

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICIA MALONEY OPUDA,

Defendant-Appellant.

UNPUBLISHED

November 22, 2002

No. 241166

Livingston Circuit Court

LC No. 02-012778-FH

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

This case is an interlocutory appeal by leave granted following the circuit court's denial of defendant's motion to quash a felony information. The circuit court found that the district court properly bound defendant over on charges of OUIL-3d, MCL 257.625, and felonious assault (by motor vehicle), MCL 750.82. We affirm.

Defendant and her husband drove together to a bar on December 22, 2001. Later in the evening, they got into a dispute and left the bar separately. Allegedly, defendant was intoxicated and drove their car home, intentionally striking her husband with the car as he was walking home.

Defendant first argues there that was insufficient evidence to bind her over. This Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). The district court can consider circumstantial evidence, and reasonable inferences from the evidence can be sufficient to support bindover. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). While the prosecution need not establish guilt beyond a reasonable doubt, *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989), evidence regarding each element of the crime or evidence from which the elements may be inferred must exist. *People v Carlin (On Remand)*, 239 Mich App 49, 64; 607 NW2d 733 (1999).

The elements of assault with a deadly weapon are: (1) an assault; (2) with a dangerous weapon; (2) with the intent to injure or place the victim in reasonable fear or apprehension of an immediate battery. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). The

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

crime of OUIL-3d focuses on the fact that a defendant operates a motor vehicle while intoxicated. *People v Crawford*, 187 Mich App 344, 350; 467 NW2d 818 (1991).

While it is true that there was no evidence that anyone had personally witnessed defendant driving the car, there was circumstantial evidence from which reasonable inferences could be drawn sufficient to establish probable cause that defendant was driving the car that struck her husband and that she was driving while intoxicated. Both parties acknowledged they had a dispute while they were still in the bar. Defendant's husband told police defendant was acting very aggressively towards him that evening, and he was trying to avoid her. He said he was struck from behind as he walked home and he then saw the car pull into his driveway. The physical evidence, fresh smudge marks on the car, correlated with his statement. Defendant continued to act in an aggressive manner when the sheriff's deputy arrived at the residence and questioned her. Defendant's blood alcohol content was well over the legal limit.

From this evidence, the court could reasonably infer that defendant was upset with the victim and that she had specific intent to injure the victim by hitting him with a dangerous weapon, the motor vehicle. Likewise, the trial court could reasonably infer that defendant was driving the car that struck her husband and that she was intoxicated at the time.

Defendant also argues that her husband's written statement should not have been admitted into evidence because it was hearsay and that, without the statement, the evidence was insufficient to establish probable cause for bindover.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419 (2000). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

During the preliminary examination, the trial court found the husband's statement was admissible as hearsay exception for recorded recollection under MRE 803(5):

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

In order to admit a writing under the recorded recollection exception to the hearsay rule, the following foundational requirements must be met: (1) the document must pertain to matters about which the witness once had knowledge; (2) the witness must now have an insufficient recollection as to such matters; and (3) the document must be shown to have been made by the witness. *People v Hoffman*, 205 Mich App 1, 16; 518 NW2d 817 (1994).

The husband's statement was handwritten when the evening's events were fresh in his mind, satisfying the first and third elements of the rule. While defendant is correct that the husband was not given an opportunity to review his own handwritten and signed notes to see if his notes "refreshed" his memory, the witness testified that he remembered almost nothing about the night in question. The trial court found, and the record clearly reflects, that the witness' memory was insufficient to allow him "to testify fully and accurately" even if he had a better opportunity to "refresh" his recollection. Because the husband's intoxication on the night in question resulted in his later having almost no recollection of his activities, it is very doubtful that his recollection could be refreshed in any meaningful manner. We therefore find no error in the admission of his statement under this hearsay exception.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Robert J. Danhof