

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellant,

UNPUBLISHED  
June 19, 2014

v

DAMON DESHAWN WEST,  
  
Defendant-Appellee.

No. 319868  
Calhoun Circuit Court  
LC No. 2013-001297-FH

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Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

The prosecution appeals by leave granted an order granting defendant’s motion to quash the information, in part, and dismissing counts 3 and 4 of the information, which charged defendant with conspiracy to commit the discharging of a firearm at a dwelling, MCL 750.157a, and gang membership providing the motive, means, or opportunity for committing the felony of discharging a firearm at a dwelling, MCL 750.411u, respectively. We reverse and remand for reinstatement of counts 3 and 4 of the information.

On November 14, 2012, Latia Williams was in her residence located on Greenwood Avenue in Battle Creek, Michigan, when she heard three gunshots and saw a silver vehicle flee the scene. She observed that a bullet had entered a window of her home and struck a wall. Officers from the Battle Creek Police Department (BCPD), who were conducting surveillance in the area, stopped the silver vehicle almost immediately and apprehended four individuals, including codefendant Anthony Glyshaw, codefendant Marcus Lipscomb, Jonathan Underhile, and Duane Young. A search of the vehicle produced no weapons, but officers found .32 caliber shell casings in the vehicle and in the street in front of the Williams home. Officers later found a .32 caliber handgun near the road on which the silver vehicle had driven. A search of a separate residence on Cain Street led to defendant and a box of .32 caliber ammunition. A .32 caliber handgun is not commonly found on the streets.

In an interview, Lipscomb told Officer Ryan Ricketson that Glyshaw handed him a gun when they turned onto Greenwood Avenue, slowed the vehicle, rolled the window down, and told Lipscomb to “get ‘em.” Lipscomb then fired several shots at the Greenwood residence and later threw the gun out the window when police pursued them. Lipscomb indicated that Glyshaw obtained the gun from defendant. Lipscomb admitted that he was a member of the “Block Boys” gang, and identified defendant as a “hard-core” member of the “East Side” gang who had

authority to give directions to other gang members. Both gangs are subsets of the “M.O.B” gang. Lipscomb further admitted that he shot at the Greenwood residence because he learned that rival gang members who had previously shot at Lipscomb resided there.

In an interview, Glyshaw told Officer Jim Bailey that he obtained the gun from defendant at the Cain Street residence on the night of the shooting and that defendant instructed Glyshaw to pick up Lipscomb and drive to Greenwood Avenue. Glyshaw also indicated that defendant was previously involved in a shooting on Greenwood. Glyshaw denied being a gang member, but claimed Lipscomb and defendant were both gang members.

Underhile testified that he was in the vehicle on the night of the shooting and witnessed Lipscomb fire several shots at the Greenwood residence after someone in the vehicle yelled “shoot ‘em.” Before the shooting, Underhile recalled that Glyshaw received a call from defendant, and Underhile overheard defendant tell Glyshaw to bring the gun back. Underhile further testified that defendant, Lipscomb and Glyshaw were gang members.

Examinations of Glyshaw’s cellular telephone and the cellular telephone used by defendant on the night of the shooting revealed a text message thread, which appeared on both telephones. It indicated that Glyshaw borrowed defendant’s gun for the purpose of a “lick,” and that defendant wanted “a cut.” A “lick” can mean either a robbery or a drive-by shooting, and “cut” could refer to defendant’s desire to be compensated for providing the gun. On Glyshaw’s telephone, a photograph was recovered of an individual with a handgun similar to the one recovered, taken a day before the shooting. On the telephone used by defendant, a photograph was recovered of an individual flashing an “M.O.B” gang sign.

Officer Chris Klein testified as an expert on gang activity and membership. He provided general information about how gangs identify and keep and share guns. He identified several photographs in which defendant, Glyshaw, and Lipscomb displayed gang signs and gang-related tattoos. He opined that defendant, Glyshaw, and Lipscomb were all gang members, and further characterized defendant as a hard-core gang member who was looked at as a leader.

Based on the above evidence, the district court issued a nine-page written order in which it summarized the evidence and ordered that defendant and his codefendants be bound over to the circuit court on all charges, including counts 3 and 4 against defendant.

Defendant thereafter moved to quash the information on the basis that insufficient evidence existed to demonstrate probable cause that defendant committed any of the charged crimes. After two hearings on the matter, the circuit court opined that the district court’s written findings did not identify the evidence relied on in making its determination regarding the elements of the charges at issue. Therefore, the circuit court remanded the matter to the district court with instructions to expand its findings. The district court declined to do so, reasoning that a proper motion to remand had not been made or heard and that the circuit court did not identify any violation of MCR 6.110. The district court further stated that the evidence was sufficient to support a finding of probable cause, and again ordered defendant to be bound over for trial. Thereafter, the circuit court dismissed counts 3 and 4 for “lack of specificity” in the district court’s findings.

On appeal, the prosecution argues that the circuit court erred in dismissing counts 3 and 4 of the information. We agree.

We review a district court's decision whether to bind over a defendant for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). "A circuit court's decision with respect to a motion to quash a bindover order is not entitled to deference because this Court applies the same standard of review to the issue as the circuit court." *Id.* "In other words, this court reviews the circuit court's decision regarding the motion to quash a bindover only to the extent that it is consistent with the district court's exercise of discretion. The circuit court may only affirm a proper exercise of discretion and reverse an abuse of that discretion." *Id.*

A preliminary examination is governed in part by MCR 6.110. That rule provides, in part, that the preliminary examination must be conducted in accordance with the rules of evidence, MCR 6.110(C); that the district court must exclude, upon motion or objection, evidence it finds to be excludable, MCR 6.110(D); and directs the district court to either bind over the defendant for trial or discharge him, depending on whether it finds that sufficient evidence exists to support a finding of probable cause that an offense was committed and the defendant committed it, MCR 6.110(E)-(F). Once a bindover has occurred, MCR 6.110(H) gives the circuit court the discretion to "either dismiss the information or remand the case to the district court for further proceedings" "[i]f, on a proper motion, the trial court finds a violation of subrule (C), (D), (E), or (F)[.]"

In this case, the circuit court remanded the matter to the district court, and ultimately dismissed counts 3 and 4 of the information, without a proper motion to dismiss pending and without a finding that the district court violated subsections (C), (D), (E), or (F). This was error. Moreover, the circuit court failed to properly address the motion actually pending before it. The circuit court was called upon to review the district court's bindover decision. A circuit court is not limited solely to the district court's written findings in making its decision. Rather, it "must consider the entire record of the preliminary examination." *People v Henderson*, 282 Mich App 307, 312-313; 765 NW2d 619 (2009). "Reversal is appropriate only if it appears on the record that the district court abused its discretion." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). The circuit court dismissed the charges for "lack of specificity" in the district court's written findings and not based on a finding that the district court abused its discretion. This was error.

Upon review of the evidence presented at the preliminary examination, we conclude that the district court did not abuse its discretion in finding probable cause to bind over defendant on all four charges against him, including the two at issue here. See MCL 776.13; MCR 6.110(E). "Probable cause requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt." *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003), quoting *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but he must present some evidence of each element. *Yost*, 468 Mich at 126. Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *Henderson*, 282 Mich App at 312.

As to count 3, sufficient evidence existed to support a finding of probable cause that defendant conspired with codefendant Glyshaw, at least, to commit the substantive crime of discharging a firearm in or at a building. See MCL 750.234b(1); MCL 750.157a. As to count 4, sufficient evidence existed to support a finding of probable cause that defendant committed the substantive crime of discharging a firearm in or at a building under an aiding or abetting theory, MCL 767.39, and that his association or membership in a gang provided the motive, means, or opportunity to commit that felony, MCL 750.411u. Because the district court did not abuse its discretion in binding over defendant, the circuit court necessarily erred in dismissing counts 3 and 4 of the information. See *Hudson*, 241 Mich App at 276.

Reversed and remanded to the circuit court for reinstatement of counts 3 and 4 of the information. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Cynthia Diane Stephens