

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SIRDAREAN ADAMS,

Defendant-Appellee.

UNPUBLISHED

November 19, 2009

No. 287034

Ingham Circuit Court

LC No. 08-000412-AR

Before: Talbot, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the 55th District Court’s refusal to bind defendant over to the Ingham Circuit Court on the charges of unarmed robbery, MCL 750.530, and assault with intent to do great bodily harm less than murder, MCL 750.84, and from the circuit court’s order affirming the district court’s ruling. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

A circuit court’s decision concerning a district court’s bindover ruling is reviewed de novo. *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000). Therefore, this Court “gives no deference to the circuit court’s decision.” *People v Henderson*, 282 Mich App 307, 313; 765 NW2d 619 (2009). The district court’s decision declining to bind a defendant over to circuit court is reviewed for an abuse of discretion. *People v Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006). “An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside th[e] principled range of outcomes.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

The prosecution contends that the district court abused its discretion in refusing to bind defendant over for trial. The complainant identified defendant as one of the people who beat and robbed him. The complainant stated that he recognized defendant from a class they had together, and recognized defendant’s voice from hearing him speak in class, as well as during the assault. Defendant did not dispute that the complainant was beaten or that his property was taken. Instead, defendant challenged the complainant’s identification of defendant as one of the assailants. The prosecutor insists the complainant’s testimony provided sufficient evidence to establish probable cause to believe that defendant committed unarmed robbery and assaulted the complainant with intent to do great bodily harm less than murder. The prosecutor further argues that, to the extent that defendant’s witnesses provided conflicting testimony, an issue for the trier of fact was created, but not grounds to deny the bindover motion. We agree.

In *Henderson, supra* at 312, this Court recently summarized the duty of the district court at a preliminary examination:

The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. *People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001). Probable cause that the defendant has committed a crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003). To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element. *Id.* Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003). If the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for trial where the questions can be resolved by the trier of fact. *Yost, supra* at 128.

Parsing the district court's ruling, it appears that the court felt that, although it found the complainant credible and believed the charged crimes had been committed, and although there was sufficient evidence to support the complainant's identification of defendant as the man who initially confronted him and pushed him, it could not conclude that probable cause existed to believe defendant was one of the men who kicked the complainant or that he was the man who took the complainant's wallet. In fact, the district court, in attempting to clarify the decision, stated: "I think there's ample room for identification problems."

Robbery is statutorily defined as having occurred when, "A person who, in the course of committing a larceny . . . uses force or violence against any person who is present, or who assaults or puts the person in fear." MCL 750.530(1); CJ2d 18.2. The elements of assault with intent to do great bodily harm less than murder are: "(1) an attempt or threat with force or violence to do corporal harm to another, and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The intent to do great bodily harm is "an intent to do serious injury of an aggravated nature." *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986), citing *People v Ochotski*, 115 Mich 601, 608; 73 NW 889 (1898).

We note again that the district court found the complainant to be credible. The complainant testified:

Yes. I was kicked by the group and then as the group stopped *there was one individual who was still kicking me and they – he did say "stay down, stay down,"* and at that time *that's when that individual reached and took my wallet out of my pocket and reached into my other pockets as well.* [Emphasis added.]

The complainant unequivocally stated that he recognized the person's voice that told him to "stay down": it was "[t]he voice of the defendant who spoke to me at the beginning of the altercation." This testimony established (1) a felonious taking of the property of another (the complainant's wallet was removed from his pants), (2) by force or violence or putting in fear (the

complainant was pushed, struck, knocked to the ground, kicked, and cautioned to stay down while defendant rummaged through his pockets), and (3) there was no testimony that defendant was armed with a weapon. Furthermore, this testimony also established the crime of assault with intent to do great bodily harm less than murder. The complainant stated that when the rest of the group stopped kicking him, defendant (the person he had initially recognized and whose voice he had heard) *kept kicking him* and also told him to “stay down.” This established not just the threat of force or violence to harm another (the admonition to “stay down”—particularly when it was delivered at the end of a beating—certainly suggested the threat of further force or violence), but also the actual application of force and violence: kicking the complainant while he was on the ground. In conjunction with defendant’s initial aggression (demanding that the complainant tell him what had happened with “my boy” and pushing him), defendant’s actions in kicking the complainant after he had been knocked to the ground and kicked by other members of the group demonstrated the intent¹ to do serious injury of an aggravated nature. This Court concludes that this testimony by the complainant was sufficient to establish probable cause to believe that defendant committed unarmed robbery and assault with intent to do great bodily harm.

Defendant presented the testimony of two classmates who stated that, contrary to the complainant’s testimony, defendant had not spoken in class.² This testimony constituted, at best, impeaching evidence that might be sufficient to raise a reasonable doubt in the minds of the jurors. “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.” *People v Goecke*, 457 Mich 442, 469-470; 579 NW2d 868 (1998), citing *People v Doss*, 406 Mich 90, 103; 276 NW2d 9 (1979), see also *Henderson, supra* at 312. As this Court cautioned in *People v Hill*, 282 Mich App 538, 546; 766 NW2d 17 (2009):

¹ The complainant testified that he sustained a fractured knee, a contusion to his jaw, and minor bruises. However, even in the absence of injury, it is the intent of the assailant that establishes the crime, and the nature of defendant’s actions in allegedly pushing the complainant and then kicking him while he was on the ground, and continuing after the others had stopped, established defendant’s intent. “An intent, of course, is a secret of a man’s mind, and he can disclose it by declarations or by his actions. And actions sometimes speak louder than words.” *People v Quigley*, 217 Mich 213, 217-218; 185 NW 787 (1921).

² The complainant testified that he was familiar with defendant’s voice because he heard him speak in class, he heard him speak at the beginning of the assault, and he heard him speak when he said, “stay down.” The testimony of defendant’s witnesses cast doubt on the complainant’s testimony that defendant spoke in the class. However, it did not directly contradict the complainant’s testimony that he recognized defendant because they had been in the same class, that defendant was the man who spoke to him when the assault began, and that he was the man who told him to “stay down” as the assault ended. In fact, defendant’s witnesses lent some credence to the complainant’s claim that he recognized defendant’s voice because they both agreed that defendant had a very distinctive voice. Once again, the nature of defendant’s “distinctive” voice, and the question whether the complainant identified the voice because of its distinctive character would be potentially fruitful areas of inquiry at trial, but they are the sort of credibility issues that will not preclude a bindover.

Contrary to what defendant argues, the preliminary examination is not the time to create questions of fact or present a defense to the charges. *People v Goecke*, 457 Mich 442, 469-470; 579 NW2d 868 (1998). Doing so would have been futile because the district court is not permitted to discharge a defendant on the basis of factual or credibility disputes. *Id.*

The district court abused its discretion by refusing to bind defendant over for trial on the charges of unarmed robbery and assault with intent to do great bodily harm less than murder. There was sufficient evidence presented by the prosecutor to establish that crimes not cognizable by the district court were committed, and probable cause to believe that defendant committed those crimes. MCL 766.13; MCR 6.110(E). Apparent conflicts in the complainant's testimony were matters that should have been decided by the trier of fact, and the district court abused its discretion by using those conflicts as a basis for refusing to bind defendant over to circuit court.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis