

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROLAND STANLEY BOUGHNER,

Defendant-Appellee.

UNPUBLISHED

January 9, 2001

No. 226872

Iosco Circuit Court

LC No. 00-003995-FH

Before: O’Connell, P.J., and Zahra and B. B. MacKenzie*, JJ.

PER CURIAM.

Defendant was bound over on a charge of felonious assault, MCL 750.82; MSA 28.277, following an altercation at a club during which he pulled a knife and threatened the complainant at a distance of approximately twenty to twenty-five feet. The prosecution appeals as of right from a circuit court order quashing the information and dismissing the case. We reverse and remand for reinstatement of the charge.

To bind over a defendant on a charge of felonious assault, there must be probable cause to believe that the defendant committed (1) a simple assault, (2) with the use of a weapon, and (3) the defendant had the present or apparent ability to commit a battery. See *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). The third element is at issue in this case. The prosecution contends that defendant and the circuit court incorrectly relied on *People v Lilley*, 43 Mich 521; 5 NW 982 (1880), and *Grant, supra*, in concluding that defendant could not be charged with felonious assault because he did not have the present or apparent ability to commit a battery. We agree. As noted by the district court, *Lilley* concerned improper jury instructions, not a motion to quash. *Lilley, supra* at 526. Furthermore, even if *Lilley* were controlling, the language of that case supports the district court’s decision to bind defendant over for trial in this case. In *Lilley*, the Court noted that there was a question for the jury: “[t]here may have been evidence in the case tending to show that when respondent was stopped, although not then within striking distance, yet so near as to cause immediate danger if not stopped, so that a jury would have been at liberty to have found that an assault was committed; yet there was evidence tending to show that none was committed. . . .” *Id.* (emphasis added). Here, defendant brandished a knife and stated that he was going to cut the complainant’s throat before being wrestled to the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

ground by a bystander. Just as in *Lilley, supra*, under these circumstances, there was a reasonable possibility that defendant could have caused injury to the complainant had he not been stopped.

In *Grant, supra* at 201, the defendant was six or seven feet away from the victim when he pulled a knife and threatened to cut her. The trial court dismissed a charge of felonious assault, determining that the defendant had no present or apparent ability to commit a battery against the intended victim because of the distance between the two. *Id.* at 203. In reversing, this Court noted that “[t]he flaw in this logic becomes clear when one considers that defendant could have thrown or intended to throw the knife at [the victim] from that distance.” *Id.* The same is true in this case. Even though defendant was about twenty feet away from the complainant, there is no indication that he could not have thrown the open knife from that distance. Of course, it would also be possible for a jury to determine that defendant did not have the present or apparent ability to commit a battery. However, where there is credible evidence to both support and negate the elements of the crime, questions of fact exist that must be determined by the jury. *People v Grayer*, 235 Mich App 737, 744 n 3; 599 NW2d 527 (1999); *People v Neal*, 201 Mich App 650, 655; 506 NW2d 618 (1993).

This Court reviews a circuit court’s decision to grant or deny a motion to quash a felony information de novo to determine if the district court abused its discretion. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). The district court’s determination regarding probable cause will not be disturbed unless it was wholly unjustified by the record. *Id.* at 575. The district court in this case did not abuse its discretion when it determined that whether defendant had the present or apparent ability to commit a battery against the complainant was a question for a finder of fact to determine. Because the circuit court erred in making its own factual determination that defendant was too far from the complainant to commit a battery, the court erred in quashing the information and dismissing the case.

Reversed and remanded. We do not retain jurisdiction.

/s/ Peter D. O’Connell

/s/ Brian K. Zahra

/s/ Barbara B. MacKenzie