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Attorney for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF

THE PEOPLE OF THE STATE OF CALIFORNIA,)	Case No.
)	
Plaintiff,)	
)	MEMORANDUM OF POINTS
Vs.)	AND AUTHORITIES
)	REGARDING INSUFFICIENCY
)	OF EVIDENCE TO SUPPORT
)	CHARGE OF PC 664/288.
Defendant.)	Date:
)	Time:
)	Dept:

I

FACTUAL SUMMARY

Put your factual summary here

II

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH DEFENDANT'S GUILT OF A VIOLATION OF ATTEMPTED LEWD ACT WITH A CHILD UNDER 14.

Chief Justice Holmes observed with respect to the law of intent, "As the aim of the law is not to punish sins, but to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it." (Commonwealth v. Kennedy (Mass 1897) 170 Mass. 18, 48 N.E. 770.)

In this case defendant is charged with attempting to violate Penal Code section 228(a). Penal Code section 664 provides, "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision of the law is made for the punishment of those attempts. . ." Penal Code section 288(a) provides in pertinent part, "[a]ny person who willfully and lewdly commits any lewd or lascivious act. . .upon or with the body, or any part of member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child is guilty of a felony. . ." The lewd and lascivious act may be any touching of the victim with the requisite specific intent. (People v. Martinez (1995) 11 Cal.4th 434, 444.)

"An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act toward its commission." (Penal Code section 21a.) The intent to commit a violation of Penal Code section 288(a) is "the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the perpetrator or of the victim." (People v. Imbler (1992) 9 Cal.App.4th 1178, 1181.) Such intent can be inferred from circumstantial evidence. (People v. Cole (1985) 165 Cal.App.3d 41, 48.)

If you can argue a lack of intent, do so here, but I doubt that will ever be a possibility. Especially if your guy has had all kinds of internet chat indicating what he wants to

do sexually with the victim. At this point in the motion you will likely have to concede intent.

In terms of the direct but ineffectual act done toward the commission of the crime, "mere acts in preparation for a crime do not constitute an attempt." (People v. Reed (1997) 53 Cal.App.4th 389.) The overt act amounting to the attempt need not be the last proximate or ultimate step toward the commission of the crime. (People v. Herman (2002) 97 Cal.App.4th 1369, 1389.) "[I]t is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.'" (People v. Memro (1985) 38 Cal.3d 658, 698.)

In determining whether a defendant's acts have gone beyond mere preparation, the court must evaluate his "entire course of conduct. . .in light of his confessed intent and prior history. (Id., at p. 699.) Thus, if intent is clearly shown, "an act done toward the commission of the crime may be sufficient for an attempt even though that same act would be insufficient if the intent is not as clearly shown." (People v. Bonner (1998) 80 Cal.App.4th 759, 764.) However, Memro and Bonner do not hold that the strength of a defendant's intent can make up for the absence of evidence of a direct act. Notably, this principle sprung from People v. Fiegelman (1939) 33 Cal.App.2d 100, 105. In Fiegelman, the defendants, pickpockets, were convicted of attempted grand theft after one of them was caught with his hand in the victim's back pocket, a far cry from the level of completion we have in this case. "[T]here must be some appreciable fragment of the crime committed, it must be in

such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter. . .'" (People v. Dillon (1983) 34 Cal.3d 441, 455.) The act must be unequivocal, so that "If it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude that a crime will be committed; but when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway, . . ." (Id., at p. 455.)

In People v. Memro, supra, the defendant had a long history involving pornography and invited a male minor, Carl Jr. to his apartment, supposedly for a coke. The apartment had pornography and associated paraphernalia. The defendant took Carl into the bedroom, turned on black strobe lights, and sat on the bed, watching the blinking lights. Carl said he wanted to leave. The defendant got mad and strangled him. (38 Cal.3d at p. 699.) When confessing, the defendant admitted he lured Carl to his apartment in order to take nude pictures of him. The Memro court found this constellation of facts sufficient to establish the attempt to commit a lewd act, noting that they went beyond mere preparation because Carl was taken into the bedroom to watch the strobe lights. However, the court admitted, "It is true that the simple act of accompanying Carl Jr. up to [defendant's] apartment probably fell within the zone of preparation." (Id., at p. 699.) If such conduct in Memro was mere preparation, then so must Defendant's conduct be in this case.

Now you argue such facts as the defendant never went to the meeting place, had told the victim the meeting wasn't for sex, had never said when sex would occur or what kind of sex it would be and the like. Good luck. You will lose, trust me. Use whichever of the foregoing cases work best for your case.

Reported cases on attempted sex crimes with minors demonstrate that there was no direct act committed here, hence no attempt. In People v. Reed (1996) 46 Cal.App.4th 1315, the defendant actually went to the meeting place, a motel, discussed there what he wanted to do with the minors in question, went to his car, got sex toys out and brought them to the motel, then said yes when asked if he was ready to meet the girls. These acts were found to constitute an attempt. In People v. Herman (2002) 97 Cal.App.4th 1369, 1390 the defendant's attempt conviction was upheld where he "follow[ed] up lewd telephonic propositions by acting deliberately to meet his victim in person, whereupon he offers incentives to participate in the suggested acts and proposes that they immediately accompany him to a place where such acts may presumably take place. . . ." (Emphasis added.) In People v. Ansaldo (1998) 60 Cal.App.4th 1190, 1193, the victim was in the defendant's office when he offered to pay her for sex. Now argue how your case is different from these, i.e. D didn't show up to the meeting place, the meeting wasn't specifically for sex, etc., no intention of immediate sex.

If the following cases works for you, include this paragraph. State v. Kemp (Ind.App. 2001) 753 N.E.2d 47 compels

the conclusion that the acts in question in the case at bar do not amount to an attempt. In Kemp, a police officer posed as a 14 year old girl and engaged in internet chat containing sexual content with the defendant who identified himself as a 25 year old male. The chat contained suggestions about where they could meet for sex. The defendant wrote he would bring condoms. They agreed to meet in a restaurant parking lot near a motel that evening. The defendant described his car. He was immediately arrested upon entering the parking lot. (Id., at p. 48.) The trial court's dismissal of the attempted child molest charge was upheld by the reviewing court:

" In the instant case, the State alleged in its charging information that Kemp had committed a substantial step toward the offense of child molesting when he agreed to meet 'Brittany4u2' at a restaurant parking lot, drove there, and brought some condoms with him. . . Under these circumstances, we observe that the facts alleged in the information do not reach the level of an overt act leading to the commission of child molesting. At most, such allegations only reach the level of preparing or planning to commit an offense. Were we to conclude otherwise, there would be no limit on the reach of 'attempt' crimes."

Also see State v. Duke (Fla. Dist. Ct. 1998) 709 So.2d 580

[conviction for attempted sexual battery on a child based on internet chat containing sexual content with officer posing as 12 year old girl reversed where defendant discussed the sexual acts he intended to commit with the "child," planned an occasion to carry them out, and arrived at a prearranged meeting place.)

Now argue how your case is more in line with these.

CONCLUSION

Sum up argument of why your guy's acts don't amount to

an intent.

Dated:

Respectfully submitted,

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Attorney for Defendant