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IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR CARBON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. **********, Defendant.	**MOTION TO QUASH BINDOVER AND MEMORANDUM IN SUPPORT THEREOF** Case No. Judge

Defendant, *******, by and through counsel, Jeanne T. Campbell, hereby moves this Court to quash the bindover in the above-referenced matter on the grounds that insufficient evidence was presented to support a reasonable belief that Mr. ****** twice committed the offense of sexual abuse of a child, a second degree felony, pursuant to UCA 76-5-404.1(2), between January 1, 2012 and December 31, 2014.

ISSUES

The issues for purpose of this motion are whether the State procedurally and substantively met its burden at the preliminary hearing of proving that Mr. ****** twice committed the offense of sexual abuse of a child during his interaction with the alleged victim, [redacted] during, in, or about the time period between January 1, 2012 and December 31, 2014.

Specifically, Mr. ******* contends that the State failed to both properly present

sufficient evidence at the preliminary hearing to support the charge of sexual abuse of a child and failed to present evidence that he did so on more than one occasion. The proffered testimony introduced by the State and purported to be the allegations of [redacted] regarding the alleged sexual abuse did not indicate that it was Mr. ****** who touched her, did not provide sufficient details that any touching was sexual in nature and/or that his actions constituted "indecent liberties" as required by Utah Code Ann. § 76-5-404. 1(2) (See Preliminary Hearing transcript, Attached as Exhibit A).

RELEVAN FACTS[1]

The following facts were alleged by an unsworn written proffer read by the State's attorney at a preliminary hearing that was held on July 19, 2019. (See Preliminary Hearing Transcript p 4: 19 – p 5:22): The alleged victim, [redacted], underwent an interview at the CJC on January 8, 2019. At the time of the interview, [redacted] was 13 years old and alleges to have been six or seven years old at the time of the contended incident(s). The Defendant was the boyfriend of [redacted] aunt. [redacted] contended that there were two or three incidents that occurred at a home in Price where the defendant lived. [redacted] claimed that she was taken into a room of that house. She claims to have been face down on the floor with her knees tucked under her. She may have been partially disrobed from the waist down and she had a blanket over her head. She claims to have heard someone undo his belt buckle and/or unzip his fly. She felt pressure on her legs and her behind. She does not have specific recollection of the nature of the touching but contends that she told her to tell others that they were discussing school. Based on the information read from the State's proffer, ******* was bound over for trial on two counts of sexual abuse of a child.

[1] The facts contained herein are taken from a transcript of the preliminary hearing.

LEGAL ARGUMENT

"[T]o prevail at a preliminary hearing, the prosecution must still produce 'believable evidence of all the elements of the crime charged,' State v. Emmett, 839 P.2d 781, 784 (Utah 1992) (quoting State v. Smith, 675 P.2d 521, 524 (Utah 1983)), just as it would have to do to survive a motion for a directed verdict. However, unlike a motion for a directed verdict, this evidence need not be capable of supporting a finding of guilt beyond a reasonable doubt." State v. Clark, 20 P.3d 300, 305 (Utah 2001). Thus, the state "must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it." Id. at 306.

A. Proffer

URE 1102 provides for the use of reliable hearsay evidence in criminal preliminary examinations. URE 1102 (b)(7) specifically provides for recordings in accord with URCr. P 15.5 which the CJC interview might qualify for, however, that interview was not presented to the magistrate for his independent viewing. Rather, the prosecution proceeded by proffer and thereby presented its summary version of that interview. The prosecutor neither gave the defense notice that he would proceed by proffer (until immediately prior to the hearing), nor was he sworn to truthfully, and without bias, relay the content of the interview. As such, the proffer cannot meet the requirement under Rule 1102 as "reliable hearsay". Further, the proffer neither contained a photograph nor any sort of identification of Mr. *******as the alleged perpetrator, again failing the URE 1102 requirements.

The role of magistrate is that of a neutral gate keeper and while URE 1102(c)(1) does mention "proffer," it could not have been the intent of the Legislature to usurp the neutral role of

the magistrate with the often slanted, one-sided version of the facts as seen through the eyes of the prosecution. Even at the preliminary hearing stage, our system is designed to be adversarial. Each side has a bent and side to zealously advocate.

As the Court stated in *State v. Virgin*, "In making determination at preliminary hearing as to whether probable cause exists to bind defendant over for trial, the magistrate's role in this process is not that of a rubber stamp for the prosecution, as the magistrates must attempt to ensure that all groundless and improvident prosecutions are ferreted out no later than the preliminary hearing. *State v. Virgin*, 2006, 137 P.3d 787, 552 Utah Adv. Rep. 38, 2006 UT 29. F

By allowing the prosecution to proceed by proffer, rather than adversarial proceeding, the magistrate forewent his neutral role. He may even have rubber stamped the prosecutor's version of the facts. In this regard, Mr. ****** was denied his constitutionally mandated preliminary hearing and, as stated above, the requirements of admission of a sworn statement under URE 1102 were not met.

B. <u>Count 1; Touching/Indecent Liberties</u>

1. <u>Touching</u>

UCA 76-5-404.1, Sexual abuse of a child, states (concerning a person under 14 years of age): …

(2) An individual commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy on a child, or an attempt to commit any of these offenses, the actor touches the anus, buttocks, pubic area, or genitalia of any child, the breast of a female child, or otherwise takes indecent liberties with a child, with intent to cause substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the sexual desire of any individual regardless of the sex of any participant.
(3) Sexual abuse of a child is a second degree felony.

Concerning the "touching" portion of said statute, the State did not present sufficient evidence because there was no testimony that identified Mr. ****** as the alleged perpetrator and no proffered testimony that he actually touched [redacted] stated that she felt "pressure on her legs and behind" but she also stated that she had a blanket over her head. She never identified Mr. ****** as the source of the "pressure." Further, it is left amiss as to what [redacted] meant by feeling "pressure." This allegation is completely left to speculation, especially given the proffer was that [redacted] had "no specific recollection of the nature of the touching". (PH p5:11-17.) Although the prosecution is only required to produce sufficient evidence to support a "reasonable belief" that Mr. ****** committed the charged crimes, the level of evidence has to be more than mere speculation and must be able to sustain each element of the crimes in question. *State v. Rameriz*, 289 P.3d 444 (Utah 2012).

The proffer as provided by the prosecution is completely devoid of any "believable evidence" that it was Mr. ******s that touched the anus, buttocks, genitalia, pubic area or breasts of [redacted] and certainly insufficient to establish that this "touching" was with the intent of causing substantial emotional or physical pain or for sexual gratification or arousal. "The liberal bindover standard does not authorize the courts to second-guess the prosecution's evidence by weighing it against the totality of the evidence in search of the most reasonable inference to be drawn therefrom." *State v. Jones*, 365 P.3d 1212, 1217 (Utah 2016). Further, the case law is consistent in supporting the opinion that a magistrate has discretion to decline bindover where the facts presented by the prosecution provide no more than a basis for speculation. *State v. Homer*, 405 P.3d 958, 960 (Utah 2017). In this case, the prosecution merely provided an unsworn proffer that Mr. ******* may have been in a room with a minor (who couldn't see anything) and may have applied pressure to the back of her legs or buttocks. And, that the exact

behavior occurred on two occasions, in the exact same manner, and [redacted] presumably had no "specific recollection of the nature of the touching" on either occasion. This information, if true, does not meet the probable cause standard for a preliminary bindover, it only provides a basis for speculation. As such, the magistrate, in his gate keeper function, should have declined the bindover in order to ferret out a groundless prosecution.

Utah courts have looked at the indecent liberties prong of the statute as a catchall which expands the scope of the statute but have emphasized that the conduct proscribed by the indecent liberties prong must be limited to "sexual misconduct of equal gravity . . . comparable to the touching that is specifically prohibited." Id. at ¶9.

2. Indecent Liberties

Utah Courts have enumerated five factors for courts to consider in determining whether behavior constitutes indecent liberties, including: "(1) The nature of the victim's participation (whether the defendant required the victim's participation); (2) The duration of the defendant's act; (3) The defendant's willingness to terminate his conduct at the victim's request; (4) The relationship between the victim and the defendant; [and] (5) The age of the victim." State v. Peters, 796 P.2d 708, 711 (Utah Ct. App. 1990). In using these factors, the Utah Court of Appeals explained that it is important to examine the "'totality of facts'" and that "any fact would be material which relates to the significance of the defendant's act in terms of its probable consequences and the need to respond with criminal sanctions." Id.

Examination of the totality of facts in this case indicates that the touching, if any, did not constitute the kind of indecent liberties contemplated by the sexual abuse of a child statute. In the case before the Court, [redacted] contended that she may or may not have

been robed from the waist down, that she had a blanket over her head, and she "felt pressure on her legs and her behind." She furthermore "has no specific recollection of the nature of the touching that occurred." (PH p5:11-17.) Even viewed in the light most favorable to the prosecution, [redacted] statement that she has no specific recollection of the nature of the touching involved leaves the magistrate guessing and the matter short of probable cause.

The behavior in this case does not approach the type of conduct proscribed by the statute and outlined in Peters, and certainly is not the kind of behavior that warrants criminal sanctions at the second degree felony level.

C. Count 2.

The magistrate bound Mr. ******* over on a second count of sexual abuse of a child, on the same proffer presented by the prosecution who indicated the exact factual circumstances took place. However, the proffered account describes a single episode – presumably that of Count 1. Nothing was presented that objectively indicates a second episode. Certainly, even in the mind of a six year old, something must have been different that would have distinguished one occurrence from the other; such as the changing of the school year or the season(s), the proximity to a holiday or birthday, one of life's demarcations such as a sibling's birth, a relative's death, a trip, a baptism, a baby blessing, an injury, an event, something – anything. Yet nothing was proffered indicating that there was a second occurrence, only the proffered assumption by the prosecution that the exact same incident occurred at some unknown time. Due to lack of evidence and pure speculative nature of Count 2, it should not have been bound over.

CONCLUSION

The State has the burden of proof at preliminary hearings and the Magistrate serves as gate keeper. An unsworn prosecutorial proffer alone defiles both the process and a Defendant's constitutional right(s) and does not meet the requirement under Rule 1102 as "reliable hearsay". Mr. ***** should not be made to stand trial on either count in this matter because the State has not provided a quantum of evidence in the form of facts or reasonable inferences taken from those facts to support each and every element of the crime of sexual abuse of a child. The State has failed to present sufficient evidence that Mr. ****** touched or took indecent liberties with the alleged victim. In the instant case, it is clear that the State has not met its burden and that forcing Mr.**** to stand trial on mere speculation that he committed these crimes would be groundless. Defendant respectfully requests that this Court exercise its crucial gatekeeping function and quash the felony bindover in this matter.

RESPECTFULLY SUBMITTED this 18th day of February, 2020.

/s/ Jeanne T. Campbell
Jeanne T. Campbell
Attorney for Mr. ******

CERTIFICATE OF SERVICE

I hereby state that I served the attached MOTION TO QUASH THE BINDOVER OF THE DEFENDANT upon the parties listed below by E-filing, E-mail Transmission, Facsimile Transmission and/or by placing a true and correct copy thereof in an envelope addressed to the following:

Carbon County Attorney's Office Attn:	[ ] by U.S.P.S. Prepaid Mail [ ] by Facsimile [ ] by Hand-delivery [ ] by E-mail [ ] Service of Process [**x**] Electronically filed with the clerk of the court and electronically served.

___/s/ Jeanne T. Campbell_____