IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. S-2015-1067**
	)	
CHAD DEWAYNE HENRY,	)	
	)	
Appellee.	)	

OPINION

HUDSON, JUDGE:

Appellee, Chad Dewayne Henry, was charged with Count 1: Robbery by Two or More Persons, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 800; Count 2: Maiming, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 751; and Count 3: Placing Bodily Fluids Upon a Government Employee, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 650.9, in the District Court of Oklahoma County, Case No. CF-2013-6764. Appellee was bound over at preliminary hearing on Counts 1 and 3 but the magistrate demurred out Count 2 for insufficient evidence.

After preliminary hearing, Appellee's case was assigned to the Honorable Cindy H. Truong, District Judge, and district court proceedings commenced. Notably, Appellee did not file a written motion to quash for insufficient evidence pursuant to 22 O.S.2011, § 504.1 at any point in the district court proceedings. Approximately twenty-two (22) months later, Appellee's case was transferred for jury trial to the Honorable Donald L. Deason, District Judge.

Voir dire commenced on November 2, 2015. At the beginning of the second day of trial (the jury had not yet been sworn), Judge Deason sustained Appellee's oral motion to quash the Count 1 charge of conjoint robbery for insufficient evidence and dismissed the venire panel in light of the prosecutor's statement that he intended to appeal.

Appellant, the State of Oklahoma, now appeals. We exercise jurisdiction pursuant to 22 O.S.2011, § 1053(4). *See Tilley v. State ex rel. Scaggs*, 1993 OK CR 52, ¶¶ 5-6, 869 P.2d 847, 849. For the reasons discussed below, we reverse the District Court's ruling.

BACKGROUND

At preliminary hearing, the State presented evidence that on September 29, 2013, David Henderson was a Wal Mart employee pushing shopping carts in the store parking lot. Appellee and Stacy Lynn Wallace approached Henderson in a vehicle driven by Appellee. Wallace asked Henderson if she could borrow his cell phone to help find someone with Alzheimer's disease who was missing in the parking lot. Henderson agreed and handed over his white Samsung Galaxy S4 to Wallace through the passenger side window. Instead of making the call, Appellee and Wallace started to drive away.

Henderson immediately grabbed the car's passenger side door with both hands and he was dragged alongside the car. Henderson testified the car traveled quickly at first and continued to accelerate across the parking lot. The cell phone was in Wallace's hands as she sat in the front passenger seat of the speeding car. When Henderson attempted to grab the cell phone, Wallace

pulled it away from him. Henderson asked Appellee and Wallace to stop. Instead, Wallace smiled at Henderson and told him to "let go". Wallace then pulled Henderson's hand off the inside door handle and began hitting the other hand Henderson was using to hold onto the exterior door handle. This caused Henderson to lose his grip and fall off the car. In the process, Henderson broke his leg and fractured his ankle.

Defense counsel demurred at preliminary hearing to the Count 1 conjoint robbery charge. Defense counsel argued insufficient evidence was presented to support bindover on Count 1 because the force used by the defendants was employed as a means of escape. *See* 21 O.S.2011, § 792 ("To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery."). The State responded that the evidence showed the defendants used force against the victim to retain possession of the cell phone. The State cited testimony from the victim that Wallace moved the cell phone out of the victim's grasp as he reached for it while being dragged alongside the car. The State also noted Appellee's acceleration of the vehicle across the parking lot as Wallace forced the victim off the passenger side door.

The magistrate overruled the demurrer and bound both defendants over on Count 1 as charged. The magistrate concluded that the evidence supported the inference that "the continuing actions of the defendants were for the purpose of preventing the victim from regaining physical contact with his

telephone and regaining possession of the telephone." (P.H. Tr. 86). Whether that was true or not, the magistrate reasoned, was a jury question but the evidence was nonetheless sufficient for bindover on the charged offense.

Appellee did not file a motion to quash at any point during the district court proceedings. His codefendant, however, *did* file a motion to quash challenging the Count 1 conjoint robbery charge on virtually the same grounds tendered in support of the demurrer at preliminary hearing. The Honorable Cindy H. Truong—the district judge assigned to this case—denied the motion to quash. Judge Truong expressed her view that the issue presented a jury question and a lesser included offense instruction of larceny would be available at trial to facilitate the jury's resolution of this question of fact. Wallace thereafter entered a guilty plea and disposed of her case.

Several months later, Judge Truong assigned Appellee's case out for trial to the Honorable Donald L. Deason, District Judge. On the second day of trial, Judge Deason noted that defense counsel had brought to the court's attention counsel's belief that Count 1 did not charge the correct felony offense. After reviewing the Information and preliminary hearing transcript, Judge Deason concluded insufficient evidence supported the Count 1 conjoint robbery charge. The record shows Judge Deason's ruling emphasized the following testimony of the victim on cross-examination at preliminary hearing:

> Q. And as the female has the phone the car begins to drive away; is that correct?
>
> A. Yes.

Q. And this is at the point that you put your hands on the car; is that correct?

A. After the car began to drive away.

Q. And you're trying to reach for the phone; is that correct?

A. Not to begin with.

Q. Well, to begin with what were you doing grabbing the car?

A. I was panicking.

(P.H. Tr. 20-21) (emphasis added).

Judge Deason concluded this testimony showed the victim's phone was not obtained in response to any force or fear. Instead, Judge Deason concluded the victim voluntarily handed over the phone and then "put himself in peril by grabbing the car" when Appellee drove off. Thus, Judge Deason concluded, there was insufficient evidence to support the Count 1 robbery charge.

The State argued that the victim's voluntary handover of the phone to Wallace was part of one continuous transaction in which the defendants sped away in the vehicle and subsequently forced the victim off the car after resisting his attempts to reclaim possession of the phone. The prosecutor described the issue of whether the force employed in this case was used merely as a means of escape—or, instead, as a means to retain possession of the property—as a jury question. Additionally, the State urged that Appellee's motion to quash was untimely and not in the required written form thus preventing the State from filing a written response.

Judge Deason rejected these arguments and concluded with the following:

> It's very clear to me that there was no force or fear used to initially obtain possession of the telephone. The victim was asked, when the car began to drive away, that he put his hands on it; asked if he was trying to reach for the phone. He indicated that that was not the case. He said he was panicking. There's no evidence that I see that he actually had ahold of the phone once he gave it up to the female in the car.
>
> Gentlemen, this just isn't robbery. It could be a larceny of some kind. It could be an embezzlement of some kind. But as a matter of law, this is not proper to send to a jury on a charge of Robbery in the First Degree. If, for some reason, they would convict, I think it would be clearly reversed on appeal.
>
> * * * *
>
> I don't think that the Court is in a position, when I see that a case that I believe is improperly pled and not factually supported, I don't think that it means I have to sit here and listen to testimony for a couple of days and then sustain a demurrer that I know is going to be coming.
>
> So my ruling stands. Motion to quash is sustained. The facts do not support robbery.

(11/3/2015 Tr. 7-8, 9).

ANALYSIS

The State raises two grounds for relief on appeal, namely, that: 1) Appellee's motion to quash was not properly before the district court; and 2) sufficient evidence was presented at preliminary hearing to support the Count 1 conjoint robbery charge. 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.

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. 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 granting Appellee's oral motion to quash because it was untimely and not presented in the proper form.[1] We find that the State preserved this claim for appellate review by raising it below. *State v. Brownfield*, 1986 OK CR 71, ¶¶ 3-4, 719 P.2d 460, 461. Further, we agree with the State that Appellee's motion to quash was not properly before the district court. Section 504.1 "provides for the filing of a motion to quash for insufficient evidence after preliminary hearing." *State v. Davis*, 1991 OK CR 123, ¶ 4, 823 P.2d 367, 369. Nothing in the plain language of this statute contemplates, let alone authorizes, oral motions to quash. Indeed, we have held that "[a]n oral motion is not the proper method to attack the information." *Atkins v. State*, 1977 OK CR 150, ¶ 18, 562 P.2d 947, 949. Our decisions show too that Appellee's motion to quash was untimely, coming as it did on the first day of trial. *Mitchell v. State*, 2005 OK CR 15, ¶ 51 n.11, 120 P.3d 1196, 1209 n.11 (failure to file motion to quash prior to entering plea on the merits waives any complaint that the magistrate erred in bind-over); *Farmer v. State*, 1977 OK CR 215, ¶ 25, 565 P.2d 1068, 1072 (same).

More fundamentally, however, the district court abused its discretion in finding that insufficient evidence was presented at preliminary hearing to support the Count 1 conjoint robbery charge. The record shows the victim

[1]Appellee did not respond to this argument in his response brief.

grabbed onto the passenger side door and attempted to regain physical possession of his phone when the defendants drove off. The victim was unsuccessful in this effort because Wallace moved the phone out of his grasp and then forced the victim from the speeding car, causing him to fall to the parking lot. Although the victim testified on cross that he initially grabbed onto the vehicle because he panicked, he acknowledged earlier in his testimony that he grabbed onto the car in order to get back his phone (P.H. Tr. 10) ("Q. Okay. Once the vehicle started in motion, did you do anything in order to try to get the phone back? A. I grabbed on to the car.").

In Oklahoma, robbery is defined as "a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." 21 O.S.2011, § 791. As mentioned earlier, "the force or fear must be employed to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery." *Id.*, § 792. The degree of force employed is immaterial. *Id.*, § 793. Here, the defendants' act of obtaining the cellphone from the victim and then driving off was not robbery. However, the defendants' actions in resisting the victim's attempt to recover the phone by moving it out of his grasp and then forcing him from the speeding car *does* constitute the offense of conjoint robbery. *King v. State*, 1978 OK CR 59, ¶ 7, 580 P.2d 164, 165 ("The snatching a thing is not considered a taking by force, but if there be a struggle to keep it, or any violence, or disruption, the taking is robbery[.]") (internal quotation

omitted); *Guarino v. State*, 1971 OK CR 477, ¶ 8, 491 P.2d 326, 328 (the mere snatching of a diamond wallet from a jeweler's hand was not robbery but the defendant's later actions during a foot chase in using mace to retain possession of the wallet does constitute the offense of Robbery by Force).

Based upon the foregoing, the State presented sufficient evidence at preliminary hearing supporting Appellee's bindover on the Count 1 conjoint robbery charge. The district court's ruling constitutes a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. Thus, the trial court abused its discretion in granting the motion to quash.

DECISION

The District Court's order granting the Motion to Quash is **REVERSED AND VACATED** and the case is **REMANDED** to the District Court for proceedings not inconsistent 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 CINDY H. TRUONG, DISTRICT JUDGE
THE HONORABLE DONALD H. DEASON, DISTRICT JUDGE
THE HONORABLE D. FRED DOAK, SPECIAL JUDGE

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