

On Appeal, the State contends that the District Court abused its discretion when it determined that there was not a legally sufficient identification within the record to support the preliminary hearing magistrate's bind-over order. In appeals brought to this Court pursuant to 22 O.S.2011, § 1053, this Court reviews the District Court's decision to determine if the District Court abused its discretion. *Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d at 1193-94; *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Id.*

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. Juarez*, 2013 OK CR 6, ¶ 11, 299 P.3d 870, 873; *State v. Heath*, 2011 OK CR 5, ¶ 7, 246 P.3d 723, 725. The State is not required to present evidence at the preliminary hearing which would be sufficient to convict at trial as there is a presumption that the State will strengthen its evidence at trial. *Id.*; *Turner v. State*, 1976 OK CR 108, ¶ 6, 549 P.2d 1346, 1348.

In the present case, the District Court disagreed with the magistrate's determination of probable cause finding that the State had not established probable cause that Arthur was the individual that committed the crime. It is apparent from the record that the District Court failed to apply the proper

deferential review to the magistrate's determination. See *State v. Nelson*, 2015 OK CR 10, ¶ 11, 356 P.3d 1113, 1117 (reviewing magistrate's denial of motion to quash for abuse of discretion); *Harris v. State*, 1992 OK CR 74, ¶ 9, 841 P.2d 597, 600 (applying abuse of discretion standard to magistrate's denial of continuance); *State v. Weese*, 1981 OK CR 19, ¶ 4, 625 P.2d 118, 119 (recognizing that magistrate's determination State had met its burden at preliminary hearing reviewed for an abuse of the discretion).

Citing the prosecutor's failure to request that the record reflect that the investigating officer had identified Arthur as the individual that had committed the crime and the magistrate's failure to make such a finding, the District Court found that the record lacked a legally sufficient identification. However, the District Court's conclusion is a clearly erroneous conclusion and judgment based upon the facts and the law.

To establish probable cause that the defendant committed the crime, the State must show that it is reasonable to believe that it was the defendant who committed the crime. *State v. Berry*, 1990 OK CR 73, ¶ 8, 799 P.2d 1131, 1133. Although in-court identification is the most common method to show that it is reasonable to believe that the defendant was the individual who committed the crime, an in-court identification is not an indispensable requisite. Instead, the State may use circumstantial evidence to satisfy its burden at preliminary hearing. *Glass v. State*, 1985 OK CR 65, ¶ 15, 701 P.2d 765, 769-70; *State v. Weese*, 1981 OK CR 19, ¶ 3, 625 P.2d 118, 119. Even without a positive identification, circumstantial evidence may be sufficient to

support the State's burden of showing probable cause that the defendant committed the crime. *Id.*

Although the record in the present case does not reflect who the investigating officer identified at preliminary hearing, the circumstantial evidence was sufficient to support the magistrate's bind-over order. The State filed an Information supported by an Affidavit of Probable Cause charging Arthur with the crime of Forgery in the Second Degree After Two or More Felony Convictions, and identified Appellant as: "Henry Joseph Arthur, Jr., 12/28/72 . . . OK-W081012914." (O.R. 1-5). Arthur received a copy of the charge and acknowledged that he was the person referenced therein. (O.R. 5-6, 12).

The evidence at preliminary hearing established that the forged check was made out in Arthur's name. Emily Thompson testified that a check was cashed on her aunt, Mary Cozart's, account which neither Cozart nor any of her relatives with a power of attorney had written. Thompson testified that the check indicated that it was pay to the order of "Henry Arthur." (P.H. 13-14; State's Ex. No. 1). Detective Larry Bessinger of the Oklahoma City Police Department further testified that the forged check was made out to "Henry Arthur." (P.H. 73).

The evidence further established that the individual that cashed the check presented a driver's license bearing Arthur's name and driver's license number. Investigator Michele Patterson of Mid First Bank testified that an individual had cashed the forged check at the bank on April 9, 2013. Patterson

related that the bank's tellers only cash a check if the ID of the person presenting the check matches the person to whom the check is payable. She explained that the bank's "teller insight system" captured the driver's license number that the individual presented to cash the forged check on Cozart's account and logged that number on the back of the check. This number was "OK DL W081012914." (P.H. 56-57, 67-68; State's Ex. No. 1). Detective Bessinger testified that this license number had been issued to "Henry Joseph Arthur, Junior." (P.H. 71-72).

The evidence at preliminary hearing further established that the individual depicted in the bank's surveillance photographs appeared to be the same individual depicted in Arthur's photograph on file with the Oklahoma Department of Corrections. Patterson testified that the bank's surveillance system captured 5 photographs of the individual that cashed the forged check. Detective Bessinger testified that he compared the Department of Corrections' photograph of Henry Joseph Arthur, Jr., to the individual depicted in the bank's surveillance photographs and concluded that it appeared to be the same person.

At the close of the State's evidence at preliminary hearing, defense counsel demurred and explicitly argued "I demur because an ID of my client was not made today in Court." (P.H. II, 2, 4). The magistrate refused to sustain the demur. Although the magistrate did not expressly determine that it was reasonable to believe that Arthur committed the crime, she bound Arthur over on the charged offense. As such, we presume that the magistrate determined

there was probable cause to believe that Arthur committed the crime. *See Long v. State*, 2003 OK CR 14, ¶ 4, 74 P.3d 105, 107 (recognizing presumption that trial court only considers competent and admissible evidence in reaching decision at non-jury trial); *Akins v. State*, 1974 OK CR 116, ¶ 17, 523 P.2d 1111, 1114.

Based upon the circumstantial evidence presented at preliminary hearing, it was reasonable to believe that Arthur committed the charged offense. Sufficient evidence supported the magistrate's bind-over order. As such, we find that the District Court abused its discretion. The State's appeal is granted and the matter is reversed and remanded to the District Court for further proceedings consistent with this Opinion.

DECISION

The order of the District Court of Oklahoma County quashing this case for insufficient evidence is **REVERSED**. The matter is **REMANDED** for further proceedings consistent with this Opinion. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: Concur
A. JOHNSON, J.: Concur
LEWIS, J.: Concur in Result
HUDSON, J.: Dissent

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HUDSON, J., DISSENTING

No one identified the defendant at preliminary hearing as the man depicted in the surveillance photos cashing the forged check belonging to the victim. The District Court's order sustaining Arthur's motion to quash for insufficient evidence was therefore not an abuse of discretion. Absent a proper in-court identification of Arthur by any witness, or an express finding by the magistrate that Arthur was the man depicted in the surveillance photos, the District Court quite reasonably concluded there was no legally sufficient identification on the record establishing Arthur as the man who cashed the forged check. I therefore dissent to the majority's reversal of the District Court's ruling and write separately to address the majority's flawed approach to this case.

Any seasoned prosecutor knows that an in-court identification of the defendant is the essence of the State's evidence at preliminary hearing. An in-court identification can take many forms. The most common situation involves a crime victim identifying the defendant as the perpetrator of the offense described in his or her testimony. Also common is testimony from a police officer identifying the defendant as the person who gave a confession to the charged offense. Sometimes, identification testimony is used to connect the defendant to circumstantial evidence showing guilt. For example, a police officer may testify to taking buccal swabs from the defendant which are submitted for DNA testing and determined to match the DNA profile for biological material found at a crime scene.

Regardless of the precise form, one thing is certain: without in-court identification testimony at a preliminary hearing, the State cannot connect the defendant with the criminal acts described in the live testimony from its preliminary hearing witnesses. In-court identification at the preliminary hearing stage is the “amino acid” building block of the State’s evidentiary presentation along with a showing of venue. In this sense, identification is a prerequisite for a felony case to proceed to trial. Okla. Const. art. 2, § 17 (“No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.”); 22 O.S.2011, § 258(8) (“The purpose of the preliminary hearing is to establish probable cause that a crime was committed *and probable cause that the defendant committed the crime.*” (emphasis added); *id.*, § 262 (requiring discharge of the defendant by the magistrate “if it appear either that a public offense has not been committed, or that a public offense has been committed, but there is not sufficient cause to believe the defendant guilty thereof . . .”).

It is important for present purposes to understand the conceptual framework underpinning the right to preliminary hearing. We have recognized that:

a preliminary hearing is the right given by the Bill of Rights for benefit of the defendant. Its origin, like the Grand Jury, was created to prevent a person from becoming the victim of an unjust and malicious prosecution. The Constitution provides for the preliminary hearing to ascertain whether there is just

cause for defendant to stand trial in District Court, or whether he should then and there be released. It is a most important part of our system of Jurisprudence and should not be treated lightly. Unfortunately, seldom do you find a person who has served as a magistrate for any period of time who has not bound defendant over to District Court when he knew justice would have been better served by having the judicial courage to have released defendant at the preliminary hearing. **It must be borne in mind that the hearing is always being conducted for the benefit of the accused.**

Beaird v. Ramey, 1969 OK CR 195, ¶ 7, 456 P.2d 587, 589 (emphasis added).

The standard of review governing our analysis of the State's appeal in this case is the following:

Title 22 O.S.2011, § 504.1(A) allows a defendant to file a motion to quash for insufficient evidence in felony cases after preliminary hearing. The defendant must establish beyond the face of the indictment or information that there is insufficient evidence to prove any one of the necessary elements of the offense for which the defendant is charged. Title 22 O.S.2011, § 1053(4), establishes an appeal by the State upon a judgment for the defendant on a motion to quash for insufficient evidence in a felony matter. *State v. Davis*, 1991 OK CR 123, ¶ 4, 823 P.2d 367, 369. In appeals brought to this Court pursuant to 22 O.S.2011, § 1053, this Court reviews the trial court's decision to determine if the trial court abused its discretion. *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225. An abuse of discretion has also been described as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263 (internal citation

omitted). See also *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

State v. Delso, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1193-94.

As previously noted, the State is required to present sufficient evidence at preliminary hearing to establish (1) probable cause that a crime was committed, and (2) probable cause to believe that the defendant committed the crime. 22 O.S.2011, § 258; *State v. Juarez*, 2013 OK CR 6, ¶ 11, 299 P.3d 870, 873. *State v. Heath*, 2011 OK CR 5, ¶ 7, 246 P.3d 723, 725. The State is not required to present evidence at preliminary hearing which would be sufficient to convict at trial as there is a presumption that the State will strengthen its evidence at trial. Nevertheless, “the evidence at preliminary hearing must coincide with [the defendant’s] guilt and be inconsistent with innocence.” *Id.*

On appeal, the State argues that the District Court abused its discretion in finding insufficient evidence to support the magistrate’s bindover order. The State urges here, as it did before the District Court, that Detective Bessinger in fact identified at preliminary hearing Arthur—the defendant present in the courtroom during the preliminary hearing—as the man he observed in the surveillance photos and that the bindover order is premised on an implicit finding by the magistrate that Arthur was the same man shown in the surveillance photos. I disagree.

Absent a proper in-court identification of Arthur by any witness, the District Court reasonably concluded there was no legally sufficient identification on the record establishing Arthur as the man who cashed the

forged check. Without an in-court identification expressly made on the record, or an express finding by the magistrate that, based on her own review of the surveillance photos Arthur—the defendant sitting in her courtroom—was the same man depicted in the surveillance photos cashing the forged check, the District Court could reasonably conclude that insufficient evidence was presented to support the bindover order. At best, the record evidence connects only Arthur's name and driver license number to the forged check. In this day and age, it is certainly not outside the realm of possibility that someone with a fake ID presented the check for payment. Thus, the absence of an in-court identification linking the defendant in the courtroom at preliminary hearing (Arthur) to the man in the surveillance photo cashing the check is fatal to this case.

The record fails to establish who in the courtroom Detective Bessinger referred to when the prosecutor attempted to elicit an in-court identification from this witness. The prosecutor never attempted to obtain an express ruling from the magistrate clarifying Detective Bessinger's purported in-court identification, let alone that Bessinger identified Arthur as the man he instead recognized in the surveillance photos. The State's theory that the magistrate, as part of her probable cause finding, necessarily concluded that Arthur was the same person depicted in the surveillance photos ignores the magistrate's actual ruling in this case. The magistrate's seven-word bindover order ("I am binding you over as charged") amounts to the sum total of the magistrate's

express ruling on this point and provides the only specific findings in support of the magistrate's ruling.

The magistrate is presumed to know the law and apply it. *Akins v. State*, 1974 OK CR 116, ¶ 17, 523 P.2d 1111, 1114. We can therefore presume for present purposes that the magistrate's seven word bindover order embodied the dual probable cause findings mandated by Oklahoma law, i.e., that a crime was committed and that probable cause exists that the defendant committed the crime. 22 O.S.2011, § 258. That is all Oklahoma law requires in order to hold a defendant to answer for the charged offense in trial proceedings before the district court. 22 O.S.2011, §§ 264, 268-69.

We cannot assume, however, that the bindover order necessarily rested upon a factual finding that Arthur, the man in the courtroom at preliminary hearing, was the same person shown in the surveillance photos. Indeed, the magistrate hypothetically could have based her probable cause ruling on any aspect of the State's circumstantial evidence without independently concluding that Arthur was the same person shown in the surveillance photos. We simply cannot presume from a cold record that the magistrate made an independent identification on her own sufficient to support the bindover order. Our standard of review dictates that we defer to the District Court's very reasonable conclusion that the failure of any witness to directly connect Arthur with the cashing of the victim's forged check rendered the evidence insufficient to support the magistrate's bindover order.

The majority opinion concludes that the absence of a "positive" in-court identification is not fatal to the State's case—that sufficient evidence nonetheless supports the magistrate's bindover order. Reviewing the total record, the majority's analysis is anchored by four documents found not in the preliminary hearing transcript but instead the court file: 1) the Information; 2) the probable cause affidavit; 3) the initial arraignment minute; and 4) a *pro se* pleading signed by Arthur entitled "Motion to Plead Guilty in Abstentia." Maj. Op. at 3 (citing O.R. 1-6, 12). The majority also relies upon the testimony of Michelle Patterson and Detective Bessinger.

The fundamental problem with the majority's reliance upon documents from the court file is that none of these documents were brought to the magistrate's attention during the preliminary hearing. The record confirms that the State did not ask the magistrate to take judicial notice of these documents. Nor were they offered by the State as evidence at the hearing. The magistrate also makes no reference to these documents at any point on the record during the preliminary hearing,

Notable too is the State's failure on appeal to cite any of these documents in support of its challenge to the District Court's demurrer. The State's failure to rely upon these four documents at any point in these proceedings speaks volumes to the dubious nature of the majority's holding in this case. The bench and bar in this state will no doubt be surprised to learn that a prosecutor can sustain his or her burden at preliminary hearing without ever

presenting any in-court identification testimony connecting the defendant to the criminal offense described in the testimony. They will be even more surprised to hear that the State can successfully champion a bindover order on appeal by referencing documents in the court file which were never brought to the magistrate's attention and for which there is no record the magistrate ever reviewed. The majority opinion cites two cases to support this approach; both are inapposite.

In *Glass v. State*, 1985 OK CR 65, 701 P.2d 765, the State joined three separate counts of rape in a single information and presented testimony from each of the three rape victims at preliminary hearing. Two of the rape victims—M.S. and C.M.—identified Glass as their attacker. C.J., the third rape victim, could *not* identify her attacker. This Court held that sufficient evidence was presented to support the magistrate's bindover order for all three rape counts because C.J. and M.S. testified that their attacker wore a jacket and both identified the same jacket at preliminary hearing. Additionally, C.M. was accosted one hour after C.J.'s assault and she testified Glass attacked her with a pair of orange handled scissors. C.J. too testified she was attacked by a man wielding orange-handled scissors. Additionally, all three women were attacked at night in the same area of Lawton. *Id.*, 1985 OK CR 65, ¶ 15, 701 P.2d at 769-70.

The facts of *Glass* therefore show that the in-court identification testimony from the two victims in the joined counts, along with the similarities

attendant to all three crimes, established the identity of the perpetrator of C.J.'s rape. 12 O.S.2011, § 2404(B). See *Welch v. State*, 2000 OK CR 8, ¶ 11, 2 P.3d 356, 366 ("distinctive methods of operation are relevant to prove the identity of the perpetrator of the crime. Identity is the more appropriate label for such signature evidence because distinctive methods of operation are indicative of who perpetrated the crime.") (internal citation omitted). Hence, *Glass* does not stand for the proposition that no in-court identification of the defendant is necessary to connect him or her to the crimes described in the testimony. *Glass* actually reinforces the need for in-court identification testimony of the defendant at preliminary hearing. Without in-court identification of Glass by the victims on the other rape counts, the State would not have met its burden with respect to C.J. *Glass* emphasizes the importance of live witness testimony at preliminary hearing—not the use on appeal of documents from the court file to rationalize a magistrate's bindover order where insufficient evidence was presented at the hearing itself.

The majority's citation to *State v. Weese*, 1981 OK CR 19, 625 P.2d 118, is also of no consequence. *Weese* stands for the unremarkable proposition that the State may satisfy its burden of proof at preliminary hearing through circumstantial evidence. *Id.*, 1981 OK CR 19, ¶ 3, 625 P.2d at 119. And yet even in purely circumstantial cases someone must come forward and identify the defendant sitting in the courtroom as having some connection with the circumstantial proof presented. For example, DNA and fingerprint evidence at

a crime scene is not direct evidence but, rather, circumstantial evidence from which the trier of fact can infer that the person with that fingerprint or DNA profile was present and participated in the crime. *Pavatt v. State*, 2007 OK CR 19, ¶ 36, 159 P.3d 272, 285. No one would dispute, however, that before fingerprint or DNA evidence connecting a defendant to a crime scene could be used as evidence of guilt that someone—a detective, a fingerprint analyst, a phlebotomist—would be required to testify that he or she drew blood or examined fingerprints taken from the defendant that matched up to the physical evidence left at the crime scene. This type of testimony is used routinely at preliminary hearings to link up the results of laboratory reports admitted under 22 O.S.Supp.2013, § 751 to defendants sitting in the courtroom.

To hear the majority tell it, the four documents from the court file at issue here amount to some type of binding admission by the defendant which serves as a substitute for in-court identification testimony at the preliminary hearing. Yet, none of the documents involve an affirmative statement by Arthur admitting the truth or accuracy of the allegations contained in the probable cause affidavit or the identifier information contained therein. Neither the information nor the preliminary arraignment minute reveal identifying driver license or date of birth information. Arthur's "Motion to Plead Guilty in Absentia" also does not represent an admission by him of any of the allegations in the information or the probable cause affidavit, let alone constitute a valid

guilty plea. This document—like the others cited by the majority—wholly fail to show Arthur was the man depicted in the surveillance photo who cashed the victim's forged check.

Regardless, we should not simply presume that the magistrate took the extraordinary step at the preliminary hearing of scouring the court file in the hopes of finding pleadings and documents helpful to the State's efforts to meet its burden of proof. "We presume, when a trial court operates as the trier of fact, that only competent and admissible evidence is considered in reaching a decision." *Long v. State*, 2003 OK CR 14, ¶ 4, 74 P.3d 105, 107. The only competent and admissible evidence presented here is that which was introduced by the parties as reflected by the transcript of the preliminary hearing. Again, there is no indication whatsoever that the magistrate ever reviewed the four documents now relied upon by the majority in concluding that sufficient evidence was presented to enter a bindover order.

The majority opinion too exaggerates the evidence actually presented at preliminary hearing. I take issue with the majority's assertion that Michelle Patterson, the Mid First Bank fraud investigator, testified "that the bank's tellers only cash a check if the ID of the person presenting the check matches the person to whom the check is payable." Maj. Op. at 5. The record does not fairly support this claim. The majority appears to rely upon this passage from defense counsel's cross-examination of Patterson:

Q. I know we don't have every single second of that video footage, but general practice at the teller counter

would be to have somebody that comes in to cash a check, that person puts their thumbprint on it, right?

A. That is correct.

Q. You wouldn't expect to find the teller's thumb print on it, right?

A. If a person attempting to transact business is not a MidFirst customer, it is procedure that we obtain their thumbprint.

Q. Okay. So this would definitely be the person at the counter?

A. Yes, sir.

Q. And we would hope that the teller would take an ID from that same person and look at it and look at the person and only cash it if that person matches their ID and matches this person on the check, right?

A. Correct.

Q. Okay. We would assume by looking at this check that somebody named Henry Arthur that had an Oklahoma ID - you said something about an ID plus zero and that meaning something? On the back, I got you. That person was the driver's license of the person that came in?

A. Correct.

Q. That would be a valid Oklahoma drivers license, right?

A. That would be the Oklahoma driver's license that the individual presented at the time. **I cannot state whether it's a valid driver's license or not.**

Q. Okay. Without maybe a teller being in on something, that would be the license number that the

person presented at that time there at the counter,
right?

A. Correct.

(P.H. Tr. 66-68) (emphasis added).

Taken in the light most favorable to the State, this passage does not establish, as the majority asserts, that Patterson “related that the bank’s tellers only cash a check if the ID of the person presenting the check matches the person to whom the check is payable.” Rather, Patterson related only that she “hoped” that’s what happened. She also admitted that she could not state whether the license presented in this case was valid or not. Noticeably absent from the record is any affirmative testimony by Patterson that Mid First Bank tellers as part of their regular business practices compare the photograph on any ID presented to ensure a match with the person cashing the check. Nor did Patterson testify that the teller in this case actually compared the photo on the ID presented to ensure it matched the person cashing the check. Moreover, the teller did not testify.

The majority’s reliance upon Detective Bessinger’s testimony to establish probable cause might be persuasive if Bessinger actually made an in-court identification of Arthur. But that’s not what happened. Detective Bessinger testified that he compared the man shown in the Mid First Bank surveillance photos to the DOC photo he obtained for Henry Joseph Arthur, Jr. Detective Bessinger concluded that the same person appeared both in the DOC photo and the bank surveillance photos. Without an in-court identification

establishing that the defendant sitting in the courtroom was the same man Bessinger observed in the bank surveillance photo and the DOC photo, probable cause simply cannot be found. Bessinger effectively repeats the statements made in the probable cause affidavit without being able to actually back it up at the preliminary hearing. Nor did any of the other witnesses at preliminary hearing actually connect Arthur to the cashing of the forged check.

The majority's approach effectively transforms the preliminary hearing stage into little more than a paper hearing. It gives no deference whatsoever to the District Court's ruling as required by our standard of review. And it finds probable cause based on little more than the driver license and name presented by the person cashing the forged check. For all we know, the person cashing the forged check in this case presented a fake ID to con the teller into cashing it—after all no one testified that the defendant was the man shown in the surveillance photos cashing the forged check. In a world in which identity theft runs rampant, the majority's approach has the potential to foster unjust and malicious prosecutions. I therefore dissent. I would affirm the District Court's inherently reasonable decision in this case.