IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Appellant,

v.

BOBBY J. FLOYD, SR., AND JUSTIN HENDREN,

Appellee(s).

NOT FOR PUBLICATION

No. S-2015-1036

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 21 2016
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

HUDSON, JUDGE:

The State of Oklahoma, Appellant, appeals to this Court from an order entered by the reviewing judge, the Honorable Robert G. Haney, District Judge, which affirmed a ruling adverse to the State entered by the magistrate, the Honorable Rebecca Gore, Special Judge, in Case Nos. CF-2015-143 and CF-2015-144 in the District Court of Craig County. *See* 22 O.S.2011, §§ 1089.1 – 1089.7.

STATEMENT OF THE CASE

The Appellees were charged with Count 1: Burglary in the Second Degree, felony, 21 O. S.2011, § 1435; and Count 2: Obstructing Officer, misdemeanor, 21 O.S.2011, § 540. At the preliminary hearing, the Appellees demurred to the evidence claiming the State had not proven the crime of Burglary in the Second Degree, but had only proven the misdemeanor breaking and entering. Judge Gore sustained the Appellees' demurrer finding the State failed to prove the intent to steal element of Burglary in the Second Degree.

The State appealed Judge Gore's ruling. The matter was assigned to Judge Haney, as reviewing judge pursuant to 22 O.S.2011, 1089.2(C), who sustained Judge Gore's ruling. The State appealed.

Pursuant to Rule 11.2(A)(4), *Rules of the Oklahoma Court of Criminal* Appeals, Title 22, Ch.18, App. (2016), this appeal was automatically assigned to the Accelerated Docket of this Court. The proposition or issue was presented to this Court in oral argument on September 27, 2016, pursuant to Rule 11.2(E). At the conclusion of oral argument, this Court took this matter under advisement.

SUMMARY OF FACTS

Evidence presented at the preliminary hearing showed that Appellee Justin Hendren ("Hendren") was going or had gone through an apparently contentious divorce with Christy Hendren ("Ms. Hendren"), and Hendren moved out of the "homestead" on January 4, 2015. On February 3, 2015, the District Court of Craig County, Case No. FD-2015-8, issued a temporary order awarding Ms. Hendren possession of the homestead and personal property located therein, and excluding Hendren from the premises. On March 3, 2015, at 12:24 a.m., Ms. Hendren received a text message from Hendren that she quoted as saying "your DF attorney better get things figured out, that he wanted his tools and tractor, if he don't get them soon, he's coming to get them."

Just after midnight on March 8, 2015, Appellees Floyd and Hendren drove to the homestead in an unmarked Craig County Sheriff Department

vehicle with the lights off. Ms. Hendren and Larry Seaton were in the house with the lights off. Ms. Hendren saw Hendren get out of the vehicle at the road and walk up to a detached garage. Hendren's tools were kept in the garage, which also contained the vehicles of Ms. Hendren and Seaton. Hendren kicked in the door of the detached garage. While inside, Hendren slashed tires on both vehicles and also wiped dirt off the license plate of Seaton's vehicle. Ms. Hendren testified that nothing else was amiss in the garage. Seaton also testified nothing was missing out of the garage. While still on the property, Hendren called Vinita police dispatch requesting owner information for the license plate on Seaton's vehicle. Ms. Hendren saw Hendren by the tractor parked behind the garage, and the tractor keys were missing after Hendren left. During the investigation of the incident, Hendren and Floyd both denied being at the homestead and gave corroborating alibis. However, cell phone records from both of their phones showed they were in the vicinity of the homestead during the incident.

After the State rested, counsel for Hendren demurred to the evidence supporting the charge of Burglary in the Second Degree claiming the State had only proven the misdemeanor breaking and entering. Hendren argued the State had failed to prove the element of intent to steal or commit a felony, which is necessary to prove Burglary in the Second Degree. The State argued that, even though the evidence showed he only slashed tires and wiped a license plate while inside the garage, Hendren's March 3, 2015 text message to his wife stating he was going to get his tractor and tools, and all of the stealth

and deception used in the incident, proves that he entered the garage with the intent to steal property. Hendren responded that the evidence showed that the tools were still in the garage and that Hendren left the garage without taking anything. Judge Gore noted that the State was required to prove all of the elements of the crime of Burglary in the Second Degree during the preliminary hearing. Judge Gore found that Hendren only spent two to three minutes inside the garage and had the opportunity but took nothing from the garage. Judge Gore held that the State had not proven that Hendren had broken into the garage with intent to steal any property therein. Counsel for Floyd also demurred and Judge Gore found there was sufficient evidence to support a charge of breaking and entering, but insufficient evidence to support the intent to steal element of Burglary in the Second Degree. The State announced its intent to appeal from the adverse ruling of the magistrate.

The State's appeal was assigned to Judge Haney, as reviewing judge pursuant to 22 O.S.2011, § 1089.2(C). On November 17, 2015, a hearing was conducted before Judge Haney. The State argued that it had presented evidence, in the form of Hendren's text message to his wife and the stealth used in the incident, which indicated his intent to steal his tools from the garage. The State argued that once this evidence was presented, the question of intent became an issue of fact for the jury. The Appellees argued that if Hendren had the intent to steal property from the garage, he could have and would have done so, because he was not interrupted or distracted while he was in the garage. Judge Haney noted that the evidence showed Hendren was not

interrupted or disturbed while in the garage and had plenty of opportunity to steal the tools if he had intended to do so. Judge Haney sustained Judge Gore's ruling by finding that the direct evidence of nothing being stolen from the garage removes the circumstantial evidence of intent to steal.

The State filed this appeal asserting one proposition of error.

I. THE DISTRICT COURT ERRED IN SUSTAINING THE DEMURRER BECAUSE THE STATE PRODUCED SUFFICIENT EVIDENCE TO ESTABLISH PROBABLE CAUSE OF BURGLARY IN THE SECOND DEGREE.

ANALYSIS

"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." 22 O.S.2011, § 258(8); *see also State v. Vincent*, 2016 OK CR 7, ¶ 5, 371 P.3d 1127, 1129. The standard of review in a state appeal from an adverse ruling of a magistrate at the preliminary hearing is "whether the evidence, taken in the light most favorable to the state, is sufficient to find that a felony crime has been committed and that the defendant probably committed said crime." 22 O.S.2011, § 1089.5; *see also Vincent, supra.* "When considering whether or not a crime has been committed, the State is required to prove each of the elements of the crime . . . . The magistrate must consider the proof established by the State in light of the statutory elements of the given offense. If the elements of the crime are not proven, then the fact of the commission of a crime cannot be said to have been established. A defendant cannot be held to answer for actions which do not amount to a crime as

defined by our statutes." *State v. Berry*, 1990 OK CR 73, ¶ 9, 799 P.2d 1131, 1133. Absent an abuse of discretion in reaching that determination, the magistrate's ruling will remain undisturbed. *Vincent, supra* (citation omitted). 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." *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Burglary in the Second Degree is committed when a person breaks and enters any building or structure in which property is kept with intent to steal any property therein or to commit any felony. 21 O.S.2011, § 1435; *see also* OUJI-CR 5-13. It is the act of forcible entry with the intent to steal or to commit any felony which is essential to the offense of second degree burglary. *Lyons v. State*, 1973 OK CR 439, ¶ 11, 516 P.2d 283, 285. While the fact that property was stolen after a breaking and entering is, of course, admissible as evidence from which it may be inferred that the intent to steal existed at the time of the entry, it is well settled that an actual stealing is not an element of the crime of burglary. *Id.*; *see also* Williams *v. State*, 1988 OK CR 221, ¶ 11, 762 P.2d 983, 986 (evidence that property is stolen after a breaking and entering is admissible to prove that intent to steal existed at the time of the entry, but it is well settled that an actual stealing is not an element of the crime of burglary); *Sheehan v. State*, 1946 OK CR 87, 83 Okl.Cr. 41, 46-47, 172 P.2d 809, 812 (the offense of burglary is complete when the building is broken into and entered with specific intent to steal, and the actual stealing is but evidence of such intent).

Upon review, we find that there was far more than just circumstantial evidence of intent to steal at the time Appellee Hendren kicked in the door and entered the detached garage. Hendren's text message to Ms. Hendren provided circumstantial evidence of his state of mind regarding the entire situation. There was substantial direct evidence concerning the stealth used to commit the crimes in this case. Direct evidence established that the crimes occurred within a week after Hendren sent the text message, and were committed with the Appellees driving to the homestead after midnight in an unmarked sheriff's vehicle with the headlights off. Ms. Hendren saw Hendren walking up the driveway, saw him beside the tractor, and then saw him walk away and out of sight. An investigation of the property after the incident produced direct evidence that, during the night Hendren was on the property, the walk-in door of the detached garage was kicked in, tires of the two cars parked in the garage were slashed, and the keys to the tractor were missing. Thus, direct evidence placed Hendren at the location of his tools and his tractor, the subjects of the text message. The fact that none of the tools were actually stolen from the garage is not an element of the crime of burglary. *Lyons, supra.*

There was also substantial direct evidence concerning the deception used in attempting to cover up the crimes committed in this case. Both Appellees denied being involved in the incident and provided written alibies. However, cellular phone records provided direct evidence that both Appellees' cell phones were used in the vicinity of the crime scene during the time of the incident. Hendren called Vinita police dispatch requesting owner information for the

license plate on Seaton's vehicle during the time he was on the property.

We find that the logic and effect of the circumstantial and direct evidence presented in this case, taken in the light most favorable to the State, provides sufficient probable cause of intent to steal. 22 O.S.2011, § 1089.5; *Vincent, supra*; *Neloms, supra.* We find that the State presented sufficient evidence to bind the Appellees over for trial on the charge of Burglary in the Second Degree and to leave the determination of Hendren's actual intent as an issue of fact for the jury. *See e.g. Murphy, supra*; *Logan, supra.*

DECISION

The order of the District Court of Craig County sustaining the magistrate's ruling adverse to the State in Case Nos. CF-2015-143 and CF-2015-144 is **REVERSED**, and the cases are **REMANDED** to the District Court with instructions to bind the Appellees over for trial on the charge of Burglary in the Second Degree. Pursuant to Rule 3.15, *Rules, supra*, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CRAIG COUNTY
THE HONORABLE ROBERT G. HANEY, DISTRICT JUDGE

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

RC/F

LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

I respectfully dissent to the Court giving this appeal a *de novo* review rather than applying the correct standard of review – abuse of discretion. When this Court reviews an appeal by the State from a ruling by a magistrate, and subsequently the reviewing judge, following a preliminary hearing pursuant to 22 O.S.2011, § 1089.1 and Rule 6, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), we are bound to accept the factual findings of the magistrate and review her decision for an abuse of discretion, *i.e.*, a clearly erroneous decision. *See State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194 (an abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented).

In the present case, the evidence presented is subject to different interpretations. However, there is a factual basis supporting the magistrate's decision and we should review it for an abuse of discretion, and not whether we would have made a different decision if we had been the magistrate. The decisions by the magistrate and reviewing judge in this case have a basis in the law and fact and we should honor those decisions. There was no abuse of discretion.

I am authorized to state that Judge Johnson joins in this dissent.