IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. S 2011-0801**
	)	
WENDEL HUGHES,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, JUDGE:

Appellee, Wendel Hughes, was charged in the District Court of Sequoyah County, Case No. CF-2011-90, with Count 1 – Preventing Witness from Giving Testimony, Count 2 – Use of Firearm While Committing a Felony, and Count 3 – False Reports of Crime. The preliminary hearing was held August 18, 2011. The Magistrate, the Honorable Lawrence L. Langley, Special Judge, sustained demurrers to Counts 1 and 2. The State appealed the ruling to the District Court. Following a hearing August 31, 2011, the Honorable Joe Sam Vassar, District Judge, affirmed Judge Langley's ruling.

From this adverse ruling, the State appeals to this Court pursuant to Section 1089.7 of Title 22. The appeal was automatically assigned to the Accelerated Docket of this Court. *See* Rule 11.2(A)(4), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2011). Oral argument was held March 1, 2012, pursuant to Rule 11.2(E).

On appeal the State argued the District Judge erred in sustaining the

demurrer because the State produced sufficient evidence to establish probable cause. 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. Supp.2003, § 258(Eighth). The standard of review, set out in Section 1089.5 of Title 22, 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." Reviewing the District Court's determination under the clearly erroneous standard of review, we cannot find that the decisions of the District Court were clearly erroneous. *See State v. Heath*, 201 OK CR 5, ¶ 9, 246 P.3d 723; *State v. Berry*, 1990 OK CR 73, ¶ 14, 799 P.2d 1131. In this case the State has not met its burden. As such, we will not interfere with the judgments of the lower courts.

DECISION

The order of the District Court of Sequoyah County dismissing Counts 1 and 2 is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEQUOYAH COUNTY
THE HONORABLE LAWRENCE L. LANGLEY, MAGISTRATE
THE HONORABLE JOE SAM VASSAR, DISTRICT JUDGE

APPEARANCES AT TRIAL

ANTHONY J. EVANS
ASSISTANT DISTRICT ATTORNEY
27TH PROSECUTORIAL DISRICT
SEQUOYAH COUNTY DISTRICT
ATTORNEY'S OFFICE
120 E. CHICKASAW, SUITE 204
SALLISAW, OKLAHOMA 74955
COUNSEL FOR APPELLANT

DONN E. BAKER
ATTORNEY AT LAW
239 WEST KEETOOWAY
TAHLEQUAH, OKLAHOMA 74464
COUNSEL FOR APPELLEE

APPEARANCES ON APPEAL

ANTHONY J. EVANS
ASSISTANT DISTRICT ATTORNEY
27TH PROSECUTORIAL DISRICT
SEQUOYAH COUNTY DISTRICT
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120 E. CHICKASAW, SUITE 204
SALLISAW, OKLAHOMA 74955
COUNSEL FOR APPELLANT

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ATTORNEY AT LAW
239 WEST KEETOOWAY
TAHLEQUAH, OKLAHOMA 74464
COUNSEL FOR APPELLEE

OPINION BY: SMITH, J.

JOHNSON, A., P.J.:	CONCUR
LEWIS, V.P.J.	DISSENT
LUMPKIN, J.:	CONCUR
JOHNSON, C., J.:	CONCUR

RE

LEWIS, VICE-PRESIDING JUDGE, DISSENTING:

I respectfully dissent. At a preliminary hearing, the State must present sufficient evidence to establish probable cause that a crime was committed and the defendant committed it. 22 O.S. 1981 § 258; *State v. Heath*, 2011 OK CR 5, ¶ 7, 246 P.3d 723, 725. The Court presumes that the State will strengthen its case at trial; the evidence at preliminary hearing must simply "coincide with guilt and be inconsistent with innocence." *Id.* (*quoting State v. Davis*, 1991 OK CR 123, ¶ 7, 823 P.2d 367, 369).

The Oklahoma Statues clearly define the task of a district judge when the State appeals from a magistrate's ruling discharging the defendant on the ground of insufficient evidence at preliminary hearing.

> [T]he assigned judge shall determine, based upon the entire record developed before the magistrate, 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. (emphasis added).

22 O.S.2011, § 1089.5. The law requiring review of evidence "in the light most favorable to the State" describes a specific mode of factual analysis that involves "crediting *all* inferences that could have been drawn in the State's favor" to sustain the charge. *Davis v. State*, 2004 OK CR 36, ¶ 22, 103 P.3d 70, 78; *Matthews v. State*, 2002 OK CR 16, ¶ 35, 45 P.3d 907, 919; *see also, City of Tulsa v. Bank of Oklahoma*, 2011 OK 83, ¶ 17, ___ P.3d ___ (when testing sufficiency of evidence on summary adjudication, "all facts *and inferences* must be viewed in the light most favorable to the non-movant") (emphasis added).

The examining magistrate and the district court both found the evidence at preliminary hearing insufficient to show the element that Appellee feloniously intended to prevent a witness from testifying or to alter that testimony. Our review is to determine whether the district court's ruling affirming the magistrate is clearly erroneous. *Heath*, 2011 OK CR 5, ¶ 9, 246 P.3d at ___. This seems generally equivalent to review for abuse of the district court's discretion, which we have consistently defined as "a *clearly erroneous* conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Sanchez v. State*, 2009 OK CR 31, 223 P.3d 980, 1001. "Under an abuse of discretion standard, the appellate court examines the evidence in the record and reverses only if the trial court's decision is clearly against the evidence or *is contrary to a governing principle of law.*" *Curry v. Streeter*, 2009 OK 5, ¶ 8, 213 P.3d 550, 554 (emphasis added).

The district court's ruling here clearly contravenes the statutory language requiring review of the evidence at preliminary hearing "in the light most favorable to the State." The crime of preventing a witness from giving testimony is defined, in pertinent part, by 21 O.S.2001, § 455 (A).[1] Excluding

[1]Every person who willfully prevents any person from giving testimony who has been duly summoned or subpoenaed or endorsed on the criminal information or juvenile petition as a witness, or who makes a report of abuse or neglect pursuant to Sections 7103 and 7104 of Title 10 of the Oklahoma Statutes or Section 10-104 of Title 43A of the Oklahoma Statutes, or who is a witness to any reported crime, or threatens or procures physical or mental harm through force or fear with the intent to prevent any witness from appearing in court to give his testimony, or to alter his testimony is, upon conviction, guilty of a felony punishable by not less than one (1) year nor more than (10) years in the State Penitentiary.

the provisions not relevant here, the offense is committed when the defendant willfully prevents a person protected by the statute from giving testimony, or threatens or procures physical or mental harm through force or fear with the intent to prevent any witness from testifying, or to alter his testimony.

Our cases acknowledge that "[t]he subjective intent with which an act is done is seldom established by direct evidence, but must of necessity be determined by all of the attending facts and circumstances surrounding such act." *Childress v. State*, 1977 OK CR 307, 572 P.2d 989, 991 (*quoting Brown v. State*, 1965 OK CR 84, 404 P.2d 78 (1965)); *Goodson v. State*, 1977 OK CR 135, ¶ 15, 562 P.2d 897, 900 (finding "knowledge and intent, being subjective states of mind, are most often proved by circumstantial evidence, barring a direct admission"). The direct and circumstantial evidence here is sufficient to create a question for the jury on the issue of Appellee's felonious intent.

Appellee was charged by the State of Oklahoma with several counts of larceny of cattle. The alleged victim of this offense was the complaining witness against Appellee in the cattle theft case, and was so endorsed on the criminal information. Appellee was a police officer, under suspension at the time of these crimes, as a result of his pending theft charges. Appellee admits that he shot himself with a pistol. He later claimed in his statements to investigators that this initial shooting was just an accident. Whatever the truth of that statement, the following is undoubtedly true.

After shooting himself, Appellee admits that he shot an additional round into his vehicle to stage a crime scene. He then hid the firearm, which has

never been found. He reported the shooting to a friend on the Sallisaw police force, and falsely accused the witness of firing the shots that wounded him and struck his vehicle. Acting on this report, Sallisaw police officers quickly found the witness and apprehended him at gunpoint for shooting Appellee. The witness was jailed for several hours, during which time he was able to exonerate himself based on videotaped evidence. Appellee then confessed his false report to investigators and these charges followed.

If Appellee's actions seem ill-conceived in hindsight, we should remember that the witness might well have been killed by police if he had resisted or panicked when falsely arrested on this trumped-up charge. A jury could reasonably infer that Appellee considered this possibility when he hid the firearm and took steps to convince police that the witness had shot him, thus implying to the responding officers that the witness might still be in possession of a loaded firearm. A jury might also reasonably infer that Appellee was, *at the least*, trying to send a message that the witness could expect to suffer from continued harassment by Appellee (and perhaps, police) if the theft case went forward. Appellee's calculated acts of aggression form a powerful circumstantial proof that he intended to prevent or alter the witness's testimony by committing them.

Viewing the evidence in the light most favorable to the State, and crediting the inferences that "coincide with guilt and are inconsistent with innocence" in the evidence at preliminary hearing, the evidence is sufficient to bind Appellee over for trial. The district court departed from the statutory

standard of review by giving *dispositive* weight to the *competing* inference that Appellee was merely retaliating against the witness through this most unusual of dirty tricks, and had no felonious intent. That determination, however, was the task of a trial jury or a judge in a non-jury trial.

> An inference is a permissible deduction from the evidence, and in dealing with inference *the jury is at liberty to find the ultimate fact one way or the other as it may be impressed by the testimony,* and the reasonable and permissible deductions therefrom. *Inferences have no significance as to the duty of either party to produce evidence,* and the jury may give to inferences whatever force or weight it thinks they are entitled to.

Stumpf v. Montgomery, 101 Okl. 257, 226 P. 65 (1924)(syllabus) (emphasis added). Appellee has successfully campaigned through counsel for this favorable inference about his reprehensible actions in every court that has heard this case. He might have even secured his acquittal by pressing the same inference upon a jury, and thus raising a reasonable doubt of his legal guilt. On these facts, however, the State should have been entitled to argue the contrary inference, that Appellee had the felonious intent to prevent or alter the witness's testimony when he committed these acts. I would reverse the district court and remand the case for further proceedings.