

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CARL ANTHONY PROKOPCHAK,

Defendant-Appellee.

UNPUBLISHED

July 29, 2004

No. 247259

Kalamazoo Circuit Court

LC No. 02-000420-AR

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the circuit court's order affirming a district court's order dismissing a charge of selling alcoholic liquor without a license in violation of MCL 436.1203(1) against defendant. Because the district court did not abuse its discretion in refusing the prosecutor's request for bind over, we affirm.

Two undercover officers posing as guests at a party near Western Michigan University paid five dollars for a red cup which was later filled with a pink liquid. The officer purchasing the cup testified at the preliminary examination that the liquid "tasted of alcohol, possibly vodka." Following this statement, defense counsel objected, and the prosecutor sought to certify the officer as an expert in identifying the substance as alcohol. The district court rightly refused to certify the officer as an expert in the area of alcohol identification,¹ but allowed the witness to state his opinion as a lay opinion. The officer also noticed that there were what appeared to be empty vodka bottles near the trash.

The district court refused to bind the case over, finding that the prosecution had failed to establish probable cause that alcohol was being sold. Thereafter, the prosecutor appealed to the circuit court, which remanded the matter to the district court to articulate the standard that court used to reaching its decision. Following remand, the district court issued a written opinion that was later affirmed by the circuit court. This appeal followed.

¹ The officer candidly told the district court that he had consumed vodka several years ago as part of a controlled test to demonstrate how much alcohol need be consumed to go over the legal limit. According to the officer, that was the only time he consumed vodka.

The prosecution contends that the district court abused its discretion by applying an improperly high standard of proof at defendant's preliminary examination. Regardless whether a reviewing court agrees with a district court's decision whether to bind a defendant over for trial, it may not substitute its judgment for that of the magistrate unless a "clear abuse of discretion" has occurred. *People v Richardson*, 469 Mich 916, 923; 669 NW2d 797 (2003), citing *People v Medley*, 339 Mich 486, 492-493; 64 NW2d 708 (1954). In determining whether an abuse of discretion has occurred, the circuit court "must consider the entire record of the preliminary examination." *People v Crippen*, 242 Mich App 278, 281; 617 NW2d 760 (2000), citing *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). We review de novo the circuit court's evaluation of the magistrate's actions. *Id.* at 282, citing *People v Flowers*, 191 Mich App 169, 174; 47 NW2d 473 (1991).

Our Supreme Court defined the abuse of discretion standard in *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), in which it held that an abuse occurs when a lower court's decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." In *People v Yost*, 468 Mich 122, 127, n 6; 659 NW2d 604 (2003), the Court applied this standard and noted that, while the propriety of using this standard in criminal cases had been questioned, it found no occasion to revisit the issue.

Under MCL 766.13 and MCR 6.110(E), district courts must determine whether to release a suspect or to have him or her bound over for trial. *People v Fiedler*, 194 Mich App 682, 692; 487 NW2d 831 (1992). MCR 6.110(E) provides as follows:

If, after considering the evidence, the 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 court must bind the defendant over for trial. If the court finds probable cause to believe that the defendant has committed an offense cognizable by the district court, it must proceed thereafter as if the defendant initially had been charged with that offense.

Our Supreme Court has held that a finding of probable cause requires "evidence sufficient to cause a person of ordinary prudence and caution to contentiously entertain a reasonable belief of the accused's guilt." *People v Justice*, 454 Mich 334, 344; 562 NW2d 652 (1997). Similarly, this Court has stated, "probable cause exists when there is a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person to believe that the accused is guilty of the offense charged." *People v Carter*, 250 Mich App 510, 521; 655 NW2d 236 (2002), citing *People v Hudson*, 241 Mich App 268, 279; 615 NW2d 784 (2000). In the instant case, the prosecution argues that the district court required it to present evidence showing that it was more likely than not that defendant committed the crime charged. It contends that the application of this higher standard was an abuse of discretion.

During the preliminary examination, the district court stated that the standard was "more likely than not" but also described the threshold for bind-over as "somewhat low." On remand from the circuit court, the district court stated that it did not apply a greater or lesser standard than that set forth in MCL 766.13 and defined by MCR 6.110(E). It explained that although "more likely than not" was not the correct standard, it had said this in an attempt to provide a simplistic explanation of the standard for those not trained in the law. In articulating the

appropriate standard, the district court recited the same definition of probable cause as found in *Carter, supra* at 521.

Although the district court initially misstated the standard for finding probable cause, the record on remand shows that it understood the appropriate standard. Based on the district court's assertion that it applied the correct standard, we cannot find that its actions were "palpably and grossly violative of fact and logic." *Yost, supra* at 127. Therefore, the standard applied by the district court did not constitute an abuse of discretion.

The prosecution next contends that the district court abused its discretion in failing to bind defendant over for trial because the evidence established probable cause to believe that defendant committed the crime charged. At a preliminary examination, "some evidence must be presented regarding each element of the crime or from which those elements may be inferred." *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998), citing *People v Doss*, 406 Mich 90, 101; 276 NW2d 9 (1979). "Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support a bindover." *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997), citing *People v Whipple*, 202 Mich App 428, 431; 509 NW2d 837 (1993). But in determining whether a crime has been committed, a magistrate has the duty to "pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses." *People v Paille*, 383 Mich 621, 627; 178 NW2d 465 (1970). In *Yost, supra* at 128, the Court reaffirmed the authority of magistrates to consider the credibility of witnesses. But it noted that they may "not refuse to bind a defendant over for trial when the evidence conflicts or raises a reasonable doubt of the defendant's guilt." *Id.* (citations omitted).

In the instant case, defendant was charged with selling alcoholic liquor without a license in violation of MCL 436.1203(1). Under *Goecke, supra* at 469, the prosecution had to present some evidence that the beverage defendant sold contained alcohol. The Michigan liquor control code of 1998 defines alcoholic liquor as follows:

any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing 1/2 of 1% or more of alcohol by volume which are fit for use for beverage purposes [MCL 436.1105(2).]

At the preliminary examination, Officer David Boysen of the Kalamazoo Department of Public Safety testified concerning the events that led to the charge against defendant. He stated that at a party, defendant sold him a cup of pink liquid and that he believed the beverage contained alcohol. The officer's lay opinion that he believed the beverage tasted like alcohol was the only evidence showing that the liquid sold fell within the statutory definition. The liquid was never tested for the presence of alcohol. Because Officer Boysen also testified that he had very limited experience with tasting alcohol, the district court did not place any weight on his opinion. Therefore, the court concluded that there was not probable cause to believe that what defendant sold was alcohol.

The prosecution asserts that the district court abused its discretion in refusing to bind defendant over because the officer testified he saw vodka bottles near the trash can, which presented the court with additional evidence that the liquid contained alcohol. However, the district court was empowered to believe or disbelieve any of the testimony presented. The mere

fact that the prosecution elicited testimony from a witness that did not persuade the court is not sufficient to establish error.

Based on the record presented, we cannot find that the district court abused its discretion in dismissing the charge against defendant. Under *Paille, supra* at 627, the district court had an obligation to assess the credibility of Officer Boysen's testimony. And an appellate court must defer to a lower court's determinations regarding the credibility of the witnesses who testify before it. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997) (citations omitted). Unlike the situation in *Yost, supra* at 128-130, the parties did not present conflicting testimony. Rather than attempting to weigh evidence that both supported and negated an inference that defendant committed the crime charged, the district court found that the evidence presented did not establish probable cause that a crime had occurred. Although circumstantial evidence can support a bindover, the district court's decision that the circumstantial evidence presented in the instant case did not create probable cause to believe that a crime occurred was not illogical or the product of passion or bias. Therefore, the district court did not abuse its discretion in determining that the prosecution failed to establish that the beverage sold by defendant contained alcohol.

Additionally, the prosecution contends that the district court abused its discretion in that it admitted Officer Boysen's lay opinion testimony pursuant to MRE 701, but then refused to consider it on the grounds that it lacked foundation. Decisions concerning the admissibility of lay opinions are "within the discretion of the trial court." *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 588; 657 NW2d 804 (2002), citing *Bachman v Swan Harbor Assoc*, 252 Mich App 400, 438; 653 NW2d 415 (2002). Under MRE 701, courts may permit lay witnesses to give opinions if they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *People v McLaughlin*, 258 Mich App 635, 657; 672 NW2d 860 (2003).

In the instant case, the district court refused to certify Officer Boysen as an expert in the investigation of alcohol offenses. But it allowed him to testify, based on his life experiences, that he tasted what he believed to be alcohol in the cup. Because the officer's opinion was based on his perception of the contents of the cup and it was relevant to whether the crime of selling alcohol without a license occurred, the district court properly admitted the testimony.

In explaining its decision to dismiss the charge against defendant, the district court stated that it did not place any weight on the officer's opinion because of his limited experience with alcohol. Although the opinion was based on sensory perception and was potentially helpful, the district court found it unworthy of belief. Under *Paella, supra* at 627, the district court has a duty to weigh the evidence and assess the credibility of the witnesses during a preliminary examination. And it is well established that the admissibility of evidence and the weight it is to be given constitute separate questions. See MRE 104(e); *People v Barrera*, 451 Mich 261, 289; 547 NW2d 280 (1996); *People v Holtzer*, 255 Mich App 478, 488; 660 NW2d 405 (2003). Thus, the district court did not abuse its discretion by admitting yet refusing to believe Officer Boysen's opinion testimony, and we accordingly affirm the circuit court's order affirming the district court's dismissal of the charge against defendant.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello