

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEREK BONASSE,

Defendant-Appellee.

UNPUBLISHED
February 9, 2001

No. 226385
Wayne Circuit Court
LC No. 99-001087

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TIMOTHY GALVIN,

Defendant-Appellee.

No. 226386
Wayne Circuit Court
LC No. 99-001087

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ISELA ACCOSTA,

Defendant-Appellee.

No. 226387
Wayne Circuit Court
LC No. 99-001087

Before: Talbot, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, the prosecution appeals as of right from the circuit court's order dismissing charges of armed robbery, MCL 750.529; MSA 28.797, against all three

defendants, and charges of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), against defendants Derek Bonasse and Timothy Galvin, for the prosecution's failure to secure the presence of the alleged victims at trial. The prosecution also appeals as of right from the district court's refusal to bind defendants over on charges of first degree felony murder, MCL 750.316; MSA 28.548, a decision with which the circuit court agreed in an order denying the prosecution's motions to reinstate charges and amend the information. We reverse and remand for further proceedings consistent with this opinion.

On the day of trial, the complainants were not present in court. The trial court had previously indicated its intent to dismiss the case if the complainants were not produced at trial. The prosecution stated that it planned to call Michelle Santana to testify to admissions made by defendant Isela Accosta while they were incarcerated together, as well as Victoria Castillo, a res gestae witness whose testimony could establish the elements of the charged offenses. On defendants' motions, the circuit court dismissed all charges against defendants despite the prosecution's assurance that it could establish its case against defendants through the proffered testimony.

On appeal, the prosecution first argues that the trial court's dismissal of the charges violated the separation of powers. "This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). To the extent that constitutional issues regarding the separation of powers are implicated, review is de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

It is fundamental that the decision whether to dismiss a case or proceed to trial rests within the prosecutor's sole discretion. *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995). The conduct of a prosecution on behalf of the people by the prosecutor is an executive act. *Morrow, supra* at 160, quoting *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683-684; 194 NW2d 693 (1972). See also *People v Gilmore*, 222 Mich App 442, 457; 564 NW2d 158 (1997). "The principle of separation of powers restricts judicial interference with a prosecutor's exercise of executive discretion. Judicial review is appropriate only where prosecutorial decisions are unconstitutional, illegal, or ultra vires or where the prosecutor has abused the power confided in him." *Gilmore, supra* at 457-458 (citations omitted). See, generally, Const 1963, art 3, § 2. "[O]nly where the evidence is insufficient has the court the power to dismiss over prosecutorial objection." *Morrow, supra* at 163-164, quoting *People v Stewart*, 52 Mich App 477, 483; 217 NW2d 894 (1974).¹ See also *People v Williams*, ___Mich App___; ___NW2d___(2001) (Docket No. 224892, rel'd 1/2/01), slip opinion.

In this case, we believe that the circuit court "exceeded its authority and impinged on the prosecutor's executive-branch powers" in dismissing the charges against defendants. *Morrow*,

¹ The *Stewart* opinion contains a footnote, also noted in *Morrow*, emphasizing the fundamental nature of this principle: "Indeed, in considering a similar issue the Seventh Circuit in *Goldberg v Hoffman*, 225 F2d 463 (CA 7, 1955), cites no less an authority than *Marbury v Madison*, 1 Cranch 137; 2 L Ed 60 (1803), to conclude that dismissing a prosecution otherwise evidentially sufficient violates separation of powers." *Morrow, supra* at 163 n 3, citing *Stewart, supra* at 483 n 7.

supra at 159. The complainants were not necessary witnesses because the prosecution could prove the elements of the charged offenses through the testimony of a res gestae witness. Victoria Castillo was present during the incident, and her testimony at the preliminary examination provided probable cause for the bindover. Additionally, the prosecution indicated that Michelle Santana would testify to admissions made by defendant Accosta. We conclude that the circuit court's dismissal of this case constituted an abuse of judicial authority.²

The prosecution also challenges the district court's refusal to bind defendants over on charges of first-degree felony murder.³ At the conclusion of Castillo's testimony at the preliminary examination, the district court found probable cause lacking with respect to the felony murder charges. The circuit court denied the prosecution's motion to reinstate the charges against Bonasse and Galvin and to amend the information to add the charge against Accosta. This Court reviews a district court's bindover decision for an abuse of discretion. *People v Goecke*, 457 Mich 442, 447, 451, 471; 579 NW2d 868 (1998); *People v Crippen (On Remand)*, 242 Mich App 278, 281-282; 617 NW2d 760 (2000). Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. *Id.*

"To bind a defendant over for trial, the magistrate must be satisfied that there is sufficient evidence that an offense has been committed and that there is probable cause to believe that the defendant committed it." *Crippen, supra* at 282, citing MCL 766.13; MSA 28.931; MCR 6.110(E). See also *Goecke, supra* at 469. "Some evidence must be presented regarding each element of the crime or from which those elements may be inferred." *Id.* 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 the statute[.] [*People v Nowack*, 462 Mich

² Defendants argue on appeal, as they argued below, that the complainants are res gestae witnesses whom defendants have a right to confront and cross-examine, and that the prosecution must show the exercise of due diligence in its attempts to produce these witnesses for trial. Defendants claim that the absence of the complainants at trial would prejudice them because it is impossible to establish their identities through the testimony of the prosecution's witnesses. Defendants' argument is without merit. The prosecution was not required to show due diligence because the complainants were not endorsed witnesses, and defendants failed to request that the prosecution assist in locating the complainants. See 767.40a; MSA 28.980(1); *People v Burwick*, 450 Mich 281, 288-291; 537 NW2d 813 (1995); *People v Gadomski*, 232 Mich App 24, 35-36; 592 NW2d 75 (1998).

³ Bonasse and Galvin were originally charged with felony murder. At the preliminary examination, the prosecution moved to amend the information to add a charge of felony murder against Accosta. The district court denied the motion, and did not bind over any of the defendants on felony murder charges.

392, 401; 614 NW2d 78 (2000), citing *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999).]

“The facts and circumstances of the killing may give rise to an inference of malice.” *Nowack, supra* at 401. Malice may be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. *Id.*

At the preliminary examination, Castillo testified to the events surrounding the alleged robbery at the house where the victims were gathered. Her testimony showed that defendant Bonasse, armed with a gun, instructed everyone in the house to get on the floor. Jaime Torres, the decedent, ran out of the room toward the back of the house. Bonasse remained in the living room and held his gun on the other victims. Castillo saw defendant Galvin as he ran out of the room after Torres, attempting to pull his gun from his pants as he ran. Defendant Accosta followed Galvin. Castillo heard sounds of fighting coming from the back of the house and she heard Galvin say, “Stop.” About ten minutes later, Castillo heard a single gunshot. The medical examiner’s report indicated that the cause of Torres’ death was a single gunshot wound to the back of the head.

We find that this evidence established probable cause to bind defendants over on the felony murder charges. The district court found probable cause that defendants committed armed robbery. The facts and circumstances of the incident permit the inference that defendants intentionally set in motion a force likely to cause death or great bodily harm. Although Galvin was the alleged shooter, Bonasse and Accosta may properly be charged with felony murder as aiders and abettors. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). See also, *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999). The district court speculated that it was possible that the shooting was related to some other event occurring after, and independent of, the alleged robbery. The court also expressed its reservations about Accosta’s complicity in the shooting of Torres. We emphasize that “[i]t is not the function of the magistrate to discharge the accused when the evidence is conflicting or raises a reasonable doubt with regard to guilt. Such questions are for the trier of fact.” *People v Flowers*, 191 Mich App 169, 179; 477 NW2d 473 (1991), citing *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). See also *Goecke, supra* at 469-470. In light of the evidence presented at the preliminary examination, we conclude that the district court abused its discretion in refusing to bind defendants over on charges of felony murder.

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/ Jessica R. Cooper