitting on either side of her. She told the policeman she sat far away
28 from Lyle and did not sit on a seat with Lyle. She never sat on a seat with Lyle. (PHT 32-38.)

1 The policeman asked her if Lyle ever touched her private parts at any time on Friday or
2 Saturday at the cabin. She told him no. She was telling the truth. She testified he did touch her once.
3 She told the policeman that he never did it, but she forgot. She told the policeman Lyle never touched
4 her in the chest or tummy area. He never touched her bum. Then the policeman asked her again if
5 Lyle ever touched her in the private or pee pee area and she told him, no. She did not remember
6 telling the policeman that Lyle never touched her pee pee at his house. (PHT 38-39.)

7 She remembered talking to a lady named Carol [at CAC]. She told the lady that Lyle touched
8 her pee pee only once. It happened when he was sitting on his big brown couch. She was playing
9 hide and seek with her brother and Lyle would interrupt her. Her brother was there but he would not
10 see it because Lyle did it quietly. She was sitting on the seat with Lyle. (PHT 39-42.)

11 She told the lady at CAC that when he would touch her she was always standing up.
12 Sometimes she would be standing, sometimes sitting on his lap. He touched her pee pee maybe four
13 times when she was sitting on his lap, at his house, not at the cabin. She remembered telling the lady
14 that Lyle never touched her anywhere else. He never touched her bum, she never touched his body,
15 she never saw him without any clothes and he never rubbed her back. He never said anything nasty
16 to her. When her mom talked to her about her private parts, it was her mother who brought it up.
17 (PHT 42-44.)

18 She had talked to the D.A. before. The D.A. told her to tell the truth. When she talked to her
19 mom about coming to court, her mom did not tell her what to say. She said to tell the truth always.
20 When Lyle touched her when she was not on his lap, she was standing right next to him, facing away
21 from him. That happened once. (PHT 48-49.)

22 She had talked to the D.A. and her mom about going to court. Her mom said she had to tell
23 the truth and always talk. They told her she was going to be talking about Lyle in court. They told
24 her to say Lyle was bad and he lied to her family. They told her he had to go to jail and he had to get
25 punishment at jail. Only her mom told her that. Her mom told her that Lyle touched her privacy.
26 (PHT 50-52.)

27 The D.A. never told her to say those things about Lyle. (PHT 53.)

28 ///

1 **Testimony of [REDACTED]:**

2 [REDACTED] testified her husband [REDACTED] worked for Defendant Lyle Burgess for 20
3 to 22 years. She identified the Defendant in court. She had been to his house in San Joaquin County
4 maybe 40 times over the years. He also has a cabin in Calaveras County, near Big Trees and she has
5 been there twice. The last time she was at the cabin was November, 2016. (PHT 55-57.)

6 She has five children including a set of twins who are seven years old, born October 12, 2019.
7 One twin is a boy, the other a girl, Jane Doe. She and her husband had taken Jane to Lyle Burgess'
8 house, probably several times a month since she was five years old. She had also taken the girl to
9 Burgess' cabin twice, once around Halloween of 2016 and then on November 11 and 12, 2016.(PHT
10 57-59.)

11 Her daughter (Jane Doe) had a friendly relationship with Lyle; she was comfortable with him.
12 She had seen her sit on his lap. Twice she saw interactions between Jane and Lyle which gave her
13 concern. It was that last time they were at the cabin. The family was sitting at the table playing a
14 game. Lyle was sitting at one end of the table and Jane was standing next to him. The witness saw
15 his arm was behind the girl and she thought it was too low. That put a red flag in her head. She
16 moved to where she could see and saw Lyle's hand was inside Jane's pants on her bum. Then his
17 hand came slowly out and patted the girl on the lower back. She immediately took her daughter out
18 of the room and went upstairs. (PHT 59-62.) She said nothing about this.

19 That same weekend at the cabin, on November 12, before dinner she went up the stairs and
20 saw Jane standing in front of Lyle, leaning back into him. He had his hand down the front of her
21 pants. His hand was all the way inside and his fingers had to be on her private parts. She grabbed
22 her daughter and sat her in a chair at the dining table. She pretended to be mad at Jane for playing
23 with an umbrella she had told her not to play with. When she took her daughter away to the table,
24 Lyle Burgess did not say anything or react in any way. Again she said nothing about this. She then
25 talked to her husband in the bathroom and told him what she had seen. (PHT 63-64.)

26 A couple of hours later she asked her daughter if anyone had touched where it is not OK.
27 Jane said, yes, Lyle had every time she went over to his house. She said he touched her pee pee, chest
28 and bottom. That evening she told her husband and they did not know what to do. They did not go

1 to the police right away because her husband worked for Lyle and that was his only job. (PHT 66-68.)

2 Early the next morning, Lyle approached her husband about it and he immediately went and
3 got the witness. Lyle asked if he did something wrong. They said, Yeah. He admitted to doing
4 things with Jane for about two months but did not say what things. He said he was sorry and would
5 do anything to fix it. (PHT 68-69.)

6 Later that day she, her husband and Lyle had a talk outside on a deck (balcony). Lyle again
7 admitted to two months, said he wanted to work it out and that they should keep talking to him. The
8 following Monday or Tuesday, she and her husband went to Lyle's house, at his request, and spoke
9 to Lyle and his wife. Lyle was trying to work things out. He was not apologizing. He admitted that
10 there was touching, but did not say for how long a period of time. He said something about a college
11 scholarship or payment of some kind. He said he wanted to keep talking to them and work it out,
12 encouraging her and her husband to discuss the matter only with him. That was the last conversation
13 they had with him about it. (PHT 69-76.)

14 The next day she reported to the authorities. Also that day Lyle left two messages on their
15 answering machine saying, in essence, keep talking to me, we can work this out, we can set something
16 up. (PHT 76-81)

17 Lyle had been a good employer to her husband and they became friends with Lyle and his
18 wife, Vicky. Over the years, Lyle had helped them financially and they had visited in his home and
19 at his cabin many times, There was never any problem between Lyle and her family until that
20 weekend in November. (PHT 82-87.)

21 The witness was the one who reported to law enforcement. As related to the incident on
22 Friday, November 11, after dinner, around 9:00 or 10:00 o'clock, Lyle and his wife, her husband and
23 two of her other children were sitting at the table playing a game. The witness denied telling San
24 Joaquin County Deputy Estrada that Jane was sitting on Lyle's lap. She testified, rather, Jane was
25 standing next to Lyle. (PHT 87-93.)

26 On the second occasion she went up the stairs from the basement and saw Jane laying back
27 against Lyle in a chair and he had his hand down the front of her pants. She did not recall telling
28 Deputy Estrada that Lyle removed his hand and rubbed Jane's belly. (PHT 93-97.) She told the

1 Deputy that she saw Lyle put his hand down Jane's pants and touch her butt [in the first incident].
2 She also told him that Jane said he only touched the outside of her vagina. She told him Jane had
3 been acting normally and had not complained of any pain. (PHT 105-106.)

4 She and her husband confronted Lyle out on the balcony in the morning. They asked him how
5 long this had been going on and he said two months. He did not describe what had been going on.
6 The witness denied asking Lyle about setting up a college fund for Jane.
7 (PHT 98-102.)

8 The witness denied ever talking about having Lyle pay her to resolve this or having Lyle make
9 a donation to a charity. She denied that, when they talked to Lyle and his wife at their house, she
10 demanded money or they would go to law enforcement. She denied talking about Lyle with her
11 daughter, telling her what to say in court, telling her Lyle is a bad man, that Lyle had to go to jail or
12 that Lyle had to be punished. (PHT 102-105.)

13 **Testimony of Daniel Estrada:**

14 Daniel Estrada testified he is a San Joaquin County Sheriff's Deputy. He interviewed Jane
15 Doe with her mother and father present on November 15, 2016, at her parents' home. He talked to
16 her about Lyle touching her. She said her family was playing a game at the table and Lyle was sitting
17 at the end of the table. During the game she was never sitting with Lyle. She said she did not sit in
18 a seat with Lyle at any time on Friday, November 11. He asked if she was ever sitting in a seat with
19 Lyle on the second day that weekend and she said, No. She said her mother talked to her about
20 touching of private parts when she was taking a bath. Her mother said this was wrong and Jane
21 acknowledged that. (PHT 109-115, 124.)

22 The Deputy asked Jane if Lyle had touched her private parts that Friday or Saturday at the
23 cabin. She said, No. He asked if Lyle had ever touched her and she described once when he touched
24 her knee, rubbing it, but that was the extent of it. He asked if Lyle had ever touched her private parts
25 or butt. She said, No. (PHT 115-116.)

26 The reporting party in the case was [REDACTED]. She told the Deputy that, during the
27 game they were playing, Jane was sitting on Lyle's lap and that is when the inappropriate contact
28 occurred. She told him Lyle's hand was low, but out of sight. She said when she was getting up to

1 walk to the kitchen, she saw Lyle's hand was under the clothing midway up his hand. She described
2 it as the waistband being just above the thumb. As she was walking by, Lyle slowly slid his hand
3 down and began rubbing Jane's back. (PHT 116-117.)

4 ██████ told him that, when they confronted Lyle on the balcony, he admitted he had his hand
5 down the victim's pants, said he had really screwed up, began to apologize and said he would do
6 anything to fix it. ██████ told the Deputy that on Monday he had a conversation with Lyle about
7 it at work. According to him, Lyle apologized, and said he felt guilty and could not sleep. ██████
8 ██████ said it was Lyle who brought up the idea of a college fund or charitable contribution. He told
9 Lyle he would discuss the issue with his wife and they agreed it would be best to discuss it with
10 Lyle's wife. (PHT 126-128.)

11 **Holding Order:**

12 After presentation of the evidence the magistrate issued an order holding Defendant to answer
13 on four counts of violating Penal Code section 288, subdivision (a).

14 **Standard of review:**

15 An indictment or Information is to be dismissed where the evidence presented is insufficient
16 to establish probable cause as to the defendant. Probable cause is sufficient evidence to induce a
17 strong suspicion in the mind of a man of ordinary caution or prudence, that a crime has been
18 committed and that the defendant was the guilty person. (*People v. Dickinson* (1976) 59 Cal.App.3d
19 314.) Neither the trial court in a Penal Code, section 995, proceeding to set aside an indictment or
20 information, nor an appellate court on review thereof, may substitute its judgment as to the weight
21 of the evidence for that of the committing magistrate. However, where there is an absence of evidence
22 supporting a necessary element of the crime charged probable cause is not established. (*People v.*
23 *Shirley* (1978), 78 Cal. App. 3d 424.) It is the duty of the trial court, and the appellate court to
24 discard, as unreasonable, inferences that derive their substance from guesswork, speculation, or
25 conjecture. (*Birt v. Superior Court* (1973) 34 Cal App 3d 934.)

26 **The evidence is insufficient to establish the element of lewd intent:**

27 The corpus delicti of crime of lewd conduct with a child consists of any lewd or lascivious
28 act on any part of the body of a child under age fourteen, with intent of arousing, appealing to or

1 gratifying lust, passions or sexual desires of either the perpetrator or the child. (*People v. Nothnagel*
2 (1960) 187 Cal. App. 2d 219.) A violation of Section 288 (a) is not established unless there is proof
3 of specific intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the
4 defendant or molested child. (*People v. Mansell* (Cal. App. 2d Dist. 1964), 227 Cal. App. 2d 842.)
5 This provision can be violated only when a lewd act is committed with the required specific intent.
6 (*People v. Bevan* (1989), 208 Cal. App. 3d 393.)

7 The evidence here shows the child has made statements that the Defendant touched her pee
8 pee, repeatedly said he never touched her butt. At other times she made statements the Defendant
9 never touched her pee pee, her butt or her chest. One time he had touched her knee and that was the
10 extent of it.

11 The mother testified the child was standing next to a chair in which the Defendant was sitting,
12 that she saw the Defendant's hand on the child's back with his fingers partly inside her clothing and
13 that he patted or rubbed her back. However, the mother told a Deputy the child was sitting on the
14 Defendant's lap. On another occasion the mother says she saw the girl sitting in a chair with the
15 Defendant and his hand was inside the front of the girl's pants. However, the girl said she never sat
16 in the same seat with the Defendant during that weekend.

17 All of this may add up to a strong suspicion that the Defendant touched the child underneath
18 her clothing, but, despite the mother's perception or opinion of wrongdoing, it is no evidence of
19 specific intent to arouse, appeal to, or gratify lust, passions or sexual desires. Such evidence is
20 entirely wanting. Rather, in view of all the surrounding circumstances, it appears most likely this was
21 innocent contact that never rose to a sexual purpose if it occurred at all.

22 As the Court said in *People v. Martinez* (1995), 11 Cal. 4th 434 the lewd character of an
23 activity cannot logically be determined separate and apart from the perpetrator's intent. It is common
24 knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of
25 a normal and healthy upbringing. On the other hand, any of these intimate acts may also be
26 undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent
27 or sexual, such behavior may fall within or without the protective purposes of Penal Code section
28 288. The only way to determine whether a particular touching is permitted or prohibited by the statute

1 is by reference to the actor's intent as inferred from all the circumstances.

2 Appellate courts have found many types of evidence and surrounding circumstances which
3 can be sufficient to infer the requisite lewd intent. But none of those types of evidence are present
4 in this case. There is no evidence the Defendant has ever, before (or since) these incidents, been
5 convicted of, arrested for, accused of or investigated for any criminal activity involving sexual interest
6 in children, nor any sex crime. Nor has he ever been convicted of, arrested for, accused of or
7 investigated for child pornography.

8 In *People v. Gilbert* (1992) 5 Cal. App. 4th 1372, the court found the intent was adequately
9 proven in view of evidence of the defendant's pattern of conduct with the victim as well as with other
10 young girls. There is no such evidence here. In *People v. Martinez* (1995), 11 Cal. 4th 434, the court
11 explained that, in determining whether an act is accompanied by a lewd intent the trier of fact looks
12 to all the circumstances, the defendant's extrajudicial statements, other acts of lewd conduct admitted
13 or charged in the case, the relationship of the parties, and any coercion, bribery, or deceit used to
14 obtain the victim's cooperation or to avoid detection.

15 Here, there are no other acts of lewd conduct admitted or charged. There is no evidence the
16 Defendant threatened the child to get her to cooperate or not to tell. (Lyle never told her not to tell
17 anybody. (PHT 24.) He never said anything nasty to her. (PHT 42-44.) When the parents angrily
18 confronted him, accusing him of molesting their daughter, he is alleged to have admitted to touching
19 the child, but did not admit any lewd intent in so doing. To infer the Defendant made any admission
20 that he had lewd intent would be speculation, which cannot be the basis of a probable cause finding.

21 As the court noted in *In re Jerry M.* (1997), 59 Cal. App. 4th 289, because intent can seldom
22 be proved by direct evidence, it may be inferred from the circumstances. (See *People v. Martinez*,
23 *supra*, 11 Cal. 4th at p. 445; see generally, 2 Witkin & Epstein, Cal. Criminal Law, *supra*, Crimes
24 Against Decency and Morals, § 789, 790, pp. 893-894.) Circumstances which have been considered
25 relevant to proving intent to satisfy sexual desires include: the charged act, extrajudicial statements,
26 the relationship of the parties, other acts of lewd conduct, coercion or deceit used to obtain the
27 victim's cooperation, attempts to avoid detection, offering of a reward for cooperation, a stealthy
28 approach to the victim, admonishment of the victim not to disclose the occurrence, physical evidence

1 of sexual arousal and clandestine meetings.

2 Here, again, there is no evidence of other acts of lewd conduct, no allegation the Defendant
3 used coercion or deceit to obtain Jane's cooperation, no attempts to avoid detection, stealthy approach
4 to the child or admonishment to the child not to disclose, no physical evidence of sexual arousal, no
5 clandestine meetings and no offer to Jane of any reward for co-operation or non-disclosure.

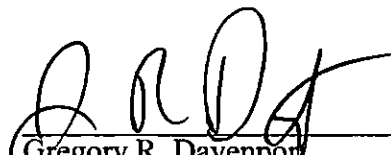
6 On two occasions when the mother thought the Defendant was touching the child
7 inappropriately, she immediately and hastily took the child away. But the Defendant did not react in
8 a guilty manner. The mother testified she caught the Defendant when his hand was all the way down
9 inside the front of Jane's pants and his fingers had to be on her private parts. She grabbed her
10 daughter away and sat her in a chair at the dining table. But the Defendant did not say anything or
11 react in any way. (PHT 63-64.) Wherever his hand was touching the child's body, and whatever the
12 mother's perception may have been, if Defendant was doing something with lewd intent, one would
13 logically expect the Defendant would offer some excuse, deny what the mother saw, or thought she
14 saw, downplay the conduct or otherwise attempt to divert the mother's suspicions. A guilty person
15 would react in some way. Also, any reasonable mother who witnessed such acts and perceived a lewd
16 intent would have said something to the perpetrator immediately.

17 Thus, there is no evidence of the type which could support an inference the Defendant had
18 the required intent in touching the child. There is no evidence of an element of the crimes charged.

19 **CONCLUSION**

20 For the reasons stated, it is respectfully requested that the Court set aside the Information
21 herein, as to all Counts.

22 Dated: January 23, 2018

23
24 
25 Gregory R. Davenport
26 Attorney for Defendant
27
28

1 **PROOF OF SERVICE**

2 *People v. Lyle Burgess*

Case Number: STK-CR-FE-2016-15689

3 I, the undersigned, declare:

4 I am a citizen of the United States, I am over the age of eighteen (18) years and am not a party to
5 this action. I am employed in the County of San Joaquin, State of California. My business address is
6 3439 Brookside Road, Suite 205, Stockton, CA 95219.

7 On January 24, 2018, I served the attached document(s): Defendant's Motion to Dismiss
8 Information as follows:

9 XX By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully
10 prepaid, and deposited the same for collection and **mailing** at Stockton, California,
following ordinary business practices, addressed as set forth below.

11 _____ By having a true copy thereof caused to be **personally** served to the person at the
12 address(es) as set forth below.

13 XX By sending a copy to the **facsimile** number(s) to the person at the address(es) as set forth
below.

14 _____ By electronic mail to:
15 San Joaquin County District Attorney's Office
16 Courthouse, Room 202
222 East Weber Ave.
17 Stockton, CA 95202
Facsimile No: (209) 465-0371

18 I am readily familiar with this offices practice for the collection and processing of documents for
19 mailing, Federal Express, overnight mail and facsimile transaction and said document(s) are deposited with
20 the United States Postal Service or Federal Express depository on the same day in the ordinary course of
21 business.

22 I declare under penalty of perjury under the laws of the State of California that the foregoing is true
23 and correct.

24 Executed on the above date at Stockton, California.

25
26 
27 Declarant
28