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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN MARTIN LINDHORST,

Defendant and Appellant.

2d Crim. No. B267780
(Super. Ct. No. 15F-00574)
(San Luis Obispo County)

Steven Martin Lindhorst was charged with lewd act upon a child (Pen. Code, § 288, subd. (a))¹ and possession of child pornography (§ 311.11, subd. (c)). After the trial court denied his motions to suppress evidence and traverse the search warrant,² he pled no contest to both counts. He was sentenced to six years in prison for lewd act upon a child and a concurrent two years for possession of child pornography with 274 days of presentence custody credit.

¹ All further statutory references are to the Penal Code unless otherwise stated.

² Although Lindhorst captioned his motion a “Motion to Traverse Search Warrant,” it was in reality both a motion to traverse the warrant (his challenge to the accuracy of the affidavit in light of alleged material omissions) as well as a motion to quash the search warrant (his facial challenge to the warrant as lacking sufficient probable cause after excluding allegedly privileged information). (See *People v. Hobbs* (1994) 7 Cal.4th 948, 972; *People v. Navarro* (2006) 138 Cal.App.4th 146, 157.)

Lindhorst contends that the trial court erred in finding probable cause to issue the search warrant by considering statements in the supporting affidavit that were misleading and protected by the clergy-penitent privilege.³ We affirm.

FACTS AND PROCEDURAL HISTORY

Lindhorst's wife (Wendy) contacted the Paso Robles Police Department because she suspected that Lindhorst's private computer contained child pornography.⁴ Approximately six months earlier she walked into their bedroom and Lindhorst was on the computer. She observed several thumbnail photos of "young girls . . . engaged in sexually suggestive poses while wearing bra and panties." The girls appeared "between the ages of 13-15 years old," and some "were . . . as young as 10 years of age." Their "sexually provocative poses" included "having their legs spread apart."

When Wendy confronted Lindhorst about the photos, he told her they "had been attached to an email he had received and he was trying to identify the sender." Lindhorst was "always using his computer and even attached a mirror next to [it] so he [would] know if someone [were] entering the bedroom." He kept its password protected and did not allow anyone else to use it.

A few days before contacting the police, Wendy found two "neatly folded" pairs of "female teenager's panties" concealed in a drawer next to Lindhorst's computer. One pair "appeared to be stained." The drawer also contained a "male masturbation device" and some lubricant. Regarding the panties, Lindhorst told her that he saw "a girl throwing items into a trashcan" and, after she walked away, "he retrieved the items from the dumpster . . . and kept them."

Wendy "suspect[ed] this has been going on for years." She recalled Lindhorst making "comments about the breast size of their friend's 12 year old twin

³ The trial court found it unnecessary to reach the privilege issue, as do we. Consequently, we do not discuss the information in the warrant application obtained from two elders at the Jehovah's Witness church Lindhorst and his wife attended.

⁴ We refer to Wendy Lindhorst by her first name to avoid any confusion with Steven Lindhorst. No disrespect is intended.

daughters.” Many years earlier, she learned that he “had been buying gifts for an underage girl who lived in the city of Atascadero.” She believed that he “had confessed his activities to two of the elders at [their] church in an attempt to keep [her] from moving out of their residence.” The elders “would not elaborate on the conversation other than to say the information [he] disclosed ‘was horrible.’”

Wendy turned over Lindhorst’s computer to the police, and they booked it into evidence. The police obtained statements from the two elders who had met with Lindhorst. Based on the information from Wendy and the elders, the magistrate issued a warrant to search the computer. When Lindhorst moved to traverse the warrant, the trial court upheld the magistrate’s probable cause determination based solely on Wendy’s statements.

DISCUSSION

A defendant may move to suppress evidence obtained as the result of a search warrant on the ground there was no probable cause for the issuance of the warrant. (§ 1538.5, subd. (a)(1)(B)(iii).) If the defendant moves to quash or traverse the search warrant, “the court should proceed to determine whether, under the ‘totality of the circumstances’ presented in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was ‘a fair probability’ that contraband or evidence of a crime would be found in the place searched pursuant to the warrant. [Citations.]” (*People v. Hobbs*, *supra*, 7 Cal.4th at p. 975.) We review the magistrate’s decision “simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239.)

The affiant, Detective Christopher McGuire, interviewed Wendy. In his affidavit, he stated that she reported seeing photos of “young girls, as young as 10 years of age all posing in sexually provocative poses, such as having their legs spread apart.” Lindhorst contends that “[t]he manner in which Detective Maguire [*sic*] described the pictures omitted the fact that the girls were clothed in bras and panties and misled the issuing magistrate by injecting speculation that the young girls were nude while posing in sexually provocative poses.” There are three flaws to this contention.

First, Lindhorst fails to meet his burden of showing that there was in fact an omission. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1297.) Wendy was interviewed by two different officers five days apart. While she told Officer Jeff Depetro that the girls she saw were “wearing bra and panties,” it does not follow that she repeated this detail to McGuire. Lindhorst introduced no evidence that she did.⁵ His claim of an omitted detail is speculative.

Second, even if McGuire was aware from interviewing Wendy that the girls she saw were not nude, his omission of that fact from his summary of the interview was not an omission from the affidavit. He had already noted the information in his summary of Depetro’s interview of Wendy. The magistrate considered the “‘totality of the circumstances’ presented in the search warrant affidavit” (*People v. Hobbs, supra*, 7 Cal.4th at p. 975), which included what the girls in the photos were wearing.

Third, and most importantly, the purported omission was not material. Section 311.11 penalizes possession of photographs of minors “engaging in or simulating sexual conduct.” (*Id.*, subd. (a).) The definition of “sexual conduct” includes “exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer” (§ 311.3, subd. (d).) Both California and federal courts “have concluded that an ‘exhibition of the genitals’ may include an exhibition of the partially clad genitals” and have “refuse[d] to limit [child pornography] only to nude displays.” (*People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1128; see *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1757 [probable cause that defendant possessed child pornography where photos depicted “panty-covered pubic and rectal areas exposed when the models were sitting, bending over, or holding their legs up while wearing skirts”].)

Given what Wendy reported to the police concerning the sexual nature of the photos she saw and the girls’ apparent ages, as well as the circumstantial evidence regarding Lindhorst’s sexual interest in teenage girls, the magistrate had a substantial basis for finding probable cause that he possessed child pornography on his computer.

⁵ Depetro testified at the suppression hearing, but McGuire did not.

DISPOSITION

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge
Superior Court County of San Luis Obispo

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