STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 3, 2011
v	No. 296215 Oakland Circuit Court
CRAIG ALAN CAUDILL, Defendant-Appellee.	LC No. 2009-229424-FH

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant Craig Caudill was charged with attempted first-degree home invasion.[1] The trial court granted Caudill's motion to quash the information and dismissed the case. The prosecution now appeals as of right. We affirm in part, reverse in part and remand.

I. FACTS

In October 2009, homeowner Jeffrey Blackmore was asleep in his residence with his wife when their dog became very excited. When Blackmore investigated the cause of his dog's agitation, he discovered Caudill forcing open a window from the outside. At the preliminary examination, Blackmore testified that he asked Caudill what he was doing. He testified that Caudill said that he was coming into the house and did not care that others were inside. Blackmore described Caudill as appearing seriously intoxicated. Blackmore testified that he picked up a baseball bat and went outside to confront Caudill. However, Blackmore's wife called the police, who apprehended Caudill before Blackmore could confront him. Blackmore was the only witness to testify at the preliminary examination.

At the preliminary hearing, defense counsel argued that there was no evidence to show that Caudill intended to commit a larceny or assault in connection with attempting to break into Blackmore's home. He further argued that the evidence did not amount to home invasion and that he had been overcharged. The prosecutor reminded the district court that intent could be

[1] MCL 750.92(2); MCL 750.110a(2).

inferred from the totality of the circumstances, postulating that there could be no other reason that Caudill would want to break into someone's home at 1:00 a.m. but to commit a felony, larceny, or assault. The district court, without elaboration, adopted the prosecution's position and bound Caudill over for trial as charged.

Caudill filed a motion to quash, or reduce the charge, in the circuit court. At the motion hearing, the circuit court held that there was no evidence to infer what Caudill's intent was at the time of the alleged breaking and entering. The circuit court entered written orders granting the motion to quash, and dismissed the case. The prosecution now appeals.

II. BIND OVER ON ATTEMPTED HOME INVASION CHARGE

A. STANDARD OF REVIEW

In reviewing a district court's decision whether to bind a defendant over for trial, the circuit court examines the entire record of the preliminary examination to determine whether the district court's decision constituted an abuse of discretion.[2] This Court, in turn, reviews de novo the circuit court's determination whether the district court abused its discretion.[3] Accordingly, "'an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.'"[4] Therefore, "'[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment.'"[5]

B. LEGAL STANDARDS

A defendant must be bound over for trial if, at the conclusion of the preliminary examination, probable cause exists to believe that the defendant committed the crime.[6] "Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged."[7] While guilt need not be established beyond a

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[2] *People v Green*, 260 Mich App 392, 401; 677 NW2d 363 (2004).

[3] *Id.*

[4] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[5] *Maldonado*, 476 Mich at 388, quoting *Babcock*, 469 Mich at 269 (alteration by *Maldonado*).

[6] *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997).

[7] *Id.*, citing MCL 766.13 and MCR 6.110(E).

reasonable doubt, there must be evidence of each element of the crime charged, or evidence from which the elements may be inferred.[8]

MCL 750.110a enumerates the elements required for first-degree home invasion as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.[9]

Accordingly, first-degree home invasion requires proof that the invader acted with "intent to commit a felony, larceny, or assault," or actually committed such a misdeed as part of the invasion.[10]

C. APPLYING THE STANDARDS

On appeal, the prosecution argues that the circuit court erred when it determined that the evidence presented at the preliminary examination was insufficient to show that Caudill had the requisite intent to proceed on a theory of attempted first-degree home invasion. In its brief on appeal, the prosecution argues that Caudill did not show that he had any other intent than to commit a felony or a larceny once inside the Blackmore's home. However, "[t]he proponent of evidence bears the burden of establishing its relevance and admissibility."[11] Likewise, "[w]hile positive proof of guilt is not required, there must be evidence on each element of the crime charged or evidence from which those elements may be inferred."[12] The prosecution has the burden of proof to present evidence that shows that Caudill had the statutorily mandated intent for first-degree home invasion. Accordingly, this burden does not shift to Caudill, and he is not obliged to show that he had some other intent contrary to the intent to commit a felony, larceny, or assault within the Blackmore's home.

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[8] *People v Flowers*, 191 Mich App 169, 179; 477 NW2d 473 (1991).

[9] *People v Wilder*, 485 Mich 35, 42; 780 NW2d 265 (2010), citing MCL 750.110a.

[10] MCL 750.110a(2).

[11] *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006).

[12] *People v Goode*, 106 Mich App 129, 136; 308 NW2d 448 (1981).

The prosecution further argues that Caudill never indicated that he was coming into the Blackmore's home for a non-felonious purpose. However, as the prosecution's chief witness, Blackmore did not testify that Caudill indicated that he was coming into the home in order to commit a felony, larceny, or assault. The prosecution asserts that a reasonable jury could infer Caudill's intent based on the late hour of the break in, and the fact that Caudill was unconcerned that the Blackmores were home at the time. However, the prosecution does not specify which aggravating intent factor—felony, larceny, assault, or combination thereof—a jury might infer from Caudill's persistence in trying to enter an occupied dwelling in the middle of the night.

"[N]o presumption of intent to steal arises solely from proof of a breaking and entering."[13] We also apply this principle in regard to the requisite intent for assault, or the commission of a felony. "While minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained the requisite intent, there must be *some* evidence reasonably leading to such a conclusion."[14] In our opinion, Caudill's persistence in trying to enter an occupied dwelling in the middle of the night does not provide such evidence.

Caudill's reason for attempting to break into Blackmore's home, beyond wishing to enter the house, is unknown. Likewise, the evidence that the prosecution presented at the preliminary examination amounts to mere speculation. There is no reasonable evidentiary inference to establish the probable cause needed to bind over Caudill for trial. Accordingly, we conclude that the circuit court correctly recognized the district court's error in binding Caudill over for trial on the charge of attempted first-degree home invasion.[15]

III. BIND OVER ON LESSER OFFENSE OF ENTERING WITHOUT PERMISSION

A. STANDARD OF REVIEW

The prosecution alternatively argues that if the evidence of Caudill's intent presented at the preliminary examination was not sufficient to support a bind over on attempted first-degree home invasion, the proper remedy was not dismissal but rather continuation of the case through prosecution of the lesser offense of entering without permission,[16] a misdemeanor.[17]

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[13] *People v Frost*, 148 Mich App 773, 776-777; 384 NW2d 790 (1985).

[14] *Id.* at 777 (emphasis in the original).

[15] See *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996) (a court "by definition abuses its discretion when it makes an error of law.")

[16] See *People v Silver*, 466 Mich 386, 392-393 (Taylor, J., joined by Young, J.), 394-395 (Kelly, J., joined by Cavanagh, J., concurring), 396 (Weaver, J., joined by Corrigan, C.J., concurring in pertinent part, and dissenting in part); 646 NW2d 150 (2002). First-degree home invasion and entering without permission "are distinguished by the intent to commit 'a felony, larceny, or assault,' once in the dwelling." *Id.* at 392.

[17] See MCL 750.115(1).

When the Court reviews the decision of a magistrate to bind over a criminal defendant for trial, the trial court may not substitute its judgment for that of the magistrate. The court may reverse a magistrate's decision only if it appears on the record that there has been an abuse of discretion.[18] This Court's task in assessing the trial court's decision to quash the information is to determine whether or not there has been an abuse of discretion on the part of the examining magistrate because, "a reviewing trial court may only substitute its judgment for that of the examining magistrate where there has been such an abuse. Our standard for review, furthermore, in testing for an abuse of discretion is a narrow one."[19]

B. LEGAL STANDARDS

If, at the conclusion of the preliminary hearing, it appears to the magistrate that there is probable cause to believe that a felony has been committed and that the defendant committed it, the magistrate must bind over the defendant for trial.[20] "The magistrate 'may examine not only the truth of the charge in the complaint, but also other pertinent matters related to the charge.'"[21] "An examining magistrate has the obligation to consider binding a defendant over on lesser included offenses where such offenses are supported by the evidence offered at the preliminary examination."[22] If the proofs establish only a misdemeanor, the magistrate must proceed as if the defendant had been initially charged with the misdemeanor.[23] "An information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime."[24]

"Breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion."[25] Breaking and entering without permission requires breaking and entering or entering the building without permission.[26] "It is impossible to commit the first-degree home invasion without first committing a breaking and entering without permission."[27]

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[18] *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998).

[19] *Id*. at 386; see also *People v Whittaker*, 187 Mich App 122, 127; 466 NW2d 364 (1991).

[20] MCL 766.13; *People v Yost*, 468 Mich 122, 125; 659 NW2d 604 (2003).

[21] *People v Baugh*, 243 Mich App 1, 6; 620 NW2d 653 (2000), quoting *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993); see also MCL 767.42(1).

[22] *People v Harris*, 159 Mich App 401, 405; 406 NW2d 307 (1987).

[23] MCL 766.14(1).

[24] *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001); MCL 767.76.

[25] *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002).

[26] See MCL 750.115(1).

[27] *Silver*, 466 Mich at 392.

The two crimes are distinguished by the intent to commit "a felony, larceny, or assault," once in the dwelling.[28]

C. APPLYING THE STANDARDS

Here, the circuit court found that there was not sufficient evidence to prosecute Caudill for first-degree home invasion. The circuit court determined that, in binding Caudill over for trial, the district court abused its discretion. However, from the record, it does not appear that either court considered any possible lesser included offenses that may have been supported by the evidence.[29]

Here, Caudill disputed the intent to commit a larceny, assault, or other felony in Blackmore's home at the preliminary examination. Likewise, on appeal, Caudill only challenges the intent element of the first-degree home invasion charge. He does not challenge that another person was lawfully present in the dwelling or that he attempted to break and enter that dwelling without permission.[30] Accordingly, the evidence supports the lesser charge of breaking and entering without permission, and the courts below erred in not considering the lesser included misdemeanor. [31]

We affirm the dismissal of the first-degree home invasion charge, but we reverse the circuit court's decision to grant Caudill's motion to quash the information, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly

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[28] MCL 750.92(2); MCL 750.110a(2).

[29] See *Harris*, 159 Mich App at 405.

[30] See MCL 750.110a and MCL 750.115(1).

[31] See MCL 766.14(1); *Harris*, 159 Mich App at 405.