STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2000
v	No. 219230 Bay Circuit Court
MICHAEL JOSEPH GLOWICKI, Defendant-Appellant.	LC No. 98-001341-FH

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of false report of a felony, MCL 750.411a(1)(b); MSA 28.643(1)(1)(b). Defendant was sentenced to three years' probation, with included terms requiring him to serve 270 days in jail, with 180 days deferred, pay $800 in fines and costs, complete forty hours of community service and attend anger management classes. We affirm.

Defendant's conviction stems from his call to 911 and his subsequent statement to police that as he saw two women, Brenda Swanson and her daughter Sherri, drive by his home, one of the women waved a handgun in the window. Defendant indicated that he considered the women's action harassment. The record demonstrates that earlier in the day of the alleged drive-by defendant had been convicted of assault and battery charges relating to an incident involving Brenda and her husband. Defendant asserted the truthfulness of his report as a defense. On appeal, defendant challenges the validity of his bindover, certain of the circuit court's evidentiary rulings, and the circuit court's refusal to provide requested jury instructions. We find no merit in defendant's various challenges.

We first address defendant's contention that the circuit court lacked jurisdiction due to an invalid bindover. Defendant states that the assignment of this case to the district court judge who presided over the preliminary examination was not by lot as required by MCR 8.111(B). Therefore, defendant argues, the district court lacked jurisdiction to bind him over on the charge and, the bindover void, the circuit court was without jurisdiction and its judgment of conviction void.

Apparently, because defendant already had an assault charge pending before one of the three district judges, his preliminary exam on this charge was assigned to the same judge. It is

possible for local jurisdictions to implement such practices through administrative rules. MCR 8.112. However, no such local rule existed. Defendant discovered and raised this issue on the third and final day of his preliminary exam, seeking dismissal of the case. Declining to take any such action at that late stage, the district judge found probable cause for defendant's bindover and deferred any ruling on the assignment issue to the circuit court.

At the circuit court, defendant brought a motion to dismiss in which he reiterated the argument that violation of MCR 8.111(B) rendered his bindover void. Defendant requested remand to the district court for proper assignment. The prosecutor responded that such action would nevertheless end with assignment to the same judge because the two remaining district judges had disqualified themselves in another matter involving defendant and would likely do the same for this case. Issuing its decision, the circuit court acknowledged that the rule requires assignment by lot, but noted that nowhere does the rule provide a remedy for violation of the procedures detailed therein. The circuit court found that regardless of the propriety of the assignment, the district judge did have jurisdiction to preside over the case because it had been assigned to him. The court then noted that defendant's requested remedy would be futile because due to disqualifications the case would wind up back with the same judge. The court denied defendant's motion.

Whether a court has jurisdiction is a question of law that this Court reviews de novo. *People v Laws,* 218 Mich App 447, 451; 554 NW2d 586 (1996). Similarly, the interpretation and application of court rules presents a question of law reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991); *Szymanski v Brown,* 221 Mich App 423, 433; 562 NW2d 212 (1997).

"[A] court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate." *In re Hatcher,* 443 Mich 426, 444; 505 NW2d 834 (1993). District courts have jurisdiction over, among other things, preliminary examinations in all felony cases. MCL 600.8311(d); MSA 27A.8311(d); *Laws, supra* at 451. The circuit court, meanwhile, is a court of general jurisdiction that has original jurisdiction in all matters not prohibited by law so that subject matter jurisdiction is presumed unless expressly denied by constitution or statute. *People v Goecke,* 457 Mich 442, 458; 579 NW2d 868 (1998), citing Const 1963, art 6, § 13 and MCL 600.151; MSA 27A.151. In personam jurisdiction and subject matter jurisdiction are vested in the circuit court on the filing of a return binding a defendant over for trial. *Goecke, supra* at 459. Because defendant's preliminary examination and subsequent trial fall within the class of proceedings the district and circuit courts are respectively authorized to adjudicate, we agree with the determination of the circuit judge that the district judge had jurisdiction to preside over the case irrespective of the manner of assignment. We also find, as the circuit judge presumably determined, that jurisdiction over defendant's trial was properly vested in the circuit court.

The question then is what impact on the proceedings, if any, runs from the failure to comply with the mandate of MCR 8.111(B) that assignment of defendant's preliminary examination to the district judge be by lot. It is intuitive that court rules providing for the random assignment and/or reassignment of cases are intended to prevent judge shopping and to avoid the appearance of impropriety. See *People v Montrose (After Remand),* 201 Mich App

378, 380 n 1; 506 NW2d 565 (1993); *Armco Steel Corp v Dep't of Treasury*, 111 Mich App 426, 438; 315 NW2d 158 (1981) (decided with reference to GCR 1963, 926, the predecessor of MCR 8.111). It has also been noted by this Court, in interpreting the correlative Wayne County Circuit Court Rule, that "[t]he fact that the system has a potential for abuse" is not grounds for reversing a defendant's conviction where no prejudice is shown and where it is apparent from the record that, whether by lot or direct assignment, the presiding judge was the only judge who could have heard the defendant's case. *People v Simonds*, 135 Mich App 214, 224-225; 353 NW2d 483 (1984).

In the instant case defendant has never asserted prejudice stemming from either the manner of assignment or the manner in which the district and circuit courts conducted the proceedings. Nor, prudently, has defendant ever suggested that the presiding district judge could or should have been disqualified pursuant to MCR 2.003. Our review of the record leads us to the conclusion that disqualification would not have been warranted. Defendant has simply maintained that the procedural misstep should afford him a second crack at preliminary examination proceedings. As the circuit court found, however, had defendant's case been remanded it would necessarily have been heard by the same district judge because the remaining two judges in the district had reasons to recuse themselves from matters involving defendant.

It has been noted at each stage of these proceedings that MCR 8.111, an administrative rule, includes no remedy for violation of its provisions. This is no deficiency, however, in light of rules such as MCR 2.003 that provide for the disqualification of judges where circumstances could adversely affect defendants. Here, like *Simonds*, no such circumstances exist and absent any showing of negative consequences we find no basis to fashion a remedy for noncompliance with MCR 8.111. Our conclusion is supported by those cases holding that evidentiary errors in a preliminary examination are to be considered harmless when a defendant is convicted following a fair, error-free trial in the circuit court. See, e.g., *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990). As our resolution, *infra*, of defendant's additional claims illustrates, his conviction resulted from an error-free trial. Remedy for any error related to the preliminary examination, available if at all through interlocutory appeal, was foreclosed when defendant elected to pursue the claim in a collateral attack.

Defendant next argues that the circuit court erred in denying his motion to quash the indictment. Defendant claims that his report of the Swanson women's actions to a 911 operator cannot sustain the charge of making a false report to a peace officer. In lieu of determining whether a 911 operator qualifies as a peace officer for the purpose of conviction under MCL 750.411a(1)(b); MSA 28.643(1)(1)(b), on the basis of defendant's report of the same facts to a county sheriff deputy and a state trooper we find no error in the circuit court's denial of defendant's motion.

"A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that (1) a felony was committed and (2) the defendant committed that felony." MCL 766.13; MSA 28.913; MCR 6.110(E); *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). This Court reviews de novo a circuit court's decision to grant or deny a motion to quash charges against a defendant to determine if the district court abused its discretion in ordering bindover. *Id*. An abuse of discretion exists

when the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias, *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993), or when an unprejudiced person, considering the facts on which the court acted, would say there was no justification or excuse for the ruling. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

Although the bulk of the evidence presented at defendant's preliminary examination centered on his call to 911, wherein he initially reported observing the women drive past his home displaying a handgun, other evidence showed that defendant reiterated his statements to both a county sheriff deputy and a state trooper who each immediately responded to the subsequent 911 dispatch. Accordingly, and notwithstanding that the information charged defendant only with making the false report to the 911 operator, the evidence presented clearly showed that defendant also made the report to a peace officer. Further evidence, including testimony indicating the Swansons' whereabouts at specific times and relevant drive times, supported their blanket denial that they had driven past defendant's home around the time in question.

It would exalt form over substance to in this case hold, as defendant seemingly requests, that the language and content of the information must control the validity of the bindover. Defendant was on notice that he was charged with making a false report to a peace officer, and he does not contest that he made his report to not only the 911 operator but also the responding officers. We find no abuse of discretion in the district court's determination that there existed sufficient probable cause that defendant committed the charged felony. Because it is not wholly unjustified by the record, we will not now disturb that determination. *Northey, supra* at 574.

Next, defendant challenges three of the circuit court's evidentiary rulings. Defendant initially asserts that the circuit court erred in refusing to admit the preliminary examination testimony of the 911 supervisor. The supervisor failed to appear at trial, but had testified during the preliminary examination regarding the timing of defendant's call to 911. Defendant contends that recitation of the supervisor's prior testimony was necessary because this testimony conflicted with call times presented at trial through the testimony of the 911 operators. Defendant argues that this testimony concerning the time of his call was critical to his case because it would show that the Swansons could feasibly have driven past his house between the times of their appearance at other locations.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Generally, relevant evidence is admissible and irrelevant evidence is not admissible. MRE 402. Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. However, even though evidence may be relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403. Additionally, under MRE 611(a), a court shall exercise reasonable control over the mode and order of interrogating

witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, and (2) avoid needless consumption of time.

Here, defendant sought to introduce the supervisor's prior testimony establishing the accurate time of the 911 call for the purpose of showing that the women allegedly drove by defendant's home shortly before the call. However, the time of the call itself would not serve to establish the precise time of the alleged drive-by, and there was a variety of evidence already admitted establishing the approximate time of the alleged drive-by, including defendant's own statements to officers, and both his and his sister's testimony. Combined with defense counsel's cross-examination of the 911 operators, which effectively raised the possibility that defendant's first call occurred at 6:05 p.m., a few minutes earlier than the time of 6:11 p.m. to which the operators testified, the question whether the women had driven past defendant's home a few minutes earlier than suggested by the prosecution was well developed by the stage of trial at which defendant sought to introduce the supervisor's testimony.

At minimum, therefore, we would find no abuse of discretion because the circuit court's intent to effectively manage the case justified its ruling to exclude the testimony pursuant to MRE 611. *Reigle, supra* at 37. In addition, however, we note that defense counsel stated early in trial that in establishing the Swansons' presence at various locations, both sides would be relying on the recollections of various witnesses for all relevant times. Defense counsel also conceded that these recollections were only somewhat reliable. Thus, while the precise time of defendant's 911 call may have been ascertainable, its probative value was not particularly high in light of the uncertainty of all the other evidence of times. We consequently hold that this minimal probative value was substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403. Notwithstanding the circuit court's omission of this rule as an explicit basis for exclusion of the supervisor's prior testimony, we find no reason to disturb the circuit court's ruling. See *People v Vandelinder,* 192 Mich App 447, 454; 481 NW2d 787 (1992).

Second, defendant argues that the circuit court erred in barring evidence that Brenda Swanson had previously threatened defendant. A few hours before his call to 911, defendant had been convicted of assault and battery charges relating to an incident involving Brenda and her husband. It is clear from this and other references in the record that there existed a history of acrimony between defendant and the Swansons, especially Brenda. Defendant asserts that testimony concerning three specific instances wherein Brenda verbalized threats, had he not been prohibited from eliciting such information during her cross-examination, would have presented the jury with evidence from which it could have drawn an inference that Brenda possessed a motive for driving past his home waving a gun. Defendant claims that because he was defending himself by asserting the truthfulness of his report, the evidence regarding Brenda's character and other acts would have filled a conceptual void and bolstered his credibility before the jury.

Like decisions concerning the general admission of evidence, whether a trial court has properly limited cross-examination is also reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). In this case, Brenda testified on cross-examination that she may have told a trooper earlier in the year that she was upset with defendant and if things were not done she would take matters into her own hands. She also admitted that

she once yelled to defendant from a vehicle "you're going to get it." Defendant sought to elicit further testimony concerning three additional instances wherein Brenda exhibited prejudice against him. The circuit court, however, concerned that this trial focus on the events of the day in question, rather than on incidents some of which were the subject of other court proceedings, ruled that defendant could establish Brenda's bias with the testimony already elicited and opined that further evidence in that vein would confuse the issues, cause undue delay and be a waste of time.

We again find no abuse of discretion on the ground that the circuit court was justified in refusing to permit further cross-examination in this area pursuant to MRE 403 and MRE 611(a). To the extent there was any error in excluding testimony concerning any of the three specific instances, we note that such preserved nonconstitutional error is not a ground for reversal unless, after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, jurors had before them the testimony of defendant and his sister, the only eyewitnesses to the alleged drive-by. Countering this evidence were the testimonial denials of Brenda and her daughter that they had driven by defendant's home, as well as the testimony of various employees who placed Brenda and Sherri at their respective businesses at pertinent times. The contested potential testimony would merely have supplemented those admissions, already on the record, that indicated Brenda's bias and undermined her credibility. On this record, it does not affirmatively appear more probable than not that the exclusion of this evidence was outcome determinative.

Lastly, defendant argues that the circuit court erred in admitting both a portion of the 911 recording that included reference to a personal protection order obtained by Brenda Swanson against defendant, and evidence of defendant's convictions for assault and battery on the day in question. The comments regarding the PPO were made during a return call by a 911 operator seeking background information with which to advise the responding officers. The circuit court allowed the playback of the 911 recording, without excise of references to the PPO, finding that the contested portion of the recording was relevant as part of the res gestae of the offense or the transactional events of the day. On the same basis the court also permitted reference to defendant's convictions, limited to identification that the convictions were part of the transactional events of the day. The court ruled, pursuant to MRE 403, that the probative value of this background information was not substantially outweighed by any possible prejudice.

Defendant contends that the admission of this evidence was more prejudicial than probative because it implied bad character and potentially allowed the jury to decide defendant's guilt on that basis rather than on the relevant facts. We agree with the circuit court, however, that the contested evidence was relevant under MRE 401 in that it constituted background circumstances surrounding the charged offense. We also note that throughout the proceedings the court appropriately handled objections to questioning about and references to the evidence which could otherwise have potentially generated unnecessary prejudice against defendant. We conclude that the circuit court did not abuse its discretion, but again note that in the context of the entire proceedings, it does not affirmatively appear that any error on this evidentiary issue was outcome determinative. *Lukity, supra* at 495-496.

Finally, defendant argues that the circuit court erred in refusing to provide lesser included offense instructions. We disagree. This Court reviews the failure to give an appropriate instruction for an abuse of discretion. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). An abuse of discretion exists if a reasonable person would find no justification or excuse for the ruling made. *Id.*

Defendant was charged with making a false report of a felony in violation of MCL 750.411a(1)(b); MSA 28.643(1)(1)(b). The felony defendant was alleged to have falsely reported was carrying a pistol in a vehicle, contrary to MCL 750.227; MSA 28.424. Defendant requested that the jurors be instructed on the offenses of knowingly brandishing a firearm in public, a misdemeanor contrary to MCL 750.234e; MSA 28.431(5), and careless, reckless or negligent use of a firearm, a misdemeanor contrary to MCL 752.862; MSA 28.436(22), arguing that these were lesser included misdemeanors. The circuit court refused defendant's request, ruling both that the crime of false report of a misdemeanor, MCL 750.411a(1)(a); MSA 28.643(1)(1)(a), was not a lesser included offense of the crime of false report of a felony, and that the firearm misdemeanors urged by defendant were not lesser included offenses of carrying a pistol in a motor vehicle.

Defendant contends that because the charged offense turns on the nature of the crime reported, the jury should have been given the opportunity to conclude that defendant reported a misdemeanor rather than a felony. However, before an instruction on a lesser misdemeanor offense is given, five factors must be met: (1) a proper request must be made, (2) an appropriate relationship must exist between the charged offense and the requested misdemeanor, (3) the requested misdemeanor instruction must be supported by a rational view of the evidence at trial, (4) if the prosecution requests the instruction, the defendant must be given adequate notice, and (5) the requested instruction must not result in undue confusion or injustice. *People v Steele*, 429 Mich 13, 18-21; 412 NW2d 206 (1987); *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982). The Supreme Court declined to set forth a mechanistic guideline for determining when justice would be served by giving an instruction on a lesser included misdemeanor, instead vesting the trial court with "substantial discretion" to determine such matters. *Steele*, *supra* at 21-22; *Stephens*, *supra* at 265.

We find that the circuit court appropriately exercised its discretion in declining to provide the additional instructions requested by defendant. The third factor of the *Steele* test requires that the element distinguishing the charged offense from the lesser misdemeanor is factually disputed and that the factual dispute is great enough for a jury to rationally reject the existence of the greater offense and accept the existence of the lesser misdemeanor offense. *Id.* at 21. We first conclude that no rational view of the evidence supports the existence of careless or reckless use of a firearm because conviction on that offense requires a showing that a firearm was discharged. Next, we find that on these facts no jury could conclude that a firearm was brandished in public, but that such action did not occur in a vehicle. Defendant's report to the police indicated that as Brenda Swanson and her daughter drove past his home, one of the women waved a gun in the window. The undisputed involvement of a vehicle compels the determination that the circuit court correctly rejected defendant's request for instruction on brandishing a firearm in public.

The requested instructions, if provided, would only have served to unduly confuse the jury. There was no abuse of the circuit court's substantial discretion in this matter.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder