

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellant,	)	
	)	Case No. 20050329-CA
v.	)	
	)	
Antonio G. Bosco,	)	F I L E D
	)	(December 30, 2005)
	)	
Defendant and Appellee.	)	<span style="border: 1px solid black; padding: 2px;">2005 UT App 566</span>

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Fifth District, Cedar City Department, 051500146  
The Honorable G. Michael Westfall

Attorneys: Mark L. Shurtleff and Brett J. Delporto, Salt Lake  
City, for Appellant  
Randall C. Allen, Cedar City, for Appellee

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Before Judges Davis, McHugh and Orme.

PER CURIAM:

The State appeals the district court's dismissal of an information against Antonio G. Bosco (Defendant) on one count of burglary, a second degree felony, in violation of Utah Code section 76-6-202.<sup>1</sup> See Utah Code Ann. § 76-6-202 (2004). The State argues that the district court erred by not binding Defendant over for trial based upon the evidence presented at a preliminary hearing.

In State v. Clark, 2001 UT 9, 20 P.3d 300, our supreme court stated, "[A]t both the arrest warrant and the preliminary hearing stages, the prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it." Id. at ¶16. In addition, "[t]he magistrate must view all evidence in the light most favorable to the prosecution and must draw all reasonable

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<sup>1</sup>Defendant was charged with a second degree felony because the State alleged that the burglary was committed within a dwelling. See Utah Code Ann. § 76-6-202(2) (2004).

inferences in favor of the prosecution.'" Id. at ¶10 (alteration in original) (citation omitted).

Despite this lenient standard at the preliminary hearing stage, "'[t]he magistrate's role in this process, while limited, is not that of a rubber stamp for the prosecution.'" Id. (quoting State v. Hester, 2000 UT App 159, ¶7, 3 P.3d 725) (alteration in original) (citation omitted). Instead, "the magistrate must attempt to ensure that all groundless and improvident prosecutions are ferreted out no later than the preliminary hearing." Id. (quotations and citations omitted).

The elements of the crime of burglary are: (1) the act of entering the building, with (2) the specific intent to commit a felony, theft, or other enumerated crime therein. See Utah Code Ann. § 76-6-202(1); State v. Brooks, 631 P.2d 878, 881 (Utah 1981). "The act of entering alone does not give rise to an inference that the actor entered with the requisite intent to constitute burglary." Brooks, 631 P.2d at 881. "The intent to commit a felony, theft, or assault must be proved, or circumstances shown from which the intent may reasonably be inferred. It is the intent to commit a theft, and not the actual theft, which is material." Id. (citation omitted).

In its order of dismissal, the magistrate ruled:

The basis for this dismissal is the fact that the [c]ourt cannot infer from the evidence that [Defendant] entered the dwelling with the intent to commit a felony or theft therein. While the [c]ourt does find that an inference exists according to the State's theory of burglary of a dwelling, the [c]ourt does not find that said inference is reasonable and dismisses the matter based on lack of intent to commit a felony or theft within the residence.<sup>[2]</sup>

The State argues that this ruling is erroneous because the evidence at the preliminary hearing allowed a reasonable inference that Defendant unlawfully entered the dwelling at issue

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<sup>2</sup>Specifically, the magistrate explained at oral argument that, although there was probable cause to believe that Defendant was not lawfully present, it could not infer from the fact that there was a request earlier in the day for money that Defendant entered the residence to commit a theft.

with the intent to commit a theft. Specifically, the State argues that an intent to steal may be inferred from Defendant's request to Ms. Bosco for money, his subsequent unlawful entry that same day, and evidence that he rummaged through a TV stand and moved other items while inside Ms. Bosco's residence.

However, even when "[v]iewed in the light most favorable to the prosecution, the facts presented at the preliminary hearing were [not] sufficient to meet the reasonable belief standard." State v. Clark, 2001 UT 9, ¶19, 20 P.3d 300. There is nothing in the evidence that allows for a reasonable inference that Defendant had the requisite intent to commit a theft other than his brief presence in the home and his earlier request for money from his ex-wife. We can see no error in the magistrate's decision that, without something more, these facts are insufficient to establish intent.<sup>3</sup>

Clark specifically states that "the magistrate must attempt to ensure that all "groundless and improvident prosecutions" are ferreted out no later than the preliminary hearing." Id. at ¶10 (citations omitted). From this language, it is clear that the supreme court preserved the gate-keeping function of a magistrate. See id. The magistrate in this case, having heard and carefully considered the State's evidence, properly dismissed the information because the State failed to establish probable

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<sup>3</sup>The inference the State urges could be drawn if the State's evidence included, rather than a television stand, that Defendant rummaged through Ms. Bosco's purse, cash box, or some other place where she regularly kept cash, checks, or other valuables. As this court has previously noted, there is a difference between a "reasonable inference" and "merely speculating about the possibilities." State v. Hester, 2000 UT App 159, ¶16, 3 P.3d 725. While the State argues that "it is difficult to imagine what other reason [than theft] [Defendant] may have had to break into the trailer," precisely the opposite is true. Defendant and Ms. Bosco were previously married, and one can only speculate as to Defendant's motive for entering into his ex-wife's residence in the middle of the day, knowing a witness had watched him break a window and enter the premises. The district court itself noted that it had heard sufficient evidence to substantiate probable cause for various offenses in this case--just not burglary. However, the State's theory was that Defendant unlawfully entered the premises with the intent to commit a theft, and we agree with the magistrate there was insufficient evidence to bind over Defendant on this charge.

cause to believe that Defendant unlawfully entered the premises with the requisite intent to commit theft.

Therefore, we affirm.

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James Z. Davis, Judge

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Carolyn B. McHugh, Judge

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Gregory K. Orme, Judge