STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2001
v	No. 220090 Genesee Circuit Court
RUVEN RIVERA, Defendant-Appellant.	LC No. 98-003143-FC

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant was charged with kidnapping, MCL 750.349; MSA 28.581, assault with intent to murder, MCL 750.83; MSA 28.278, and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). Following a jury trial he was acquitted of the kidnapping and sexual assault charges, but convicted of the lesser offense of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of fifteen to twenty-five years' imprisonment. He appeals as of right. We affirm.

I

The victim alleged that defendant forced her to drive to a neighborhood park where she was beaten and choked after resisting defendant's attempts to force her to perform oral sex on him. As a result of these allegations defendant was charged with, and ultimately bound over for trial on, one count of kidnapping. However, at the request of the prosecutor the matter was remanded to the district court for consideration of additional charges.

On remand, the district court declined to reopen the preliminary examination and returned the matter to circuit court, prompting the prosecutor to charge defendant under a separate file with assault with intent to commit murder and assault with intent to commit criminal sexual conduct. Following a preliminary examination on these charges, the district court dismissed the charge of assault with intent to commit criminal sexual conduct and reduced the charge of assault with intent to murder to aggravated assault, MCL 750.81a; MSA 28.276(1), a misdemeanor, which it scheduled for trial in the district court. Shortly thereafter, the prosecutor appeared before the circuit court and moved to join the aggravated assault and kidnapping prosecutions for trial in the circuit court, and, once joined, to amend the information to reinstate the charges of assault with

intent to commit murder and assault with intent to commit criminal sexual conduct. The circuit court granted the prosecutor's motion, and defendant was tried and convicted as stated above.

II

On appeal, defendant argues that as a result of the prosecutor's decision to separately charge him with assault rather than appeal the district court's refusal to reopen the preliminary examination, the circuit court lacked jurisdiction to join the misdemeanor assault and felony kidnapping prosecutions and amend the information to reinstate the original felony assault charges. Defendant thus asserts that his conviction of assault with intent to do great bodily harm less than murder must be reversed because it is a lesser included offense of assault charges not properly before the circuit court. We disagree.

Defendant's challenge to the circuit court's jurisdiction is premised in part upon the Michigan Supreme Court's decision in *People v Goecke*, 457 Mich 442; 579 NW2d 868 (1998). In that case, the defendant was charged with second-degree murder, MCL 750.317; MSA 28.549, and operating a motor vehicle under the influence of intoxicating liquor (OUIL), causing the death of another person, MCL 750.325; MSA 28.557. *Goecke*, *supra* at 450. After a preliminary examination, the district court granted the bindover on OUIL causing death, but denied the prosecutor's motion to bind the defendant over on the charge of second-degree murder. *Id*.

In the circuit court, the prosecutor filed a motion to amend the information to reinstate the second-degree murder charge, which the court granted. *Id*. On appeal, this Court held that the circuit court lacked jurisdiction to amend the information absent a timely appeal of the district court's bindover decision or an application for leave to appeal. *Id*. at 451.

In reversing this Court's decision, our Supreme Court observed that in criminal matters the circuit court acquires jurisdiction over the defendant upon the filing of a return by the examining magistrate or the magistrate before whom the defendant waived preliminary examination. *Id*. at 458-459. Therefore, the Court concluded:

> The return having been filed, the circuit court had subject matter jurisdiction over the class of case and personal jurisdiction over the defendant. Had no return been filed, the circuit court would not have acquired jurisdiction over the case or the accused. In such a case, the prosecution would be required to file an appeal if charges were dismissed because that is the only way the case would come within the jurisdiction of the circuit court. [*Id*. at 459; citation omitted.]

Relying on this rationale, defendant argues that upon the district court's refusal to reopen the preliminary examination for consideration of additional charges, the prosecutor's only "lawful option" was an appeal to the circuit court. Defendant asserts that because all charges against a defendant that arise out of a single criminal act or occurrence must be brought in one prosecution, the prosecutor could not initiate a separate prosecution on the assault charges. Although we agree that the procedures employed by the prosecutor in this matter were somewhat irregular, we find that these procedures nonetheless provided the circuit court with jurisdiction over each of the crimes charged.

Initially, we note that nothing in the Supreme Court's decision in *Goecke, supra*, required that the prosecutor appeal the district court's decision or forgo the prosecution of assault charges. To the contrary, the holding in that case merely clarifies that because the circuit court acquires its jurisdiction from the return filed by the district court following preliminary examination, a decision not to bind over a defendant on any charge may not be reviewed by the circuit court on a motion to amend the information, but rather only by appeal.

Similarly, although it is true that constitutional jurisprudence requires that all charges arising from a single criminal act or occurrence be joined in a single trial, *People v Hunt (After Remand)*, 214 Mich App 313, 315-316; 542 NW2d 609 (1995), that rule exists as a guard against double jeopardy, a problem not present in the instant matter because whatever the irregularities that existed in initially bringing the charges, defendant was not subject to successive prosecutions after a conviction or an acquittal, see *id.* at 315, or "multiple punishments for the same offense," *People v Mackle*, 241 Mich App 583, 601; 617 NW2d 339 (2000).

Accordingly, the question becomes simply whether the circuit court possessed jurisdiction to join the misdemeanor assault charge then pending before the district court with the felony kidnapping charge on which defendant had already been bound over. As explained below, we believe that the circuit court did possess such jurisdiction.

Although the district courts have jurisdiction over "[m]isdemeanors punishable by fine or imprisonment not exceeding 1 year, or both," MCL 600.8311; MSA 27A.8311, the circuit courts have original jurisdiction in all matters not prohibited by law. Const 1963, art 6, § 13; *Goecke, supra* at 458. Accordingly, because circuit court jurisdiction over certain misdemeanor offenses is not prohibited by law, the circuit and district courts possess concurrent jurisdiction over these misdemeanors where joined with a felony arising out of the same conduct and involving the same sequence of events. *People v Loukas*, 104 Mich App 204, 207; 304 NW2d 532 (1981). In *Loukas*, *id*. at 205-206, the defendant pleaded nolo contendere to charges of resisting arrest, a felony, and careless driving, a misdemeanor. On appeal, the defendant argued that his plea was invalid because the circuit court lacked jurisdiction to accept a plea that joined a felony count and a misdemeanor count. *Id*. at 206. The defendant asserted that only the district court had jurisdiction to hear misdemeanor cases. *Id*. at 206-207. However, this Court held that because the misdemeanor charge arose out of the same transaction as the felony charge, it was properly joined with the felony charge in circuit court. *Id*. at 207-208. The Court noted that nothing in the statutes conferring jurisdiction prohibited such joinder. *Id*. at 207; see also *People v Veling*, 443 Mich 23, 34; 504 NW2d 456 (1993).

In the instant matter, it is undisputed that defendant was properly bound over to the circuit court for trial on the kidnapping charge. Therefore, the circuit court had both "subject matter jurisdiction over the class of case and personal jurisdiction over the defendant." *Goecke*, *supra* at 459; see also *People v Carey*, 110 Mich App 187, 189-190; 312 NW2d 205 (1981) (fact that the defendant was subsequently acquitted of the charges that originally conferred jurisdiction did not divest circuit court of jurisdiction). Although it is true that *Loukas*, *supra*, involved misdemeanor and felony charges originally brought within the same information, defendant has identified no authority or rationale that would deny the circuit court jurisdiction over a separately charged misdemeanor that arose from the same criminal act or occurrence as felony charges

already pending in the circuit court. To the contrary, the very principle defendant asserts as a bar to the prosecutor's actions in this matter, i.e., that all charges arising from a single criminal act must be tried in one prosecution, required that the circuit court join the two matters for trial.

Accordingly, we reject defendant's contention that the circuit court was without jurisdiction to join the misdemeanor and felony charges for trial in the circuit court. MCR 6.120; see also *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977) (trial judge has discretion to permit joinder of separate offenses where the offenses involve the same conduct or a series of acts connected together or constituting parts of a single scheme or plan).

Similarly we reject defendant's contention that even had the circuit court possessed jurisdiction in this matter, it could not properly amend the information to reinstate the charges of assault with intent to murder and assault with intent to commit criminal sexual conduct because to do so "would unfairly surprise or prejudice the defendant." MCR 6.112(H). "Where a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial …." *Goecke*, *supra* at 462. It is undisputed that defendant was afforded a preliminary examination on the charges ultimately reinstated by the circuit court, and thus we find no merit in defendant's contention that the circuit court erred in amending the information because such amendment constituted unfair surprise or prejudice.

III

Defendant next argues that the circuit court erred, as a matter of law, in finding that the district court abused its discretion when it refused to bind defendant over on felony assault charges solely on the basis of its disbelief of the complainant's testimony at the preliminary examination. We disagree.

In *Goecke*, *id.* at 469-470, our Supreme Court explained the prosecutor's evidentiary burden at the preliminary examination:

> For purposes of preliminary examination, the proofs adduced must only establish probable cause to believe that a crime was committed and probable cause to believe that the defendant committed it. If the district court determines that "probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it," the defendant must be bound over for trial. Some evidence must be presented regarding each element of the crime or from which those elements may be inferred. *It is not, however, the function of the examining magistrate to discharge the accused when the evidence conflicts or raises a reasonable doubt of the defendant's guilt;* ***that is the province of the jury***. [Emphasis added; citations omitted.]

See also *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996) ("the role of the magistrate is not that of ultimate finder of fact; where the evidence conflicts and raises a reasonable doubt regarding the defendant's guilt, the issue is one for the jury, and the defendant should be bound over"). "In other words, the magistrate may not weigh the evidence to determine the likelihood of conviction, but must restrict his or her attention to whether there is

evidence regarding each of the elements of the offense …." *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000).

Nonetheless, in refusing to bind defendant over on charges of assault with intent to commit murder and assault with intent to commit criminal sexual conduct, the district court remarked that it had "grave doubts" about the case based, not on the factual sufficiency of the evidence in support of a bindover, but rather on its determination that the victim's version of events did not "seem possible." As explained above, such determinations are within "the province of the jury" and thus should not constitute the basis for a decision not to bind a defendant over for trial. *Goecke*, *supra* at 469-470. Here, it is clear from the district court's remarks, although couched in terms of credibility determinations, that the court engaged in impermissible fact finding and exceeded the bounds of its duty to pass upon the competency of the evidence.

Because the district court failed to "restrict [its] attention to whether there [was] evidence regarding each of the elements of the offense," we do not believe that the circuit court erred in determining that the district court exceeded its authority and abused its discretion when it failed to bind defendant over on the felony assault charges. *Hudson*, *supra* at 278.

IV

Defendant next argues that he was denied due process of law when the circuit court failed at sentencing to appropriately respond to challenges concerning inaccurate information contained in the presentence investigation report. We disagree.

A criminal defendant has a due process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990). Therefore, at sentencing, either party may challenge the accuracy of any information contained in the presentence report. MCR 6.425(D)(2)(b); *Hoyt*, *supra* at 533-534.

Defendant challenged statements indicating that he was associated with two street gangs, arguing that he was not a member of either gang. Defendant asserts that despite these challenges the trial court improperly considered the disputed information in sentencing, without first conducting an evidentiary hearing, and, therefore, he is entitled to resentencing. We disagree.

Defendant correctly cites *Hoyt*, *id.* at 535, for the proposition that the sentencing court may resolve challenges to presentence reports by accepting the defendant's version of the facts, disregarding the information, or holding an evidentiary hearing to determine its accuracy. Further, when a defendant challenges factual statements contained in the presentence report, the trial court "must make a finding on defendant's challenge on the record, and, when it finds challenged information to be inaccurate or irrelevant, it must strike that information from the presentence investigation report before sending it to the Department of Corrections." *Id.*

In responding to defendant's concerns, the trial court indicated that the disputed paragraph simply reported the information received from both sides, including defendant's denial of gang involvement and the victim's assertions. The court noted that the report drew no

conclusion concerning whether defendant was a gang member. The court concluded that the report accurately and fairly reflected the statements made.

The court sufficiently stated its findings on the record. See *id.* at 535. Defendant's argument that the trial court sentenced him without an adequate resolution of disputed facts, and on the basis of inaccurate information, is without merit.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey