STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 9, 2013
v	No. 312776 Isabella Circuit Court
TEASHA LEANNE REICHERT, Defendant-Appellee.	LC No. 12-000537-FH

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

The prosecution appeals by leave granted an order granting defendant's motion to quash a charge of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

While defendant was retrieving her property from her former boyfriend's home, she allegedly stole some of his tools and a 40-caliber Smith and Wesson pistol. Subsequently, defendant was charged with larceny of a firearm, MCL 750.357b, larceny from a building, MCL 750.360, and felony-firearm, MCL 750.227b. After defendant was bound over to circuit court, she moved to quash the felony-firearm charge. Defendant argued that neither larceny charge could constitute the predicate felony for the felony-firearm charge because she did not possess a gun during the commission of either felony. The circuit court agreed and granted defendant's motion to quash the felony-firearm charge. Following the circuit court's denial of its motion for reconsideration, the prosecution moved for leave to appeal which we granted.

The prosecution argues that the circuit court improperly granted defendant's motion to quash the felony-firearm charge because either larceny charge could constitute a predicate felony in support of the charge. We disagree.

This Court reviews de novo a circuit court's decision to grant a motion to quash to determine if the district court abused its discretion in binding over a defendant for trial. *People v Green*, 260 Mich App 710, 714; 680 NW2d 477 (2004). However, we review de novo issues involving questions of law. *People v Miller*, 288 Mich App 207, 209; 795 NW2d 156 (2010).

The purpose of a preliminary examination is to determine whether probable cause exists to believe that a crime was committed and that the defendant committed it. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003). Although the evidence need not establish guilt

beyond a reasonable doubt, "there must exist evidence of each element of the crime charged or evidence from which the elements may be inferred." *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support a defendant's bindover if such evidence establishes the requisite probable cause. *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003).

The felony-firearm statute, MCL 750.227b(1), provides in pertinent part:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years. [(footnotes omitted).]

Thus, it is a felony to carry or possess a firearm when committing or attempting to commit any felony other than the unlawful sale of a firearm, MCL 750.223, carrying a concealed weapon, MCL 750.227, unlawful possession of a pistol by a licensee, MCL 750.227a, and alteration or removal of identifying marks from a firearm, MCL 750.230. *People v Mitchell*, 456 Mich 693, 696-697; 575 NW2d 283 (1998). This list of four excepted offenses "is exclusive." *Id*. at 698. "[T]he Legislature's intent in drafting the felony-firearm statute was to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute." *Id*.

In general, the crime of larceny is committed by "stealing." See, e.g., MCL 750.356, 750.360. The basic elements of larceny are:

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999), quoting *People v Anderson*, 7 Mich App 513, 516; 152 NW2d 40 (1967).]

A larceny is considered a completed offense "as soon as there is the slightest taking of property with the intent to steal it." *People v Mumford*, 171 Mich App 514, 518; 430 NW2d 770 (1988), citing *People v Bradovich*, 305 Mich 329, 332; 9 NW2d 560 (1943); see also *People v Randolph*, 466 Mich 532, 543; 648 NW2d 164 (2002).

Here, defendant was bound over on the charge of larceny from a building for allegedly stealing tools from her former boyfriend's garage; thus, the alleged "stealing" occurred from within the confines of a building. See MCL 750.360. She was also bound over on the charge of larceny of a firearm for allegedly stealing a gun from her former boyfriend's house. See MCL 750.357b. Defendant argued in her motion that the felony-firearm charge had to be quashed because the preliminary examination evidence did not establish probable cause to believe that she possessed a firearm when she purportedly stole either the tools or the gun. The circuit court agreed with defendant and so do we. The evidence presented at the preliminary examination did not show that defendant's conduct fell within the scope of the felony-firearm statute.

First, under the circumstances of this case, larceny of a firearm could not be a predicate felony for the felony-firearm charge. A charge of felony-firearm requires that the defendant carry or have in her possession "a firearm when [she] commits or attempts to commit a felony." MCL 750.227b(1); see also *People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004). It is undisputed that defendant was not carrying a gun at the time she allegedly stole her former boyfriend's gun, i.e., no second gun was involved. But the prosecution argues that defendant became in "possession" of the same gun that she stole at the moment she picked it up with the intent to steal it and that such "possession" supported the felony-firearm charge. We cannot agree.

We interpret statutes so as to ascertain and give effect to the intent of the Legislature; thus, when the plain and ordinary meaning of the language is clear, no construction is necessary or permitted. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). Further, when interpreting a provision of the Penal Code, we consider the fair import of the terms "to promote justice and to effect the objects of the law." MCL 750.2. In *People v Flick*, 487 Mich 1; 790 NW2d 295 (2010), our Supreme Court considered the meaning of the noun "possession" and concluded that it was a legal term of art. *Id*. at 11 n 7. The *Flick* Court then turned to a legal dictionary which defined the noun "possession" as:

> "1. [t]he fact of having or holding property in one's power; the exercise of dominion over property. 2. [t]he right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. [s]omething that a person owns or controls. 4. [a] territorial dominion of a state of nation. [*Id*. at 12, quoting Black's Law Dictionary (7th ed).]

Considering the definition of the term "possession" with regard to the felony-firearm statute, as well as the elements of the larceny of a firearm offense, we conclude that the perpetrator of this larceny offense cannot simultaneously have possession of and steal the same gun for purposes of the felony-firearm statute. Until the perpetrator commits the larceny offense, i.e., takes the subject gun with the intent to steal it, the perpetrator does not have or hold that gun in his power and does not exercise dominion over that gun. See *Flick*, 487 Mich at 12, quoting Black's Law Dictionary (7th ed); *Bradovich*, 305 Mich at 332. Again, a larceny is considered a completed offense "as soon as there is the slightest taking of property with the intent to steal it." *Id*.; see also *Randolph*, 466 Mich at 543. Thus, in the case of larceny of a firearm, the perpetrator possesses the stolen firearm after the crime is completed, not during the commission of that crime. As our Supreme Court has concluded: "The evident purpose of the [felony-firearm] statute is to enhance the penalty for the carrying or possession of firearms during the commission of a felony and thus to deter the use of guns." *Moore*, 470 Mich at 62. Consistent with this object of the felony-firearm law, MCL 750.2, we conclude that the offense of larceny of a firearm cannot constitute a predicate felony for a felony-firearm charge when the same gun is involved in both offenses. In this case, the evidence produced at the preliminary examination failed to establish probable cause to believe that defendant was in possession of a firearm when she allegedly committed the larceny of a firearm offense. Therefore, as the circuit court concluded, this charge could not constitute a predicate felony in support of the felony-firearm charge.

Second, under the circumstances of this case, the charge of larceny from a building could not constitute a predicate felony for the felony-firearm charge. According to the preliminary examination testimony of an eyewitness, Ashley Jordan, the tools that defendant allegedly stole were already removed from defendant's former boyfriend's garage before defendant allegedly stole the gun. More specifically, Jordan testified that she saw a black hard case with some yellow lettering in the garage. After defendant told Jordan the case was hers, Jordan took it from the garage and placed it in the U-Haul. It was after the tool case had been removed from the garage that defendant was able to gain entry into the house and, once she did, she allegedly stole the gun. Defendant's former boyfriend also testified that, when he arrived home, defendant and two of her friends, including Jordan, were packing up defendant's items which "was mainly stuff from inside the house . . . mainly clothes." Thus, the record evidence did not establish probable cause to believe that defendant had a gun in her possession when she purportedly committed larceny from a building, i.e., stole the tools from the garage. See MCL 750.227b(1); *Hill*, 433 Mich at 469. Therefore, as the circuit court concluded, this charge could not constitute a predicate felony in support of the felony-firearm charge.

In summary, the evidence produced at the preliminary examination did not establish probable cause to believe that defendant committed felony-firearm. Thus, the district court abused its discretion in binding over defendant on that charge and the circuit court properly granted defendant's motion to quash the felony-firearm charge.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray