

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
August 2, 2012

v

DAMON DWAIN BOSTICK,
Defendant-Appellee.

No. 308627
Oakland Circuit Court
LC No. 2011-236420-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

CURTIS M. BRAGG,
Defendant-Appellee.

No. 308628
Oakland Circuit Court
LC No. 2011-236421-FC

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

The prosecution appeals, by leave granted¹, the trial court's identical orders for each defendant, Damon Dwaine Bostick and Curtis M. Bragg, which denied the prosecution's motions to reinstate charges of felony murder, MCL 750.316(1)(b), against each defendant in these consolidated appeals. Because the trial court abused its discretion in dismissing the felony murder charges, we reverse and remand for further proceedings consistent with this opinion.

¹ See *People v Bostick*, order of the Court of Appeals, entered March 5, 2012 (Docket No. 308627); *People v Bragg*, order of the Court of Appeals, entered March 5, 2012 (Docket No. 308628).

Following a preliminary examination, the district court bound both defendants over for trial on the charges of assault with intent to commit armed robbery, MCL 750.89², and conspiracy to commit armed robbery, MCL 750.157a, but dismissed the felony-murder charges against each defendant. The prosecution moved for reinstatement of the felony-murder charges in the circuit court. The motions were denied and the prosecution now appeals, arguing that probable cause existed to conclude that defendants had the requisite intent to bind them over on charges of felony murder. We agree.

When reviewing a district court's bindover decision, this Court reviews the district court's decision regarding the sufficiency of the evidence for an abuse of discretion. *People v Flick*, 487 Mich 1, 9; 790 NW2d 295 (2010). The circuit court's decision is given no deference. *People v Henderson*, 282 Mich App 307, 313; 765 NW2d 619 (2009). A court abuses its discretion "when its decision falls outside the range of principled outcomes." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

A defendant is bound over for trial after the preliminary examination if the district court determines a felony has been committed and there is probable cause to believe that the defendant committed it. MCL 766.13; *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003). Probable cause exists when there is evidence "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief" of the accused's guilt on each element of the crime charged." *People v Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006), citing *Yost*, 468 Mich at 126. The district court may use circumstantial evidence and make reasonable inferences when determining if probable cause exists. *Henderson*, 282 Mich App at 312; *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003).

The elements of felony murder are: "(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b)." *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). The felonies listed in MCL 750.316(1)(b) include robbery and larceny of any kind.

In this case, both defendants were bound over on the charges of assault with intent to commit armed robbery and conspiracy to commit armed robbery. This Court has held that assault with intent to commit armed robbery is a proper underlying felony for felony murder because finding a defendant guilty of assault with intent to commit armed robbery requires finding the defendant guilty of attempted armed robbery, which is included in MCL 750.316(1)(b). See *People v Akins*, 259 Mich App 545, 553; 675 NW2d 863 (2003). The issue, then, is whether sufficient evidence was presented to support a determination that probable cause existed to find defendant's guilty of each of the elements of felony murder.

² Defendants were initially charged with armed robbery, MCL 750.529, but at the conclusion of the preliminary examination, the prosecution amended the information to change this count to assault with intent to rob while armed.

Demetrius Lanier was killed, thus establishing the first element. There is also probable cause to believe he was killed during the commission of an assault with intent to commit armed robbery. Bostick made arrangements with Richard Shannon to buy marijuana from Shannon. Bostick, Bragg, and a third man went to Shannon's apartment, which is on the sixth floor of an apartment building. Lanier was already at Shannon's apartment. Instead of pulling out money to pay for the marijuana, however, all three men pulled out guns. Shannon, Bostick, and the third man then struggled. Bostick and the third man duct taped Shannon while Bragg held a gun on Lanier. Bostick then demanded more marijuana and went upstairs to get more, threatening to tell Bragg to shoot Lanier if he did not find any. While Bostick was gone, Bragg and Lanier struggled. The struggle migrated to the balcony, where Lanier subsequently fell to his death. Three pounds of marijuana were gone when Shannon got out of the duct tape. Shannon also testified that Bostick and the third man took his wallet. With these facts, there is probable cause that defendants committed an assault with intent to commit armed robbery.

The primary issue for both defendants is if there was probable cause to believe that they had the requisite intent, or malice. To prove malice, the prosecution relies on the intent to "create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *Smith*, 478 Mich at 318-319.

DEFENDANT BOSTICK

Bostick was in contact with Shannon throughout the day to buy marijuana. He brought two others with him to Shannon's apartment and all three had guns. Bostick struggled with Shannon and subsequently duct taped him to a chair. During this struggle, one of the perpetrators said, "if you keep struggling, we gonna shoot one of you all up in there." Bostick then said, "I know you all got some more weed, where is it at?" Lanier told him there was some on the ninth floor. Shannon did not, though, have an apartment on the 9th floor; his other apartment was on the 11th floor. Bostick then threatened to tell Bragg to shoot Lanier if he did not find any marijuana up there: "I'm fixin' to go up here and go look you know what I'm sayin' he said if you lyin' when I get upstairs I'm gonna call my man downstairs [Bragg] and tell him to pop you if you lyin' if there ain't no weed up there." All of Bostick's actions, along with the actions of Bragg and the third man, created a volatile, dangerous situation. There were three armed men in Shannon's apartment and multiple struggles between the perpetrators and Shannon. Bostick threatened to call Bragg and tell him to shoot Lanier. A struggle between Lanier and Bragg began when Bragg's phone rang. This struggle migrated to the sixth floor balcony, where Lanier fell and later died from his injuries. This situation strongly supports a finding of probable cause that Bostick intended to create a very high risk of death or great bodily harm. The district court abused its discretion in finding otherwise.

Finally, Bostick focuses on the district court's statement, "[t]here is no credible evidence that Bostick foresaw or knowingly agreed to cause death or great bodily harm to Lanier." However, the district court concluded that it found Shannon's testimony credible "on the critical parts of his testimony." Furthermore, the district court's statement relates to binding Bostick over for felony murder based on an aiding and abetting or vicarious liability theory. In this case, Bostick can be bound over for felony murder as a principal actor, as discussed above, and theories of vicarious liability are unnecessary.

DEFENDANT BRAGG

When Bragg's cell phone rang, Lanier got up and said he could not breathe. Bragg began to struggle with Lanier and this struggle migrated to the balcony. There is evidence that they continued to struggle on the balcony; Shannon testified that he heard scuffling. The balcony railing was only three and one-half feet tall. Throughout this struggle, Bragg had a gun. A person of ordinary prudence and caution could entertain a reasonable belief that Bragg created a high risk of death or great bodily harm when he struggled with Lanier on a sixth floor balcony, with a railing only three and one-half feet high, while armed with a gun. See *Yamat*, 475 Mich at 52. The district court abused its discretion when it concluded there was no probable cause to find malice.

Reversed and remanded to the district court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly