



**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

THE STATE OF OKLAHOMA,)
)
 Appellant,)
 v.)
)
 DAVID FLORES VILLANUEVA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. S-2018-1227

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

SEP 26 2019

**JOHN D. HADDEN,
CLERK**

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

On March 6, 2018, Defendant Villanueva was charged with one count of Burglary in the First Degree in Comanche County Case No. CF-2018-135. On November 7, 2018, a preliminary hearing was conducted before the District Court of Comanche County, the Honorable Ken Harris, Special Judge. At the hearing, the State amended the information to add one count of Conspiracy to Commit Burglary. Villanueva demurred to both charges. The demurrer was overruled as to the burglary charge but was granted as to the conspiracy charge. The State appealed Judge Harris's ruling pursuant to Rule 6.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019) and 22 O.S.2011, § 1089.1.

The appeal was assigned to the Honorable Scott D. Meaders, District Judge, for review. On November 20, 2018, after hearing argument of the parties and reviewing the preliminary hearing transcript, Judge Meaders affirmed the magistrate's ruling.

From this ruling, the State appeals. The State's sole proposition of error is that the trial court erred when it granted Villanueva's demurrer to the conspiracy charge. Pursuant to Rule 11.2(A)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), this appeal was automatically assigned to this Court's Accelerated Docket. The propositions and issues were presented to this Court in oral argument on July 11, 2019, pursuant to Rule 11.2(E).

When the State appeals a demurrer from a preliminary hearing, this Court shall consider "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. "Absent an abuse of discretion in reaching that determination, the magistrate's ruling will remain undisturbed." *State v. Bradley*, 2018 OK CR 34, ¶ 12, 434 P.3d 5, 10. This standard demands that the State prove the lower court came to "a

clearly erroneous conclusion . . . one that is clearly against the logic and effects of the facts presented.” *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

The lower court did not abuse its discretion in granting Villanueva’s demurrer to the conspiracy charge. The trier of fact’s decision to grant Villanueva’s demurrer to the conspiracy charge was neither “clearly erroneous” nor illogical in light of the facts presented.

DECISION

The order granting the defendant’s demurrer to the Conspiracy to Commit Burglary charge in Comanche County District Court Case No. CF-2018-135 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT
OF COMANCHE COUNTY
THE HONORABLE KEN HARRIS, SPECIAL JUDGE**

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OPINION BY: LEWIS, P.J.:

KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J.: Dissent
ROWLAND, J.: Dissent

RA/F

HUDSON, J., DISSENTING:

I join Judge Rowland's dissent in full but write separately to point out that the magistrate's ruling ignores "in Oklahoma . . . the State, at preliminary hearing, is not required to present evidence sufficient to convict; it is presumed that the State will strengthen its case at trial." *State v. Ward*, 1985 OK CR 134, ¶ 9, 707 P.2d 1217, 1219. Indeed, "[t]he 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). As Judge Rowland shows, sufficient evidence—when taken in the light most favorable to the State—was presented at preliminary hearing to allow the magistrate to find probable cause that a conspiracy was committed by Appellee and his confederates. See *State v. Bradley*, 2018 OK CR 34, ¶ 20, 434 P.3d 5, 12. The magistrate in this case had no discretion to deny a bind over order for the crime of conspiracy applying the governing standard. At best, the State's evidence gave rise to conflicting inferences concerning the existence of a conspiracy. The resolution of that issue, however, is for the jury at trial, not the magistrate.

ROWLAND, JUDGE, DISSENTING:

I respectfully dissent because, in my opinion, the preliminary hearing magistrate failed to view the evidence in the light most favorable to the State and erroneously concluded that no reasonable person could infer the existence of an agreement among the three defendants in this case. Testimony at the preliminary hearing showed that the two victims were at home when one heard a knock on her door. She looked out and saw her female roommate standing on the porch. Behind the roommate were two men whose faces were obscured, one by a biker's mask and the other by a bandana. It turns out each man was armed with a weapon: the African American in the biker's mask had a gun and Appellee Flores Villanueva in the bandana had some sort of wooden handle or club. The female suspect forced her way into the residence, followed closely by the two masked men, and began hitting the female victim and demanding money. When the victim attempted to use her cell phone to call the police, the African American man put the gun to her head warning her "not to do that." Appellee Flores Villaneuva, at some point, struck the victim in her side with the wooden weapon he was carrying. All three attackers then left the residence. At the conclusion of the preliminary

hearing, the State sought to add a charge of conspiracy and the magistrate denied its request for insufficient evidence.

The elements of conspiracy are “an agreement between two or more people to commit an unlawful act, and some overt act by one or more of the parties in furtherance of this agreement.” *Pearson v. State*, 1976 OK CR 297, ¶ 19, 556 P.2d 1025, 1030. It need not be proved by direct evidence and is most often proved by circumstantial evidence. *Hutchman v. State*, 61 Okla. Crim. 117, 128, 66 P.2d 99, 104 (1937)(“The courts of this country have often held that it is not necessary that a conspiracy be proved by direct testimony, in fact, conspiracies are seldom susceptible to such proof. It is often proved by circumstances.”) As the Tenth Circuit has succinctly noted, “In a conspiracy prosecution, the critical inquiry is whether the circumstances, acts, and conduct of the parties are of such a character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists.” *United States v. Kendall*, 766 F.2d 1426, 1431 (10th Cir. 1985). Finally, at the preliminary hearing stage, the magistrate is required to view these circumstances, acts and conduct of the parties in the light most favorable to the State. *See State v. Bradley*, 2018 OK CR 34, ¶ 20, 434 P.3d 5, 12.

The preliminary hearing magistrate in this case had to determine whether the appearance of two masked men at the same residence on the

same day and time, each armed with a weapon, who follow a third person forcefully pushing her way inside the residence, and who then with violence and force assist that female in demanding money from the victims, are facts from which a reasonable person could infer that an agreement to perform these acts existed ahead of time. The magistrate need not have concluded that such an agreement was the only inference that could be drawn from these facts. Indeed, even if the magistrate believed it was equally likely that sheer coincidence caused these three to independently appear on the same door step on the same day and hour with the same devious plans, the magistrate was required by law at the preliminary hearing to view the facts in the light most favorable to the state, i.e. that the three agreed ahead of time to take these actions. *Id.* In finding insufficient evidence to support a conspiracy charge, the magistrate effectively held that no reasonable person viewing these facts could reasonably infer that the three had agreed ahead of time to don masks, weapons, and travel to this residence to commit an unlawful act. Given the low burden of proof at the preliminary hearing, and the required standard of review, the ruling of the magistrate was, in my view, an abuse of discretion.

It is impossible to square the magistrate's finding of insufficient evidence, as well as the holding of the majority, with our extant case law on conspiracy. Early on the Court stated:

The very existence of a conspiracy is generally a matter of inference deduced from certain acts of the persons accused, done in pursuance of an apparently criminal or unlawful common purpose. It is not necessary to prove that the conspirators came together and actually agreed to pursue their purpose by common means, one performing one part and [the other] another.

Mathews v. State, 19 Okla. Crim. 153, 167, 198 P. 112, 117-18 (1921).

In *State v. Davis*,¹ 1991 OK CR 123, ¶ 12, 823 P.2d 367, 370 and *Fetter v. State*,² 1979 OK CR 77, ¶¶ 10-11, 598 P.2d 262, 265 this Court held similar circumstances sufficient to prove an agreement despite the lack of any evidence the two conspirators ever discussed an agreement between themselves.

¹ In *Davis*, co-conspirator one emerged from her house and spoke to an informant who was there to buy drugs. She then went back into the house, and co-conspirator two came out to the vehicle, took money from the informant, then went back into the house. Co-conspirator one then re-emerged from the house, handed the informant the drugs without speaking a word and then left. This Court found those circumstances justified a finding that the two alleged co-conspirators had an agreement to consummate the drug deal with the informant and that the district court erred in granting the defendant's motion to quash. *Davis*, 1991 OK CR 123, ¶ 8, 823 P.2d at 869.

² In *Fetter*, evidence showed defendant spoke by phone with an undercover federal agent he believed to be an organized crime hitman, and that his female co-defendant also spoke by phone and flew to New Orleans to meet the agent in person. Both discussed with the undercover agent hiring him to kill the same man, and this Court found sufficient evidence from which a jury could infer the existence of a conspiracy beyond a reasonable doubt. *Fetter*, 1979 OK CR 77, ¶¶ 3-4, 598 P.2d at 264.

In an appeal pursuant to 22 O.S.2011, §1089.7, we review the magistrate's decision for an abuse of discretion. *See State v. Salathiel*, 2013 OK CR 16, ¶ 7, 313 P.3d 263, 266. An abuse of discretion has been defined as "any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue." *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. "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.'" *State v. Haliburton*, 2018 OK CR 28, ¶ 12, 429 P.3d 997, 1000-01 (quoting *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d at 1194).

In an ordinary abuse of discretion analysis, the fact I may have ruled differently than the magistrate or trial judge is not enough to find an abuse of discretion; our job as appellate judges is not to substitute our judgement for that of the trial court in matters of discretion. Essential to the proper adjudication of this case, however, is the fact that the preliminary hearing magistrate was not armed with the usual broad discretion which usually attends judicial decisions, because when acting as a preliminary hearing magistrate he was required to view the evidence in the light most favorable to the prosecution. The magistrate, I believe, wrongly found that no reasonable person could infer an agreement from the above facts when it was at least one of the possible inferences to be

drawn and, in my opinion, the only logical one. Because the evidence, when viewed in the light most favorable to the prosecution, clearly raised the inference of an agreement to commit the unlawful acts, I respectfully dissent.

I am authorize to state that Judge Hudson joins in this dissent.