STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND,

Plaintiff,

vs.

[redacted]

Defendant.

Case No.: [redacted]

1/15/15

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNTS 2 - 4 FOR LACK OF PROBABLE CAUSE

The Defendant, [redacted] submits the following points of law and argument in support of his motion to dismiss Counts 2 through 4 for lack of probable cause.

FACTS & TRAVEL

At 6:00 PM on Saturday, October 5, 2013, [redacted] telephoned [redacted] and told her he wanted to see her. (Defense 37).[1] He asked [redacted] "what are you doing tonight?" (Defense 37). [redacted] replied, "nothing, why?" (Defense 37). [redacted] asked, "do you want to go see my mom tonight?" (Defense 37). [redacted] answered, "no tomorrow." (Defense 37). [redacted] asked [redacted] "why?" (Defense 37). [redacted] replied that she did not have a ride. (Defense 37). So, [redacted] offered to pick [redacted] up. (Defense 37). [redacted] agreed and arranged to meet [redacted] at a bus stop on Douglas Avenue. (Defense 38).

Around 7:30 PM, [redacted] arrived at the bus stop as agreed. (Defense 50). Before [redacted] got in the car, she noticed a knife on the front passenger seat. (Defense 41). [redacted] removed the knife to the back of the car, [redacted] got in, and together they proceeded toward [redacted] mother's house on [redacted] Street. (Defense 39, 41). While en route, [redacted] told

[1] Citations to "Defense" refer to the Criminal Information packet, the first 50 pages of which are submitted herewith and Bates stamped in the lower right corner of each page therein.

[redacted] that she looked "cute tonight, sexy, bad." (Defense 39). Asked if [redacted] touched her, [redacted] stated, "he touched my leg . . . he reached over and placed his hand on my leg." (Defense 39). Asked how far up the leg did he go, [redacted] responded, "up to my waistline." (Defense 40).

At approximately 8:10 PM, Rhode Island State Police Trooper [redacted] pulled [redacted] over on Interstate 95. (Defense 15). Just prior to the stop, [redacted] stuffed a bag of Molly in [redacted] bra. (Defense 40). In so doing, [redacted] stated that [redacted] grabbed her breast. (Defense 40). Upon these facts, the Rhode Island State Police arrested and charged [redacted] with second degree sexual assault, in violation of G.L. 1956, § 11-37-4 (Count 2), enticement of a child, in violation of G.L. 1956, § 11-26-1.5 (Count 3), and concealed carrying of a knife over three inches, in violation of G.L. 1956, § 11-47-42 (Count 4). (Defense 1-2). [redacted] now moves to dismiss Counts 2, 3, and 4 on the basis of lack of probable cause.

STANDARD OF REVIEW

In addressing a motion to dismiss a criminal information, "a trial justice is required to examine the information and any attached exhibits to determine whether the state has satisfied its burden to establish probable cause to believe that the offense charged was committed and that the defendant committed it." *State* v. *Strom*, 941 A.2d 837, 841 (R.I. 2008). Whether probable cause is present is a "commonsense, practical" question requiring examination of the "totality-of-the-circumstances." *State* v. *Correia*, 707 A.2d 1245, 1249 (R.I. 1998), quoting *Illinois* v. *Gates*, 462 U.S. 213, 230-31 (1983). Specifically, "probable cause exists where the facts and circumstances . . . are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id.*, quoting *Draper* v. *United States*, 358 U.S. 307, 313 (1959).

DISCUSSION

[redacted] did not engage in sexual contact with [redacted] and [redacted] was not incapacitated, threatened with harm, or medically examined. Therefore, even if the State could establish sexual contact, it will be unable to carry the second half of its burden on Count 2 to show that a second degree sexual assault occurred. Moreover, because the crime of enticement of a child depends on felonious intent, the failure of proof on Count 2 also upends Count 3. As for Count 4, there simply is no allegation that [redacted] carried a knife about his person. The following addresses these arguments in detail and explains why probable cause is lacking with respect to each.

1. [redacted] did not [redacted] inner thigh or hide Molly in [redacted] bra for purposes of sexual gratification; therefore, the State cannot establish that sexual contact occurred.

"A person is guilty of a second degree sexual assault if he or she engages in sexual contact with another person . . . ." G.L. 1956, § 11-37-4. Section 11-37-1 defines "sexual contact" as "the intentional touching of the victim's or accused's intimate parts, clothed or unclothed, if that intentional touching can be reasonably construed as intended by the accused to be for the purpose of sexual arousal, gratification or assault." G.L. 1956, § 11-37-1(7). As the following explains, [redacted] did nothing of the sort.

The information package relates two incidents of alleged intentional touching by [redacted] The first occurred before the vehicle was pulled over by Trooper [redacted] when [redacted] "touched [redacted] leg . . . he reached over and placed his hand on [her] leg." (Defense 39). The second incident occurred just prior to Trooper [redacted] stop of [redacted] vehicle when [redacted] allegedly stuffed a bag of Molly in [redacted] bra. (Defense 40). In so doing, [redacted] stated that [redacted] grabbed her breast. (Defense 40). Neither incident amounts to sexual contact as that term is defined in § 11-37-1(7).

a. In touching [redacted]'s leg, [redacted] did not touch her inner thigh.

Under § 11-37-1(7), it is essential that the alleged "sexual contact" concern the purported victim's "intimate parts." By statute, one's "'intimate parts' means the genital or anal areas, groin, inner thigh, or buttock of any person or the breast of a female." G.L. 1956, § 11-37-1(3). [redacted] however, merely touched [redacted] leg, and the information package does not indicate what part of her leg that he touched. It merely references an incident where [redacted] allegedly placed his hand on [redacted] leg. Asked how far up the leg he went, [redacted] responded, "up to my waistline." (Defense 40). By common understanding, the waistline is "the natural indentation of the body at the waist," or "the point or line at which the skirt and bodice of a dress join." Webster's II New College Dictionary, at 1271 (3d ed. 2005). Thus, it is far from implicit that in referring to her "waistline" that [redacted] intended her inner thigh or any other intimate area. Accordingly, this brief contact was not intimate, as none of [redacted] "intimate parts" were involved.

b. [redacted]'s contact with [redacted] breast was not sexual as [redacted] did not touch [redacted]'s breast for the purpose of sexual arousal or gratification.

The circumstances of [redacted] touching of [redacted] breast cannot conceivably be interpreted by a rational trier of fact as intended for sexual arousal or gratification. Rather, the touching was incident to [redacted] alleged attempt to secrete contraband. It would strain credulity for any inference to be drawn that as the police were pulling over [redacted]s vehicle, he was overcome with an urge to grab [redacted] breast so as to satisfy his carnal desires. Without any evidence that [redacted] actions were undertaken in order "to arouse himself or to gratify himself sexually," there is insufficient evidence to establish that sexual contact occurred. *State* v. *Tobin*, 602 A.2d 528, 535 (R.I. 1992).

2. Even if the State establishes sexual contact, it will be unable to carry the second half of its burden because [redacted] was not incapacitated, threatened with harm, or medically examined.

To constitute second degree sexual assault, the sexual contact between the victim and the accused must occur under one of three circumstances in which the victim's lack of consent is manifest. These circumstances, enumerated in section 11-37-4, subparagraphs (1)-(3), are when the accused either (1) "knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless," or (2) "uses force, element of surprise, or coercion," or (3) "engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification, or stimulation." G.L. 1956, § 11-37-4. In this instance, [redacted] was not incapacitated, threatened, or medically examined. Therefore, the evidence is inadequate to warrant a reasonable belief that [redacted] committed a second degree sexual assault. The following addresses these three possible avenues for conviction under section 11-37-4, and explains why the evidence is insufficient with respect to each.

a. [redacted] *was not drunk or high, afflicted by a mental impairment, or otherwise unable to communicate.*

The first potential avenue for conviction under section 11-37-4 is where the victim lacks capacity, that is, where the accused either "knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless." G.L. 1956, § 11-37-4(1). As statutorily defined, "mentally incapacitated" means "a person who is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or who is mentally unable to communicate unwillingness to engage in the act." G.L. 1956, § 11-37-1(5). But here, there is no contention that [redacted] was under the influence of any substance. Similarly, there is no contention that [redacted] had a mental impairment. See G.L. 1956, § 11-37-1(4) (defining "mentally disabled" as "a person who has a mental impairment which renders that

person incapable of appraising the nature of the act"). As for "physically helpless," the General Laws define that to mean "a person who is unconscious, asleep, or for any other reason is physically unable to communicate." But again, there is no contention that [redacted] was unconscious, asleep, or unable to communicate. Rather, [redacted] and [redacted] spoke on the telephone, planned their meeting, and chatted while in his car. Therefore, the State cannot establish that [redacted] was incapacitated, impaired, or physically helpless, let alone that Joshua should have known of such non-existent impairment. Consequently, probable cause to believe that [redacted] committed a sexual assault under subparagraph (1) of section 11-37-4 is lacking.

b. [redacted] did not use force or threaten [redacted] with violence, and he tossed the knife into the back of the car out of reach before [redacted] climbed in.

In the absence of incapacity, a sexual assault can occur under subparagraph (2) of section 11-37-4 by way of "force, element of surprise, or coercion." See G.L. 1956, § 11-37-4(2). An accused violates subparagraph (2) when he: (i) "uses or threatens to use a weapon," (ii) "overcomes the victim through the application of physical force or physical violence," (iii) "coerces the victim . . . by threatening to use force or violence," or (iv) "coerces the victim . . . by threatening to at some time in the future murder, inflict serious bodily injury upon or kidnap the victim or any other person . . . ." G.L. 1956, § 11-37-1(2). But as was the case with incapacity, there is no allegation of any of this. [redacted] not use force or physical violence against Amanda, or expressly threaten her. Although she has alleged that there was a knife on the passenger seat when [redacted] first arrived to pick her up, [redacted] put the knife into the back of the car without brandishing it, and [redacted] climbed in. He never touched or discussed the knife again and did not have it within easy reach. Moreover, the Rhode Island Supreme Court has been reluctant to extend the *Burke* analysis of implied threats beyond the context of that case. *State* v. *Jacques*, 536 A.2d 535, 538 (R.I 1988). (declining to apply an implied threat analysis to an employer-employee context).

In *Burke*, a uniformed police officer armed with handcuffs and a gun used his position to intimidate a young woman to perform oral sex on him. *State* v. *Burke*, 522 A.2d 725, 734-35 (R.I. 1987). The woman suffered from alcoholism and complied with the officer's commands because he was a uniformed police officer carrying a gun. *Id.* at 733, 735. The officer never verbally threatened the woman, and the Court noted that consent "occasioned by an unreasoning or irrational fear" does not render sexual activity sexual assault. *Id.* at 734-35. Nonetheless, the officer's "position of authority was the determinative factor." *Id.* at 735. His "appearance of authority, combined with the fact that defendant was armed, and the peculiar vulnerability of the victim [were] sufficient to support a jury verdict that defendant coerced submission by impliedly threatening the victim." *Id.* at 736.

There is little in common between the facts of *Burke* and the case at bar other than the fact that neither Burke nor [redacted] made an express threat. Unlike Burke, who was a police officer, [redacted] had no position of authority. He was a unit assistant who changed bed linens and assisted patients with personal hygiene at Rhode Island Hospital. To [redacted] he was little more than a ride and the brother of her ex-boyfriend. While Burke was armed with a gun and handcuffs, and actually demonstrated his willingness to use the handcuffs, [redacted] was not armed. He removed the knife into the back of the car, did not brandish it, did not discuss it, and made no conversation suggestive of a violent temperament or willingness to use force. As for [redacted] she also bears little similarity to the victim in *Burke*. There is no indication that she suffers from alcoholism or any other impairment, and in fact, exhibited little deference to persons of authority insofar as she attempted to flee from Trooper Reynolds and persistently misled him with false information concerning her name, age, and where [redacted] picked her up. (Defense 15-16). Finally, the context is also quite different. In *Burke*, the victim was ordered into a squad car. Here, [redacted] made plans with [redacted] and waited for him to arrive at a bus stop. For these

reasons, [redacted] was not a towering figure of armed authority in the likes of the officer in *Burke*, and [redacted] was not the victim with "peculiar vulnerability" hauled off against her will. Therefore, the *Burke* analysis of implied threats does not apply, and the State lacks sufficient evidence for a reasonable man to believe that J[redacted] violated subparagraph (2) of section 11-37-4 through an actual or implied threat of force.

c. [redacted] *made no medical examination* [redacted]

In light of the foregoing, the State faces a lack of evidence on both subparagraphs (1) and (2) of section 11-37-4. The only remaining avenue for conviction is subparagraph (3), which is predicated upon "the medical treatment or examination of the victim for the purpose of sexual arousal, gratification, or stimulation." G.L. 1956, § 11-37-4(3). That, however, is so far removed from the context of [redacted] interaction with [redacted] that it warrants little discussion. In short, [redacted] was the brother of [redacted] ex-boyfriend, not her doctor or medical provider. Thus, the totality of the circumstances fails to provide a reasonable basis to believe that [redacted] committed a second degree sexual assault against [redacted] whether under subparagraph (1), (2), or (3). For these reasons, Count 2 must be dismissed for lack of probable cause.

3. The *mens rea* necessary to prove the enticement charge in Count 3 in this instance depends upon proof [redacted]s intent to commit a second degree sexual assault; seeing none, the enticement [redacted]nnot survive.

In defining the crime of enticement of a child, the General Laws provide that it is insufficient to simply show that the accused persuaded a child under sixteen to leave home or enter his vehicle; rather, the accused must also possess *mens rea*. See G.L. 1956, § 11-26-1.5(a); see also *State* v. *Tobin*, 602 A.2d at 534 ("The existence of *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence"). In § 11-26-1.5, the *mens rea* required is the intent to "engage in felonious conduct." *Id.* This element, while

amorphous, must be "examined in the light of the facts of the case at hand." *State* v. *Allen*, 68 A.3d 512, 517 (R.I. 2013).

In this instance, the *mens rea* alleged is [redacted] purported "intent to engage in lewd, illicit, or criminal conduct" with [redacted] Unfortunately, the term "criminal conduct" provides no more guidance than does the term "felonious conduct." Though vague, one may surmise from context that the terms "lewd" and "illicit" are a reference to second degree sexual assault as charged in Count 2. But, absent probable cause to believe that [redacted] committed a second degree sexual assault, there is scant evidence on which to base a belief that he picked up [redacted] for that purpose. As discussed above, there is no indication that [redacted] was incapacitated or that [redacted] used or threated force. Consequently, there is also no probable cause to believe that [redacted] pick up [redacted] for the purpose of using or threatening force. For these reasons, Count 3 also must be dismissed for lack of probable cause.

4. [redacted] did not carry a knife on his person; therefore, he could not have violated the concealed carry statute.

In this matter, it is only alleged that a knife was present in [redacted] car. It is not alleged that he carried a knife on his person at any time. As stated in *State* v. *Johnson*, § 11-47-42 does not penalize a defendant for "mere possession of instruments ordinarily associated with lawful use." *State* v. *Johnson*, 414 A.2d 477, 480 (R.I. 1980). Certainly, an ordinary steak knife has a blade of three inches or more and falls easily into that category. Rather, "[t]he purpose of that provision [§ 11-47-42] is to protect the public from the peril of the enumerated instruments or weapons when they are concealed about the person." *Id.* Thus, because [redacted] did not carry any such weapon about his person, concealed or otherwise, he did not violate § 11-47-42. Accordingly, Count 4 cannot stand.

CONCLUSION

For the reasons set forth herein, the Defendant, [redacted] requests that this Court dismiss Counts 2 through 4 of the Information.

Dated: January 15, 2015

The Defendant,

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2015, a true copy of the within was served via United States Postal Service, First Class mail, to:

RI Department of Attorney General
150 South Main Street
Providence, RI 02903