

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
)
 Appellant,) NOT FOR PUBLICATION
)
 v.) Case No. S-2015-87
)
 DONNA LONG and)
 LILLIAN SHIPMAN,)
)
 Appellees.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 14 2016

MICHAEL S. RICHIE
CLERK

OPINION

JOHNSON, JUDGE:

The State of Oklahoma charged Donna Long and Lillian Shipman in the District Court of Oklahoma County, Case No. CF-2012-2056, with two counts of Financial Exploitation by Caretaker in violation of 21 O.S.2011, § 843.1. The State alleged the defendants acted in concert to financially exploit the alleged victim. On November 8, 2013, the Honorable Larry A. Jones held a joint preliminary hearing. After the State presented its evidence, counsel for each defendant demurred and argued that the evidence was insufficient for bind over on the alleged counts of exploitation. The Honorable Larry A. Jones overruled both demurrers and bound over both defendants on each of Counts 1 and 2.

Long and Shipman filed separate Motions to Quash the Information under 22 O.S.2011, § 504.1, alleging the State failed to produce sufficient evidence at preliminary hearing.¹ On January 22, 2015, the Honorable Donald L. Deason

¹ Shipman moved to quash Count 1, claiming there was no evidence she was involved in negotiating check number 5170, the subject of Count 1. Long moved to quash and dismiss

held a hearing on various motions, including the defendants' motions to quash. He ruled on all motions except the motions to quash and took the matter under advisement in order to re-read the preliminary hearing transcript. The following day the parties appeared and the district judge granted the defendants' motions to quash and dismissed the case. The State of Oklahoma appeals that order under 22 O.S.2011, § 1053 (4), and the matter is properly before this Court. We affirm the district court's order for reasons discussed below.

BACKGROUND

The State accused Lillian Shipman and her sister Donna Long of acting in concert to exploit Shipman's mother-in-law, Pamela Shipman, who died of cancer on October 5, 2011. In the last weeks of Pamela Shipman's life, Lillian was Pamela's primary caretaker and she cared for and administered Pamela's medication with oversight from hospice nurses. At issue are two checks signed by Pamela Shipman: Count 1 - check # 5170 dated August 12, 2011 in the amount of \$5,500.00 made payable to Michael or Scott Metzger cashed by Scott Metzger on October 1, 2011;² and Count 2 - check # 5171 dated September 2011 in the amount of \$250,000.00 made payable to Lillian Shipman deposited by Lillian and her sister on October 4, 2011.³

Counts 1 and 2, claiming there was insufficient proof that she was a caretaker of the alleged victim.

² Scott Metzger told police that he cashed check # 5170 for Donna Long on October 1, 2011, and she paid him \$100.00 for his services. Donna Long confirmed Metzger's account in a statement to police.

³ The exact date on check # 5171 is illegible. Appellees Shipman and Long opened a joint account on October 4, 2011, and deposited check # 5171 for \$250,000.00.

Pamela Shipman's husband and granddaughter testified at preliminary hearing that Lillian Shipman provided Pamela's primary care in the few weeks before her death and that Long provided no care. Each described Pamela's weakened condition in those last weeks and her inability to manage her affairs and care for herself. They explained that Pamela never wrote large checks like these before her illness and that she was in the habit of discussing any large expenditure with her husband before moving forward. Pamela's husband said she would never have written a check for \$250,000.00 because she would not write a check she knew would bounce.

Before granting each of Appellees' motions to quash for insufficient evidence, the court questioned the prosecution about its evidence. The court asked about evidence showing that Long was a caretaker. The prosecutor conceded there was no "positive evidence" of that fact. When the court later pointed out that the Information charged Long as a caretaker, the prosecutor noted the State was moving to amend the Information to state "caretaker or other person" consistent with section 843.1.⁴ The court then asked about the prosecution's evidence that Lillian Shipman with the aid of Long exploited Pamela to acquire the checks. The court found the prosecutor's supporting evidence and logic unavailing and stated:

I think the State's evidence that the checks in question were obtained as a result of exploitation is based upon speculation and innuendo. I

⁴ Title 21 O.S.2011, § 843.1(A)(1) provides, "No caretaker *or other person* shall abuse, commit financial neglect, neglect, commit sexual abuse, or exploit any person entrusted to the care of such caretaker *or other person* in a nursing facility or other setting, or knowingly cause, secure, or permit any of these acts to be done." (emphasis added) The prosecutor said "the weight of the evidence is going to show that [Long] aided and abetted the true caretaker in this."

don't hear of any concrete evidence before the Court that either of those checks were obtained as a result of exploitation as defined by the law of the State.⁵

The court found that Long did not fit the definition of caretaker as alleged in the Information and that there was no evidence Lillian Shipman helped obtain or pass the \$5,500.00 check. The court acknowledged there was evidence that checks "were taken from an elderly person who was dying of cancer," but no evidence of "who actually took them."⁶ The State announced its intent to appeal and the court formalized its ruling on the record. It held with respect to Appellee Shipman on Count 1 involving check # 5170 for \$5,500.00 that there was no evidence she was involved in uttering the forged instrument and no evidence she "actually" took the check or that she obtained the check through financial exploitation. The court found on Count 2 there was no evidence Shipman took check # 5171 or that she obtained the \$250,000.00 check from Pamela Shipman by exploiting her. The court found that Long was not a caretaker as alleged in the Information, a fact conceded earlier in the hearing by the State. While the court addressed the issue that Long was not a caretaker in its findings, its ruling on the motions to quash was predicated in large part on the absence of evidence, direct or circumstantial, that Lillian Shipman or Donna Long with the aid of each other acquired either check by exploiting Pamela Shipman.

⁵ The court noted with respect to Count 2 that the State alleged the financial exploitation was committed by the defendants' act of opening a checking account and attempting to deposit the \$250,000.00 check. The judge stated, "[t]hat allegation does not comply in any way with the definition of exploitation under the statutes."

⁶ The court found as to Count 1 evidence to support a charge of second degree forgery against Long with respect to the \$5,500.00 check, but was unsure whether the State's evidence could support a forgery charge against both defendants with respect to the \$250,000.00 check.

DISCUSSION

We review the district court's ruling granting Appellees' motions to quash for an abuse of discretion. *See State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

"At preliminary hearing the State is required to present sufficient evidence to establish (1) probable cause that a crime was committed, and (2) probable cause to believe that the defendant committed the crime." *State v. Heath*, 2011 OK CR 5, ¶ 7, 246 P.3d 723, 725. While the State need not prove the defendant's guilt with certainty, it must show that it is reasonable to believe that the defendant was involved in the commission of the charged offense. *Id.* There is a presumption that the State will strengthen its evidence at trial. *Id.* The evidence at preliminary hearing, however, must coincide with the defendant's guilt and be inconsistent with innocence. *Id.*

The State is not required to establish each element of the offense or the defendant's involvement by direct evidence; circumstantial evidence from which it is reasonable to infer the existence of each element of the offense and that the defendant committed the crime is sufficient. *Id.* at ¶ 8. We further observe that under Oklahoma law, "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in

its commission,” are equally accountable as “principals” in the commission of the crime at issue. *Id.*; *see also* 22 O.S.2011, § 432.

The State was required to show that Long and Shipman were caretakers, who with the aid of the other, acquired the two checks by exploiting Pamela Shipman. *See* OUJI-CR2d 4-147 (Supp.2013). Exploitation is the unjust or improper use of the resources of a vulnerable adult for the profit or advantage, pecuniary or otherwise, of another person through the use of undue influence, coercion, harassment, duress, deception or false representation. *See* OUJI-CR2d 4-148 (Supp.2013). The district court’s conclusion that there was insufficient evidence that Shipman or Long used undue influence or any of the other forbidden tactics to acquire either check # 5170 or # 5171 is supported by the record.

Robert Shipman testified that his wife Pamela pre-signed checks after her diagnosis and he believed the \$250,000.00 was possibly one of the pre-signed checks. Several weeks after her diagnosis, Pamela’s ledger and checkbook went missing and were not found again until after her funeral. No witness observed Shipman or Long exert any undue influence or any other tactic to obtain either check from Pamela. The investigating officer could not rule out the checks were stolen. Although the State charged Long as a caretaker, there was no credible evidence presented she ever cared for Pamela during her illness. Neither the district court’s ruling nor this opinion conclude that there was no wrongdoing by these defendants. The issue is whether the State presented sufficient evidence at preliminary hearing of the offenses as charged. Applying the highly deferential

abuse of discretion standard of review, as we must, to the district court's ruling on the motions to quash, we find no error.

DECISION

The Order of the District Court of January 23, 2015, sustaining Long's and Shipman's motions to quash the Information and dismissing the case, is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE DONALD L. DEASON, DISTRICT JUDGE

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OPINION BY: JOHNSON, J.
SMITH, P.J.: DISSENT
LUMPKIN, V.P.J.: CONCUR IN RESULT
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR

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SMITH, P.J., DISSENTING:

I respectfully disagree with the decision of the majority. I believe that the evidence presented was sufficient to establish probable cause that crimes alleged in Counts 1 and 2 were committed and probable cause that the Appellees committed these crimes.