

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TYRONE POE,

Defendant-Appellee.

UNPUBLISHED

December 18, 2003

No. 242810

Wayne Circuit Court

LC No. 02-001876

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order quashing the information and dismissing the charges of first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. We reverse and remand for reinstatement of the charges. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At the preliminary examination, complainant testified that at 4:30 a.m. on December 29, 2001, defendant entered her home without permission, slapped her, held a gun to her head, remarking that he should kill her, and stomped on her stomach. Complainant stated that she was frightened because she had argued with defendant earlier in the evening. She acknowledged that she and defendant were the parents of a child born on December 13, 2001, and that defendant had visited her home with permission several times after the child was born. Complainant acknowledged that she never told defendant he could not visit her home on December 29, 2001. She acknowledged that she had been convicted of fraudulent use of credit cards, that several months before the incident in question she broke the windows of defendant's car, and that she had made similar accusations against her former boyfriend. The district court bound defendant over on charges of first-degree home invasion, felonious assault, and felony-firearm.

Defendant moved to quash the information. After remanding the matter to the district court for further amplification of the decision to bind defendant over, the trial court granted the motion, stating that it did not find that any of the elements of the charged offenses were established at the preliminary examination.

The purpose of a preliminary examination is to determine if probable cause exists to believe that a crime was committed and that the defendant committed it. *People v Fiedler*, 194 Mich App 682, 689; 487 NW2d 831 (1992); MCL 766.13; MCR 6.110(E). Probable cause is

defined as evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

During a preliminary examination, the prosecutor is not required to prove the defendant's guilt beyond a reasonable doubt. The prosecutor must produce evidence of each element of the crime charged, or evidence from which the elements can be inferred. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Circumstantial evidence and reasonable inferences drawn from the evidence can be sufficient. *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003). A magistrate should not discharge a defendant if the evidence conflicts or raises a reasonable doubt of guilt. Such questions should be left for the jury. *People v Drake*, 246 Mich App 637, 640; 633 NW2d 469 (2001). The decision to discharge or bind over a defendant is reviewed for an abuse of discretion. *People v Vasher*, 167 Mich App 452, 456; 423 NW2d 40 (1988). The trial court may not substitute its judgment for that of the district court. *Drake, supra*, 639-640. We review the trial court's decision that the district court abused or did not abuse its discretion de novo. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

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 the person is armed with a dangerous weapon or another person is lawfully present in the dwelling. MCL 750.110a(2).

The elements of felonious assault are: (1) an assault; (2) with a dangerous weapon; and (3) with the intent to place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). An assault is an attempt to commit a battery or an unlawful act which places another person in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

The elements of felony-firearm are: (1) the possession of a firearm; (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b. A person has "possession" of a firearm if the firearm is accessible and available during the commission of or the attempt to commit a felony. *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993).

We reverse the trial court's order quashing the information and remand this matter for reinstatement of the charges. At the preliminary examination complainant testified that defendant entered her home without permission, placed a gun to her head and remarked that he should kill her, and stomped on her stomach. Complainant stated that when defendant entered her home she was frightened. Complainant's testimony provided evidence of each of the elements of the offenses charged. She stated unequivocally that she did not give defendant permission to enter her home on that occasion. The fact that complainant testified that defendant visited her home with permission on several previous occasions went to the issue of her credibility; however, issues of credibility and conflicting evidence are to be resolved by the jury. *Drake, supra*, 640. The trial court was entitled to consider the entire record, including the fact

that complainant wrote to the trial court and stated she lied at the preliminary examination,¹ but was not entitled to resolve issues of credibility. *Id.* The prosecution presented evidence of each element of the charged offenses, *Hill, supra*, and probable cause existed to believe that defendant committed the charged offenses. *Yost, supra*. The magistrate's decision to bind defendant over for trial as charged did not constitute an abuse of discretion. *Vasher, supra*. The trial court erred by quashing the information. *Orzame, supra*.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White

¹ Apparently, complainant did not specify the manner in which she lied.