Motion to Quash Bindover Handouts

UACDL Annual Seminar
October 15, 2021

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Presentation Slides

Motions to Quash Bindover
October 15, 2021

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Motions to Dismiss
Insufficiency /Failure to Establish an Element

Motion to Dismiss Information
Motion to Quash Bindover
Motion for Directed Verdict
Motion to Arrest Judgment

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Types of Insufficiency Arguments

Acceptable Arguments
- Allegation or evidence in support of element is nonexistent
- Allegation or evidence is insufficient to support an inference
  - Allegation or evidence is innocuous
  - Allegation or evidence is supposition
  - Allegation or evidence does not support the conclusion

Generally Unhelpful Arguments
- The testimony is not credible (except for *Robbins/Prater* argument at trial)
- There is evidence going the other way

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Preserving Insufficiency Arguments

State v. Darnstaedt, 2021 UT App 19, ¶ 22, 483 P.3d 71

- "At trial, Darnstaedt did not renew his preliminary hearing arguments and the district court's ruling did not refer to those arguments or otherwise suggest that the basis for the motion was apparent to the court."
- "[Instead] At trial, defense counsel stated, 'I'd just move for a directed verdict based upon the evidence that's been presented. I don't see how a reasonable jury could find beyond a reasonable doubt that Mr. Darnstaedt was guilty. I'll submit.'"

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Insufficiency Motions

- Timing
- Procedural Rule
- Burden and Form of Proof
- Standard for Obtaining Dismissal

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Insufficiency Motions

- Before preliminary hearing
- At preliminary hearing
- After preliminary hearing
- At trial
- After trial

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Insufficiency Motions

- Motion to dismiss information (Utah R. Crim. P. 25(b)(2)
- Oral motion to deny bindover at preliminary hearing (Utah R. Crim. P. 7B)
- Motion to quash bindover (Utah R. Crim. P. 7B)
- Petition for permission to appeal interlocutory order (Utah R. App. P. 5)
- Motion for a directed verdict (Utah R. Crim. P. 17(o)
- Motion to arrest judgment (Utah R. Crim. P. 23)

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Motion to Dismiss Information

- **Rule:** Utah R. Crim. P. 25(b)(2)
- **Standard for Establishing Elements:** Allegations in the information or indictment and bill of particulars.
- **Standard for Dismissal:** "The allegations of the information or indictment, together with any bill of particulars furnished in support thereof, do not constitute the offense intended to be charged in the pleading so filed."

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Motion to Quash Bindover

- **Rule:** Utah R. Crim. 7, 7B
- **Standard for Showing Probable Cause:** Evidence presented at the preliminary hearing, including hearsay and evidence acquired by unlawful means.
- **Standard for Dismissal:** The State has failed to produce "reasonably believable evidence—as opposed to speculation—sufficient to sustain each element of the crime(s) in question." *Prisbrey*, 2020 UT App 172, ¶ 21.

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Motion to Directed Verdict

- **Rule:** Utah R. Crim. 17(o)
- **Proof Beyond a Reasonable Doubt:** Evidence presented by the State in its case at trial.
- **Standard for Dismissal:** "[T]he court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense."

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Motion to Directed Verdict

- **Rule:** Utah R. Crim. 23
- **Proof Beyond a Reasonable Doubt:** Evidence presented by the State in its case at trial.
- **Standard for Dismissal:** "At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense…."

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Before Preliminary Hearing

Motion to Dismiss Information (Rule 25(b)(2))

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Motion to Dismiss Information

- **Bases under Rule 25(b)**
  - Unreasonable or unconstitutional delay;
  - Allegations do not constitute the offense intended to be charged;
  - Substantial and prejudicial defect regarding the grand jury;
  - The court is without jurisdiction;
  - The prosecution is barred by the statute of limitations.

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Motion to Dismiss Information

- "The allegations of the information or indictment, together with any bill of particulars furnished in support thereof, do not constitute the offense intended to be charged in the pleading so filed." Utah R. Crim. P. 25(b)(2).

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Motion to Dismiss Information

- **(d) Effects of dismissal.** For most bases, "further prosecution for the offense shall not be barred and the court may make such orders with respect to the custody of the defendant pending the filing of new charges as the interest of justice may require. Otherwise the defendant shall be discharged and bail exonerated."
- An order of dismissal based upon unconstitutional delay in bringing the defendant to trial or based upon the statute of limitations, shall be a bar to any other prosecution for the offense charged.

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At/After Preliminary Hearing

Motion to Quash Bindover (Rule 7, 7B)

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Preliminary Hearing

State v. Schmidt, 2015 UT 65, ¶19, 356 P.3d 1204

- The "primary purpose" of a preliminary hearing is to "ferret out groundless and improvident prosecutions without usurping the jury's role as the principal fact-finder."

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Preliminary Hearings

RULE 7B(a). Preliminary examinations.

- (b) **Probable cause determination**. If from the evidence the magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate must order that the defendant be bound over for trial.

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Preliminary Hearings

RULE 7B(a). Preliminary examinations.

- **(c) If no probable cause.** If the magistrate does not find probable cause to believe the crime charged has been committed or the defendant committed it, the magistrate must dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

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Preliminary Hearings

State v. Clark, 2001 UT 9, ¶ 10, 20 P.3d 300

- To bind a defendant over for trial, the State must show "probable cause" at a preliminary hearing by "present[ing] sufficient evidence to establish that 'the crime charged has been committed and that the defendant has committed it.' "

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Preliminary Hearings

State v. Prisbrey, 2020 UT App 172, ¶ 21, 479 P.3d 1126

- "The State need only present ***reasonably believable evidence—as opposed to speculation***—sufficient to sustain each element of the crime(s) in question."

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Preliminary Hearings

State v. Clark, 2001 UT 9, ¶ 10, 20 P.3d 300

- "[T]he magistrate must view all evidence in the light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution."
- And "[w]hen faced with conflicting evidence, the magistrate may not sift or weigh the evidence … but must leave those tasks 'to the fact finder at trial.'

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Preliminary Hearings

State v. Prisbrey, 2020 UT App 172, ¶ 22, 479 P.3d 1126

- "[W]hen the evidence, considered under the totality of the circumstances, is wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecution's claim, the magistrate is not required to bind a criminal defendant over for trial."
- "Similarly, a magistrate may properly deny bindover where the facts presented by the prosecution provide no more than a basis for speculation."

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Preliminary Hearings

State v. Prisbrey, 2020 UT App 172, ¶ 22, 479 P.3d 1126

- [T]he line separating "speculation" from "reasonable inference" can at times be faint.
- An "inference" is "a conclusion reached by considering other facts and deducing a logical consequence from them.
- [But as] our supreme court has explained, "the difference between an inference and speculation depends on whether the underlying facts support the conclusion

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Preliminary Hearings

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Preliminary Hearings

State v. Prisbrey, 2020 UT App 172, ¶ 29, 479 P.3d 1126

- The State did not surmount the low probable cause bar when:
  - "[T]he State's evidence consisted largely of ***innocuous facts*** coupled with ***unexamined supposition***";

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Preliminary Hearings

State v. Prisbrey, 2020 UT App 172, ¶ 29-31, 479 P.3d 1126

- The State did not surmount the low probable cause bar when:
  - For two witnesses testimony, "no underlying facts supported their speculative suspicion";
  - The witnesses suppositions, "in context, [were] not a reasonable inference supportive of [the charged crime]"

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Preliminary Hearings

State v. Prisbrey, 2020 UT App 172, ¶ 31, 479 P.3d 1126

- The State did not surmount the low probable cause bar when:
  - "[S]ome of the other facts to which the State now points are ***entirely innocuous***, and do almost nothing to support an inference of arson";

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Preliminary Hearings

State v. Prisbrey, 2020 UT App 172, ¶ 31, 479 P.3d 1126

- The State did not surmount the low probable cause bar when:
  - "[T]he evidence of the insurance company's investigation presented by the defense at the preliminary hearing served to overcome any remnants of reasonable inference that remained in the State's references to accelerants or the holes in the wall."

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Interlocutory Appeal

Petition for Permission to Appeal Interlocutory Order (Utah R. App. P. 5)

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If the Motion Is Granted…

- The State may appeal the grant of a motion to quash bindover.
- "The prosecution may, as a matter of right, appeal from[] a final judgment of dismissal, including dismissal of a felony information following a refusal to bind the defendant over for trial." Utah Code § 77-18a-1(3)(a).

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If the Motion Is Denied…

- A defendant may file a petition for interlocutory appeal regarding the denial of a motion to quash bindover.
- E.g., "[I]n the event Gollaher's case is bound over to the district court following a preliminary hearing, his remedy would be to file a motion to quash the bindover. If the magistrate were to deny the motion to quash, Gollaher could then file an interlocutory appeal." *Gollaher v. State*, 2017 UT App 168, ¶ 8.

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Time for Interlocutory Appeal

Utah R. App. P. 5(a)

- "[W]ithin 21 days after the trial court's order is entered…."

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Standard for Interlocutory Appeal

Utah R. App. P. 5(g)

- Appeals from interlocutory orders should be "granted only if it appears that the order involves substantial rights and may materially affect the final decision" or that immediate review "will better serve" the "interests of justice."

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Standard for Interlocutory Appeal

Houghton v. Utah Dep't of Health, 2008 UT 86, ¶14

- In other words, interlocutory appeal must be "essential to adjudicate principles of law or procedure in advance as a necessary foundation upon which the trial may proceed; ***or if there is a high likelihood that the litigation can be finally disposed of on such an appeal***."

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Standard of Review

State v. Jones, 2016 UT 4, ¶14, 365 P.3d 1212.

- The existence of probable cause is a legal question that this Court determines for itself on appeal.

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Appealing Related Interlocutory Orders

State v. Hernandez, 2018 UT 41, ¶¶ 2-3, 428 P.3d 1023

- Hernandez sought to subpoena the alleged victim (Victim) to testify at the preliminary hearing. The State moved to quash that subpoena, ….The court quashed the subpoena.
- The court held the preliminary hearing that day and bound Hernandez over for trial.
- Hernandez sought interlocutory appeal of the order quashing the subpoena, but not the bindover.

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Appealing Related Interlocutory Orders

State v. Hernandez, 2018 UT 41, ¶ 8, 428 P.3d 1023

- The defendant asks us to permit him to call Victim as a witness at his preliminary hearing. He has clarified that his sole purpose in questioning her is to uncover testimony that could affect the probable cause determination. But he has not appealed the bindover.

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Appealing Related Interlocutory Orders

State v. Hernandez, 2018 UT 41, ¶ 8, 428 P.3d 1023

- This means that Hernandez is appealing in hopes of adducing evidence that might change a determination that has already been made and has not been appealed. Because Hernandez has not appealed the bindover decision, reversing the district court's decision—if we were to reverse—would have "no legal effect" on the existing bindover decision.

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Appealing Related Interlocutory Orders

State v. Hernandez, 2018 UT 41, ¶ 9, 428 P.3d 1023

- In fairness to Hernandez, an untested assumption skulks beneath his arguments. Hernandez assumes that if we reverse the motion to quash the subpoena, the district court could reopen the preliminary hearing. But he offers no rule, statute, or case to support this proposition.

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Example Motion to Quash Bindover

[Attorney Block]

Attorney for Defendant

IN THE THIRD DISTRICT COURT / SALT LAKE DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. [Name], Defendant.	**MOTION TO QUASH BINDOVER** **[Case No.]** **[Judge:]**

Defendant by and through counsel, hereby moves to quash bindover pursuant to rule 7B of the Utah Rules of Criminal Procedure.

RELIEF REQUESTED AND SUPPORTING GROUNDS

Defendant moves to quash bindover 7B of the Utah Rules of Criminal Procedure, which provides that "[i]f the magistrate does not find probable cause to believe the crime charged has been committed or the defendant committed it, the magistrate must dismiss the information and discharge the defendant." Utah R. Crim. P. 7B. To meet the probable cause standard, the State must present at the preliminary hearing "reasonably believable evidence—as opposed to speculation—sufficient to sustain each element of the crime(s) in question." *State v. Prisbrey*, 2020 UT App 172, ¶ 21, 479 P.3d 1126, 1132, *cert. denied*, 485 P.3d 946 (Utah 2021)

In this case, Defendant has been charged with two counts of kidnapping, a second degree felony. At the preliminary hearing, the State produced testimony from the Complainant, a minor, that she and Defendant arranged to meet each other at a building, they met up and went inside the building together, they went inside a room together, and Defendant shut and locked the door of the room once they were inside. Complainant testified that her parents did not know where she was. Complainant also testified that she was scared and wanted to leave but did not say anything. This evidence does not constitute "reasonably believable evidence" of each element of the charge of kidnapping. *Prisbrey*, 2020 UT App 172, ¶ 21.

Most of the variants of kidnapping require that the defendant "detain[] or restrain[]"an alleged victim under certain enumerated circumstances, and every variant of kidnapping includes as an element that the defendant must act "intentionally or knowingly . . . against the will of the victim." *Id.* § 76-5-301(1). But the allegations in this case do not support the element that Defendant detained or restrained Complainant, or the element he did so intentionally and knowingly against her will.

Because the allegations fail to support the requisite elements of the offense of kidnapping, the information must be dismissed pursuant to rule 7B of the Utah Rules of Criminal Procedure.

BACKGROUND

ARGUMENT

I. THE KIDNAPPING CHARGES REQUIRE THAT THE DEFENDANT DETAIN OR RESTRAIN THE VICTIM AND ACT KNOWINGLY OR INTENTIONALLY AGAINST THE WILL OF THE VICTIM

The offense of kidnapping has as elements that the defendant "detain[] or restrain[]" the alleged victim, and that he do so "intentionally or knowingly" against the will of the victim.[1] Utah Code § 76-5-301(1). These elements must be established, even when the alleged victim is a minor between the age of 14 and 18 years old, for the reasons set forth below. But as discussed *infra* section 2, the State failed to produce evidence in support of these elements at the preliminary hearing.

One variant of kidnapping applies when a defendant acts "without the consent of the minor's parent or legal guardian . . . if the minor is 14 years of age or older but younger than 18 years of age." Utah Code § 76-5-301(1)(d). But even under this theory, that the defendant acts without the consent of the minor's parent or legal guardian is not the only element that must be established. Instead, as with other variants of the kidnapping offense, the elements include that

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[1] These variants include that the defendant "detains or restrains the victim for any substantial period of time," "detains or restrains the victim in circumstances exposing the victim to risk of bodily injury," or "detains or restrains a minor without the consent of the minor's parent or legal guardian or the consent of a person acting in loco parentis, if the minor is 14 years of age or older but younger than 18 years of age." *E.g., id.* § 76-5-301(1)(a), (b), (d).[1]

Two variants do not include "detain[] or restrain[]—these variants involve the defendant "hold[ing] the victim in involuntary servitude" or "mov[ing] the victim any substantial distance or across a state line." Utah Code § 76-5-301(1)(c), (e).

The allegations against Defendant do not indicate that either of these variants apply. But regardless, under these variants as well, it is an element of the offense that the defendant's action must "intentionally and knowingly . . . against the will of the victim," and for the reasons set forth in this motion, the allegations against Defendant do not support this. *Id.* § 76-5-301(1).

the defendant "detains or restrains [the] minor" and that he does so "intentionally and knowingly . . . against the will of the victim." *Id.* § 76-5-301(1), (1)(d).

Accordingly, for an alleged offense involving a minor child, it is not enough that the minor is held "without the consent of the minor's parent or legal guardian." While the parent's non-consent establishes *an* element of the crime of kidnapping, it does *not* establish the other elements—that the defendant "detain[ed] or restrain[ed]" the minor and that the defendant did so "intentionally or knowingly . . . against the will of the [minor]. *Id.* § 76-5-301(1), (1)(d).

The kidnapping statute therefore stands in contrast to the *child kidnapping statute* (applicable to children "under the age of 14"), which does *not* require that the defendant's action be against the will of the minor victim. *Id.* § 76-5-301.1(1) ("An actor commits child kidnapping if the actor intentionally or knowingly, without authority of law, and by any means and in any manner, seizes, confines, detains, or transports a child under the age of 14 without the consent of the victim's parent or guardian . . . .")

The kidnapping statute likewise stands in contrast to the *unlawful detention statute*, which defines "against the will of the victim" to include without the consent of a parent or guardian of "a minor who is 14 or 15," *id.* § 76-5-304(3)(b). Unlike the unlawful detention statute, under the kidnapping statute, the definition of "against the will of the victim" is limited to "without the consent of the legal guardian or custodian of a victim who is a mentally incompetent person." *Id.* § 76-5-301(2).

Consistent with the language of the statute, in a case charged under the same kidnapping statute at issue here, where "[t]he State's primary theory in support of the kidnapping charge was that [the defendant] 'detain[ed] or restrain[ed]' a minor between the ages of fourteen and eighteen without the consent of the minor's parent," the Utah Court of Appeals explained that

"[t]he State was *further* required to prove that [the defendant] did so 'intentionally or knowingly, without authority of law, and *against the will of the victim.*'" *State v. Fowers*, 2013 UT App 212, ¶ 6, 309 P.3d 1156 (emphasis added).

Additionally, it is not enough that the defendant's action be "against the will of the victim"—the statute specifies that to constitute a crime, the defendant must "*intentionally or knowingly*" act "against the will of the victim." *Id.* § 76-5-304(1) (emphasis added); *State v. Barela*, 2015 UT 22, ¶ 26, 349 P.3d 676 ("[O]ur criminal code requires proof of mens rea for each element of a non-strict liability crime.").

The case law confirms the elements of kidnapping include that the victim was detained or restrained, that the defendant acted against the will of the victim, and that the defendant acted with the requisite mens rea. In *State v. Fowers*, the court of appeals considered the sufficiency of the evidence for a defendant convicted of attempted kidnapping. 2013 UT App 212, ¶¶ 6–7, 309 P.3d 1156. The court concluded that there was "sufficient evidence to show that [the defendant] engaged in conduct constituting a substantial step toward *detaining or restraining* [the minor] and strongly corroborating his *intent* to detain or restrain her" when the minor testified that the defendant "blocked her path with his car, got out of the car, and told her to 'just get in' *after she had twice refused his offer* of a ride" and that "he grabbed her forearm hard enough to leave red marks and *only released her arm when she kicked him*." *Id.* (emphasis added).

Relatedly, the Utah Supreme Court has explained that "[a] kidnaping begins when the detention begins to be '*against the will of the victim*.'" *State v. Couch*, 635 P.2d 89, 93 (Utah 1981) (emphasis added). And where the alleged victim had a first willingly accompanied the defendant, the court held that "the detention began to be against prosecutrix's will at the point where defendant continued to drive her car despite her expressed desire that he not do so." *Id.*

Accordingly, to establish the elements of kidnapping in regard to a minor between the ages of 14 and 18 years old, the State must prove not only that the minors parents or guardians did not consent to the minor's whereabouts, but also that the defendant detained or restrained the minor "intentionally or knowingly . . . against [her] will." *Id.* § 76-5-304(1). And as set forth below, the State failed to produce believable evidence of these elements at the preliminary hearing. Utah R. Crim. P. 7B; *Prisbrey*, 2020 UT App 172, ¶ 22.

II. THE STATE FAILED TO PRODUCE BELIEVABLE EVIDENCE OF ALL THE ELEMENTS OF KIDNAPPING

The evidence presented at the preliminary hearing fails to establish the elements of kidnapping. Utah Code § 76-5-304(1). While Complainant's testimony that her parents were not aware of her whereabouts may be sufficient evidence that Defendant's actions were "without the consent of the minor's parent or legal guardian," the evidence at the preliminary hearing nonetheless fails to support the other elements required for a kidnapping—specifically, (i) that Defendant detained or restrained Complainant, and (ii) that he did so "intentionally and knowingly . . . against the will of the victim." Utah Code § 76-5-301(1), (1)(d).

At the preliminary hearing, Complainant testified that Defendant did three things that might be the basis for the kidnapping charges—(1) met up with Complainant at the building, (2) went inside the building with Complainant; (3) shut and locked the door of a room after going inside the room with Complainant. But as discussed below, the testimony related to these acts does not support the elements so of kidnapping.

First, Complainant testified that Defendant made arrangements by text message to meet with Complainant and subsequently met up with her at a building. But there is no allegation that Defendant brought Complainant to the building; instead, Complainant testified that she "arrived"

at the building on her own volition. (*Id.*) Thus, the allegation does not support the element that Complainant was restrained or detained when she voluntarily met Defendant at the building, nor does it support that Defendant "intentionally or knowingly" detained or restrained her "against [her]will. Utah Code § 76-5-301(1), (1)(d).

Second, Complainant testified that Defendant told Complaint to come into the building. (*Id.*) But Complainant does not allege that she did not assent or agree to enter the building. Nor does she state that she objected or resisted, that Defendant forced her into the building, or that she was unable to open the building door or exit the building once she entered it. Thus, the allegation does not establish the element that Defendant detained or restrained Complainant by going with her into the building, nor does it establish the element that Defendant did so "intentionally or knowingly . . . against [her] will." *Id.*

Third, Complainant testified that Defendant shut and locked the door of the room after he and Complainant went inside the room together. (*Id.*) But Complainant did not testify that she was trapped in the room or unable to unlock the doors. Nor did she testify that she objected to the doors being locked, that she attempted to leave, expressed a desire to leave, or was prevented from leaving by Defendant.

Although Complainant did testify that she "felt scared" and "wanted to leave," she did not testify that she expressed her discomfort or desire to leave to Defendant. Nor did she testify that she did anything to signal her desire to leave or to try to leave, like going to the door. Complainant's unexpressed feelings do not support that Complainant was prevented from leaving such that she was detained or restrained. Moreover, even if Complainant's private fear could somehow support that she was detained or restrained by her emotions, this testimony still does not suppot that *Defendant* detained or restrained her. And even if it could somehow support

that he did something to detain or restrain her, it does not support that he did anything "intentionally or knowingly" against "[her] will" where Complainant did not testify to any words or conduct on her part that would have made Defendant aware that she was staying in the room against her will. Thus, the testimony that Defendant closed and locked while he and Complainant were inside the room together does not establish the elements of kidnapping. Utah Code § 76-5-301(1), (1)(d).

In sum, the State failed to produce believable evidence of all the elements of the kidnapping offenses with which Defendant is charged, and the State therefore failed to establish probable cause to bind the Defendant over for trial. Utah R. Crim. P. 7B(c). Accordingly, Defendant respectfully requests that this Court quash the bindover, dismiss the information, and discharge the Defendant. *Id.*

CONCLUSION

Because the State failed to produce sufficient evidence at the preliminary hearing to bind the Defendant over for trial, Defendant respectfully requests that this Court quash the bindover, dismiss the information, and discharge the Defendant. Utah R. Crim. P. 7B(c).

State v. Prisbrey, 2020 UT App 172

479 P.3d 1126
Court of Appeals of Utah.

STATE of Utah, Appellant,

v.

Clare Eugene PRISBREY, Appellee.

No. 20190569-CA
|
Filed December 24, 2020

Synopsis

Background: Defendant was charged with aggravated arson and filing a false insurance claim. After a hearing, the Fifth District Court, Iron County, Keith C. Barnes, J., found no probable cause that defendant had committed charged crimes and declined to bind defendant over on either charge. State appealed.

[Holding:] The Court of Appeals, Harris, J., held that magistrate did not abuse his limited discretion in determining that State's case was too speculative to support bindover.

Affirmed.

Pohlman, J., filed dissent.

West Headnotes (23)

[1] **Criminal Law** Preliminary proceedings

When appellate court reviews magistrate's bindover decision, it views all evidence in the light most favorable to the prosecution, draws all reasonable inferences in favor of the prosecution, and recites the facts with that standard in mind.

[2] **Criminal Law** Holding accused to answer

A decision to bind over a criminal defendant for trial presents a mixed question of law and fact and requires the application of the appropriate bindover standard to the underlying factual findings.

[3] **Criminal Law** Particular issues in general

Appellate courts give limited deference to a magistrate's application of the bindover standard to the facts of each case.

[4] **Criminal Law** Right of accused to examination

The preliminary hearing is a fundamental procedural right guaranteed by provision of Utah Constitution governing prosecution by information or indictment. Utah Const. art. 1, § 13.

[5] **Criminal Law** Right of accused to examination

Under provision of Utah Constitution governing prosecution by information or indictment, a defendant charged with any felony or any class A misdemeanor is entitled to a preliminary hearing. Utah Const. art. 1, § 13.

[6] **Criminal Law** Sufficient, reasonable, or probable cause

While the State bears the burden of establishing the existence of probable cause at a preliminary hearing, that burden is relatively low.

[7] **Criminal Law** Sufficient, reasonable, or probable cause

To make the necessary showing to satisfy its burden of establishing the existence of probable cause at a preliminary hearing, the State need not produce evidence sufficient to support a finding of guilt at trial or even to eliminate alternative inferences that could be drawn from the evidence in favor of the defense.

[8] **Criminal Law** Sufficient, reasonable, or probable cause

To make the necessary showing to satisfy its burden of establishing the existence of probable cause at a preliminary hearing, the State need only present reasonably believable evidence—as opposed to speculation—sufficient to sustain each element of the crime(s) in question.

[9] **Criminal Law** Presumptions, Burden of Proof, and Weight and Sufficiency of Evidence

In considering the evidence presented when the State seeks to make the necessary showing to satisfy its burden of establishing the existence of probable cause at a preliminary hearing, the magistrate conducting the preliminary hearing must view all evidence in the light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution.

[10] **Criminal Law** Holding accused to answer

Despite the relatively low evidentiary threshold at a preliminary hearing, a magistrate may deny bindover in certain situations.

[11] **Criminal Law** Sufficient, reasonable, or probable cause

When properly construed and applied, the probable cause standard at a preliminary hearing does not constitute a rubber stamp for the prosecution but, rather, provides a meaningful opportunity for magistrates to ferret out groundless and improvident prosecutions.

[12] **Criminal Law** Holding accused to answer

When the evidence, considered under the totality of the circumstances, is wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecution's claim, the magistrate is not required to bind a criminal defendant over for trial.

[13] **Criminal Law** Holding accused to answer

A magistrate may properly deny bindover where the facts presented by the prosecution provide no more than a basis for speculation.

[14] **Criminal Law** Holding accused to answer

When determining whether evidence is sufficient to support bindover, the line separating "speculation" from "reasonable inference" can at times be faint.

[15] **Criminal Law** Holding accused to answer

An "inference," in the context of determining whether evidence is sufficient to support bindover, is a conclusion reached by considering other facts and deducing a logical consequence from them.

1 Cases that cite this headnote

[16] **Criminal Law** Holding accused to answer

"Speculation," in the context of determining whether evidence is sufficient to support bindover, is the act or practice of theorizing about matters over which there is no certain knowledge at hand.

1 Cases that cite this headnote

[17] **Criminal Law** Holding accused to answer

In the context of determining whether evidence is sufficient to support bindover, the difference between an inference and speculation depends on whether the underlying facts support the conclusion.

1 Cases that cite this headnote

[18] **Arson** Weight and Sufficiency

Arson, like all crimes, may be proved through circumstantial evidence.

[19] **Criminal Law** Presumptions

Over the course of a case, inferences that once appeared reasonable may, upon further

investigation, be proven to be unreasonable or no longer based on facts in evidence.

[20] **Criminal Law** Sufficient, reasonable, or probable cause

In exceptional cases, evidence put forward by a defendant at a preliminary hearing may overcome a prima facie showing of probable cause.

[21] **Criminal Law** Holding accused to answer

Magistrate did not abuse his limited discretion in determining that State's case was too speculative to support bindover, in prosecution for aggravated arson and filing a false insurance claim; State's evidence consisted largely of innocuous facts coupled with unexamined supposition, fire chief's supposition that house was sparsely furnished was not a reasonable inference supportive of arson, insurance company, despite awareness of arson investigation and $350,000 insurance claim at stake, conducted investigation which resulted in conclusion that fire was accident, and fire marshal's conclusion that holes in wall of house were indicative of arson was simply a theory about matters over which there was no certain knowledge.

[22] **Arson** Weight and Sufficiency

By itself, the fact that a house is sparsely furnished is hardly evidence of arson.

[23] **Criminal Law** Holding accused to answer

When reasonable inferences from the evidence cut both for and against the State's case, the magistrate making bindover determination lacks discretion to choose between them and must leave such a determination to the fact-finder at trial.

***1128** Fifth District Court, Iron County Department, The Honorable Keith C. Barnes, No.181500247

Attorneys and Law Firms

Sean D. Reyes and Jeffrey D. Mann, Salt Lake City, Attorneys for Appellant

Gary W. Pendleton, Attorney for Appellee

Judge Ryan M. Harris authored this Opinion, in which Judge David N. Mortensen concurred. Judge Jill M. Pohlman dissented, with opinion.

Opinion

HARRIS, Judge:

¶1 One New Year's Eve, Clare Eugene Prisbrey's house caught fire. It took firefighters more than an hour to get the fire under control, and the house sustained severe damage. After examining the scene that night and the next day, fire officials came to suspect that Prisbrey had set the blaze intentionally, and the State later charged him with aggravated arson and filing a false insurance claim. At a preliminary hearing, however, the magistrate found no probable cause that Prisbrey had committed those crimes, and declined to bind the case over for trial. The State appeals that determination, and we affirm.

BACKGROUND[1]

[1] ¶2 On December 31, 2017, Prisbrey and his girlfriend (Girlfriend) were together at Prisbrey's house, celebrating the holiday. A few weeks earlier, Prisbrey had decorated his living room (the great room) with Christmas decorations, including a miniature Christmas village—a collection of decorative ceramic houses arranged on foam blocks, wood, and synthetic snow—set up on a table against the wall. Around 9:30 that evening, Prisbrey lit several candles in the Christmas ***1129** village display and, later, around 10:00 p.m., he and Girlfriend opened a bottle of sparkling grape juice and watched New Year's Eve fireworks displays happening in "different time zones."

¶3 A few minutes later, Prisbrey and Girlfriend left the house; Prisbrey explained to fire officials that he had made a "last minute" decision to propose marriage to Girlfriend

that evening, and wanted to do so on the grounds of the local temple of the Church of Jesus Christ of Latter-day Saints. So, a few minutes after 10:00 p.m., Prisbrey, Girlfriend, and Prisbrey's dog got into Prisbrey's car and made the short drive to the temple. No one remained in Prisbrey's house. Before leaving the house for the proposal, however, Prisbrey did not extinguish the six candles in the Christmas village display. Girlfriend testified that she and Prisbrey, in the moment, did not think about it, and merely forgot. The State takes a different view.

¶4 Just as Prisbrey and Girlfriend arrived at the temple and pulled into a parking spot, Prisbrey received a phone call from one of his neighbors informing him that his house was on fire. Someone called the fire department at 10:22 p.m. and the local fire chief (Chief) arrived on scene at 10:29 p.m. Fire crews arrived at "about the same time" and began attempts to extinguish the fire. At that point, the fire was already "50 percent involved," with "fire showing from the roof and from the windows." Chief found that the fire was already "so intense" that he could not approach the house to turn off the gas and the power. Having been informed that there were no people or pets in the house, firefighters took "a defensive strategy," choosing to fight "the fire from the outside" instead of "going inside."

¶5 Firefighters began by deploying a "deck gun" from their fire truck, which dispenses between 500 and 1,000 gallons of water per minute. However, use of the deck gun "didn't seem to knock the fire down," so the fire crews used an "aerial apparatus" to fight the fire from above, and "that's when [they] started getting control" of the fire. In total, it took the fire crews "just over an hour" to get the blaze contained.

¶6 Once the fire was contained, Chief began inspecting the damaged remains of the house, and noticed some "red flags" that he thought might indicate that the fire had been intentionally set. First, he thought that "the [house] appeared to be sparsely furnished," in that "it just didn't seem to have the stuff that a regular [house] would have in it." Chief did not inventory the contents of the house, but simply developed this viewpoint from walking through the various rooms of the house after the fire. Another officer on the scene, whose identity Chief could not recall, told him that Prisbrey "had placed some stuff in a storage unit," but Chief did not follow up on the "storage unit" lead, or investigate the source of the other officer's statement or the extent to which it might be correct. Second, Chief noticed that "[t]here were some holes that were pushed through the wall" between the great room and the garage, about "a foot and a half off the floor," and he thought those holes might have been intended to facilitate the spread of the fire into the garage.

¶7 After noticing these things, Chief spoke with Prisbrey and asked him if he had any idea how the fire may have started. Prisbrey told Chief that, about two weeks earlier, his dog had tracked paint through the house, and that within the previous couple of days Prisbrey had used paint thinner to spot-clean the dog's paint tracks. Not all paint thinners are flammable, and Chief did not ask Prisbrey what kind of paint thinner he used or specifically where he had used it. Nevertheless, this piece of information added to Chief's suspicions, and based on all of the information he had at the time, he made the decision to notify the office of the Utah State Fire Marshal to ask it to investigate. Chief made that notification by phone call at about 11:30 p.m. that night. He also decided to station a fire crew at the house overnight to make sure the scene remained undisturbed, until someone from the State Fire Marshal's office could arrive.

¶8 The following morning, New Year's Day 2018, a section manager from the State Fire Marshal's office (Marshal) arrived on the scene. Before entering the house, Marshal spoke with Prisbrey, who was sitting in his ***1130** vehicle in front of the house. Prisbrey told Marshal about leaving the six candles lit in the Christmas village. When Marshal asked about flammable liquids in the house, Prisbrey informed Marshal that he had some camp fuel stored in a closet, and again recited the events that had occurred with his dog tracking paint into the house and cleaning it up "all over the place" with paint thinner. Like Chief, Marshal did not ask Prisbrey what kind of paint thinner he used or specifically where he had used it.

¶9 After interviewing Prisbrey, Marshal then inspected the house. He discovered "very heavy fire damage" in the great room near where the Christmas village display had been, and "very heavy" damage to the second floor of the house, such that it was unsafe for him to proceed up the stairs. Prisbrey also pointed out where his "overly dry" Christmas tree had been located. During his walk-through, Marshal saw signs that the fire may have spread quickly through the house, "more quickly than [he] would have expected."

¶10 When Marshal went into the garage—which shared a wall with the great room—he noticed that the garage was "significantly undamaged," either from fire or water damage. A water heater was located along the wall next to the great

room, and right next to the water heater—within just a few inches—were stacked several one-gallon containers of gasoline, one of which had its top removed. Near the gas cans was a "plastic garbage can full of various aerosols and flammable liquids."

¶11 Perhaps most significantly, Marshal noticed, along the wall between the garage and the great room, "two holes in the wall" that were located very close to where the Christmas village display had been (on the great room side) and where the gas cans were (on the garage side). Marshal asked Chief and the local fire marshal whether the two holes had been created "during suppression" by high-pressure water hoses, and Chief and the local marshal stated that "they didn't make [the holes] with a water stream," and that if they had, there would have been extensive water damage in the garage and the items in the garage, including the gas cans, would have been moved around.[2] But Marshal did not ask any of the line firefighters whether the holes had been created after the fire had been controlled, when crews were searching the house for hot spots, and Marshal conceded on cross-examination that it was "[p]ossibl[e]" that the holes had been made by fire crews after the fire was under control.[3] When asked about the two holes, Prisbrey denied any knowledge of them, and Girlfriend testified that she had not noticed them when she was in the garage on New Year's Eve before leaving for the temple, although she acknowledged she had not been looking for them.

¶12 After his inspection of the garage, Marshal "believed [he] had uncovered elements of an arson," so he "backed out of the scene" and informed the officers on scene that they "would need a warrant to proceed any further." He testified that this was "the ***1131** end of [his] investigation," and that, at that point, he "left the scene and never returned to the premises." However, the record contains no indication that a search warrant was ever sought or obtained, and no evidence of any further investigation of the incident by any governmental entity—whether by local law enforcement or by the office of the State Fire Marshal—was submitted to the magistrate at the preliminary hearing.

¶13 Despite conducting no further investigation, Marshal testified at the preliminary hearing that, in his opinion, "this was an arson." In response to a question about the basis for this opinion, Marshal testified as follows:

> The holes in the wall that weren't caused by fire department suppression streams, the gas cans up against the water heater, the candles on the other side of the garage wall in the great room that were left burning with combustible material around them, that was certainly some of my red flags as far as elements of an arson go.

Marshal acknowledged that he had not reached any conclusion that the house had been sparsely furnished, and was not basing his opinion on any such notion, and that his opinion was likewise not based on the presence of paint thinner (or any other accelerant) on the floor, even stating that he "wasn't concerned with accelerant being used" in the great room. Indeed, upon direct questioning from the magistrate, Marshal reaffirmed that his opinion was not based on the presence of accelerants, but was instead based on "the hole[s] in the walls, [the] location of the gas cans, as well as the lit candles."

¶14 Soon after the fire, Prisbrey notified his insurance company and submitted a claim, therein representing to the insurance company that he did not intentionally cause the fire. On January 2, 2018, the insurance company hired its own investigator (Investigator) to inspect the home and offer an opinion as to whether the fire was arson, so that the insurance company could make a decision about whether to pay the claim. Investigator traveled to the scene on January 4, 2018, and spent "four or five hours" on the premises. In his view, the house was not sparsely furnished. While he was in the house, Investigator took photographs and samples of various items. In particular, he filled four lined one-gallon cans, designed to keep gases inside, with various fire debris, with the intent to test the debris samples for the presence of accelerants. Those samples were later tested, and Investigator testified that they showed no sign of accelerants anywhere near where the fire had started, in the great room.

¶15 Investigator also focused on the two holes in the wall between the great room and the garage. In particular, he examined the relative damage on the two sides of the wall, as well as on the gypsum and the paper in the drywall along the sides of the holes, and concluded that the holes had been created *after* the fire, and not before. In particular, Investigator observed that the gypsum inside the drywall along the edges of the holes was less discolored than the torn paper covering the drywall around the holes, and concluded that the paper had not been torn—an event that would have occurred when the holes were created—until after the fire was over. Investigator also noted the absence of any fire damage inside the garage, observing that a fire burning intensely enough to burn the drywall inside the room "would have gone into the garage" if the holes had existed while the fire was burning.

¶16 After completing his investigation, Investigator notified the insurance company that his preliminary conclusion was that the fire was accidental, and he later submitted a final written report reaffirming that conclusion and detailing the basis for it. Based in part on Investigator's conclusion, the insurance company approved Prisbrey's claim, ultimately paying him "over $350,000 in benefits" for, among other things, repair to the house and for temporary housing.

¶17 After the insurance company paid the claim, the State charged Prisbrey with aggravated arson, a first-degree felony, and with filing a false insurance claim, a second-degree felony. The district court, sitting in the capacity of a magistrate, held a preliminary hearing to decide whether to bind Prisbrey over for trial on these charges; the hearing took place over two days, spaced eleven months apart. During that hearing, the State called three witnesses: Chief and ***1132** Marshal, who testified as to the events described above; and a witness from the Insurance Fraud Division of the Utah Insurance Department, who testified that Prisbrey had submitted a claim to his insurance company. After the State rested, Prisbrey called Investigator and Girlfriend. During his testimony, Investigator described his investigation, the conclusion he had drawn from it—that the fire had been accidental—and the reasons for his conclusion. At the end of the hearing, the magistrate declined to bind Prisbrey over on either charge, determining that, even though the State's burden "is not very high," the State had failed to meet that burden.

ISSUE AND STANDARD OF REVIEW

[2] **[3]** ¶18 The State now appeals the magistrate's decision not to bind Prisbrey over for trial. A "decision to bind over a criminal defendant for trial presents a mixed question of law and fact and requires the application of the appropriate bindover standard to the underlying factual findings." *In re I.R.C.*, 2010 UT 41, ¶ 12, 232 P.3d 1040 (quotation simplified). In this context, appellate courts give "limited deference to a magistrate's application of the bindover standard to the facts of each case." *See State v. Ramirez*, 2012 UT 59, ¶ 7, 289 P.3d 444 (quotation simplified); *accord State v. Virgin*, 2006 UT 29, ¶ 34, 137 P.3d 787.

ANALYSIS

[4] **[5]** ¶19 "The preliminary hearing is a fundamental procedural right guaranteed by article I, section 13 of the Utah Constitution." *Ramirez*, 2012 UT 59, ¶ 8, 289 P.3d 444. Under that provision, a defendant charged with any felony or any class A misdemeanor is entitled to a preliminary hearing. *See State v. Hernandez*, 2011 UT 70, ¶ 29, 268 P.3d 822; *see also* Utah Const. art. I, § 13. Under a separate constitutional provision, the people of Utah have declared that the "function" of a preliminary hearing "is limited to determining whether probable cause exists" to bind a defendant over for trial. *See* Utah Const. art. I, § 12.

¶20 Our supreme court has noted that "probable cause never had and never will have a precise meaning." *See State v. Clark*, 2001 UT 9, ¶ 11 n.1, 20 P.3d 300 (quotation simplified). In *Clark*, the court held that the "probable cause" standard applicable in preliminary hearings was the same as the "probable cause" standard applicable in the context of arrest warrants, stating that, "at both the arrest warrant and the preliminary hearing stages, the prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it." *Id.* ¶ 16; *accord* Utah R. Crim. P. 7B(b); *State v. Schmidt*, 2015 UT 65, ¶ 17, 356 P.3d 1204. And the *Clark* court noted that this "reasonable belief" formulation of the probable cause standard was not materially different from the "fair probability" formulation of the probable cause standard applicable in the context of search warrants. *See* 2001 UT 9, ¶ 11 n.1, 20 P.3d 300 (stating that, "[t]hough phrased differently, there is little, if any, difference" between the "reasonable belief" standard for obtaining an arrest warrant and the "fair probability" standard for obtaining a search warrant); *see also State v. Decorso*, 1999 UT 57, ¶ 59, 993 P.2d 837 (stating that a search warrant is proper where there is a "fair probability that evidence of the crime will be found in the place or places named in the warrant" (quotation simplified)), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016.

[6] **[7]** **[8]** **[9]** ¶21 While the State bears the burden of establishing the existence of probable cause at a preliminary hearing, *see State v. Lopez*, 2020 UT 61, ¶ 46, 474 P.3d 949, that burden is "relatively low," *see Ramirez*, 2012 UT 59, ¶ 9, 289 P.3d 444; *see also Lopez*, 2020 UT 61, ¶ 46, 474 P.3d 949 (stating that the burden is "light"). To make the necessary showing, the State "need not produce evidence sufficient to support a finding of guilt at trial or even to eliminate alternative inferences that could be drawn from the evidence in favor of the defense." *Lopez*, 2020 UT 61, ¶ 46, 474 P.3d 949 (quotation simplified). The

State need only present "reasonably believable evidence—as opposed to speculation—sufficient to sustain each element of the crime(s) in question." *Ramirez*, 2012 UT 59, ¶ 9, 289 P.3d 444. And in considering the evidence presented, the magistrate conducting ***1133** the preliminary hearing "must view all evidence in the light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution." *Clark*, 2001 UT 9, ¶ 10, 20 P.3d 300 (quotation simplified).

[10] **[11]** **[12]** **[13]** ¶22 But "[d]espite the relatively low evidentiary threshold at a preliminary hearing, a magistrate may deny bindover in certain situations." *State v. Graham*, 2013 UT App 109, ¶ 9, 302 P.3d 824. Indeed, when "[p]roperly construed and applied, the probable cause standard does not constitute a rubber stamp for the prosecution but, rather, provides a meaningful opportunity for magistrates to ferret out groundless and improvident prosecutions." *State v. Virgin*, 2006 UT 29, ¶ 19, 137 P.3d 787. For instance, "when the evidence, considered under the totality of the circumstances, is wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecution's claim, the magistrate is not required to bind a criminal defendant over for trial." *Graham*, 2013 UT App 109, ¶ 9, 302 P.3d 824 (quotation simplified). Similarly, a magistrate may properly deny bindover "where the facts presented by the prosecution provide no more than a basis for speculation." *See State v. Jones*, 2016 UT 4, ¶ 13, 365 P.3d 1212 (quotation simplified).

[14] **[15]** **[16]** **[17]** ¶23 To be sure, the line separating "speculation" from "reasonable inference" can at times be faint. *See Salt Lake City v. Carrera*, 2015 UT 73, ¶¶ 11–12, 358 P.3d 1067 (stating that the "distinction between a reasonable inference and speculation" is a "difficult" one "for which a bright-line methodology is elusive"); *see also State v. Cristobal*, 2010 UT App 228, ¶ 16, 238 P.3d 1096 (referring to the distinction between reasonable inference and speculation as "sometimes subtle"), *abrogated on other grounds as recognized by State v. Law*, 2020 UT App 74, 464 P.3d 1192. An "inference" is "a conclusion reached by considering other facts and deducing a logical consequence from them." *Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067 (quotation simplified). "On the other hand, 'speculation' is the act or practice of theorizing about matters over which there is no certain knowledge at hand." *Id.* (quotation simplified). As our supreme court has explained, "the difference between an inference and speculation depends on whether the underlying facts support the conclusion." *Id.*; *see also Salt Lake City v. Gallegos*, 2015 UT App 78, ¶ 10, 347 P.3d 842 (stating that "inferences drawn from facts in evidence are appropriate," but "inferences drawn from inferences are not" (quotation simplified)).

[18] ¶24 In this case, the State charged Prisbrey with aggravated arson, a crime that occurs when a person, "by means of fire," "intentionally and unlawfully damages ... a habitable structure." Utah Code Ann. § 76-6-103(1)(a) (LexisNexis 2017). Arson, like all crimes, may be proved through circumstantial evidence. *See State v. Nickles*, 728 P.2d 123, 126 (Utah 1986) (stating that, in the context of arson, "circumstantial evidence alone may be sufficient to establish the guilt of the accused"). After Chief and Marshal walked through the burned house on New Year's Eve and New Year's Day, they made several circumstantial observations that they thought pointed toward the conclusion that Prisbrey had intentionally set his house on fire. Specifically, the State points to seven such observations that it contends support bindover: (1) that Prisbrey told fire officials that he had used paint thinner to clean up dog-tracked paint in the days leading up to the fire; (2) that Marshal believed the fire had spread more quickly than he would have anticipated; (3) that flammable materials were present in the house, including an "overly dry" Christmas tree, camp fuel in a closet, and gasoline cans in the garage; (4) that Chief believed the house was sparsely furnished, and had heard that Prisbrey had removed items to a storage unit prior to the fire; (5) that Prisbrey failed to extinguish the six candles in the Christmas village display before leaving the house on New Year's Eve; (6) that Prisbrey, Girlfriend, and dog had all left the house prior to the fire; and (7) that two holes were punched into the wall between the great room and the garage, right between where the Christmas village display and the gas cans were located, and that these holes had not been created by fire department water streams.

***1134** ¶25 After making these observations, Chief and Marshal left the scene, with Marshal commenting that they "would need a [search] warrant to proceed any further." But no warrant was ever sought or obtained; neither Chief nor Marshal conducted any further investigation, and no evidence was presented to the magistrate that any other governmental entity did either.

¶26 Because the State never sought a search warrant, no magistrate was ever asked to evaluate the State's evidence—as it existed at that moment in time—to consider whether probable cause existed to support a search warrant to further

investigate the possibility that Prisbrey had committed arson. And we are not asked to consider that question either, although we certainly acknowledge that a request for a warrant, if the State had made one on New Year's Day, may very well have been appropriately granted, given the incomplete information that then existed.

[19] **[20]** ¶27 The question we are asked to consider is not whether probable cause existed to support a search warrant on New Year's Day, but instead whether probable cause existed to support bindover at the conclusion of the preliminary hearing, in light of all of the evidence presented at that hearing. Even if we assume, for the sake of argument, that the State could have demonstrated probable cause for a search warrant on New Year's Day, it does not necessarily follow from that conclusion that probable cause will continue to be present at all subsequent stages of the case. Over the course of a case, inferences that once appeared reasonable may, upon further investigation, be proven to be unreasonable or no longer based on facts in evidence. And in exceptional cases, evidence put forward by a defendant at a preliminary hearing may overcome a *prima facie* showing of probable cause. *See Lopez*, 2020 UT 61, ¶¶ 46–48, 474 P.3d 949 (noting the "low bar" the State must surmount at a preliminary hearing, and stating that, given the low bar, "it may be difficult for the defense to overcome a *prima facie* showing of probable cause").

[21] ¶28 The magistrate adjudged this case to be one of those rare cases in which the State's evidence did not surmount the low probable cause bar. And in this unique case, for two related reasons, we discern no abuse of the magistrate's limited discretion in reaching that conclusion.

¶29 First, the State's evidence consisted largely of innocuous facts coupled with unexamined supposition. As noted above, the difference between "speculation" and "reasonable inference" turns on whether there are facts that underlie the conclusion. *See Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067. For many of Chief's and Marshal's "red flags," no underlying facts supported their speculative suspicion. For instance, Chief's supposition about the use of accelerants was based on Prisbrey's account that, some days prior to the fire, he had used paint thinner to spot-clean dog-tracked paint. But paint thinner evaporates over time, and neither Chief nor Marshal knew the date on which Prisbrey had applied the paint thinner, nor did they know whether the paint thinner Prisbrey used was even flammable, or whether he had applied any paint thinner anywhere near the Christmas village display. And neither conducted any follow-up investigation to attempt to ascertain these facts. Under the circumstances, Chief's suspicion that Prisbrey had applied flammable accelerants on a location near the Christmas village display on a date recent enough to matter amounted to nothing more than a "theor[y] about matters over which there is no certain knowledge." *See id.* (quotation simplified). Indeed, during his testimony, Marshal specifically disavowed reliance on any such supposition, informing the magistrate, in response to a direct question, that he "wasn't concerned with accelerant being used" in the great room. The State's attempted reliance upon it now is misplaced.

[22] ¶30 Similarly, Chief's supposition that the house was sparsely furnished was, in context, not a reasonable inference supportive of arson. By itself, the fact that a house is sparsely furnished is hardly evidence of arson; what triggered Chief's suspicion was that the *reason* the house was sparsely furnished might have been because Prisbrey had taken items out of the house prior to the fire and placed them in a storage unit. That ***1135** fact, if true, would potentially be circumstantial evidence of arsonous intent. But here, nothing other than unexamined supposition supports any such notion. Chief could not even remember who told him about the storage unit, let alone any details about the type and number of items that might have been moved there prior to the fire. And no additional investigation was apparently ever conducted to locate or inspect any such storage unit. Chief's suspicion along these lines was speculative, and Marshal again distanced himself from it, testifying that he included no observations in his report about the house being sparsely furnished. The State's attempted reliance upon this fact now is likewise misplaced.

¶31 In addition, some of the other facts to which the State now points are entirely innocuous, and do almost nothing to support an inference of arson. For instance, the fact that Prisbrey had flammable materials in his house and in his garage was entirely unremarkable. Many Americans have an overly dry Christmas tree in their house on New Year's Eve. And if the presence of camping fuel in a closet and gas cans in the garage were indicative of arsonous intent, it would be the exceptional homeowner who would not fall under suspicion.

¶32 Second, the evidence of the insurance company's investigation presented by the defense at the preliminary hearing served to overcome any remnants of reasonable inference that remained in the State's references to accelerants or the holes in the wall. It bears noting that—at the

time it investigated the claim—the insurance company was fully aware that local fire officials were wondering about arson; indeed, that is why the company dispatched its own investigator to the scene. And it goes almost without saying that the insurance company—given the $350,000 insurance claim at stake—had every interest in making sure the fire had not been started intentionally. But despite the insurer's awareness and incentives, its investigation resulted in a conclusion that the fire had been an accident.

¶33 Specifically, Investigator took samples, preserved in lined cans, with the intention of determining whether there was any evidence that Prisbrey applied paint thinner or other accelerants in locations designed to spread the fire. Tests of the samples yielded no such evidence.

¶34 And Investigator carefully examined the two holes in the wall between the great room and the garage. This piece of evidence was arguably the State's most powerful, and the item upon which Marshal almost entirely rested his conclusion that Prisbrey had intentionally set the fire. But Investigator concluded, based on his analysis of the components of the drywall on each side of the wall and the lack of fire damage in the garage, that the holes had been created *after* the fire.

[23] ¶35 The State asserts that Marshal's conclusion to the contrary—that the holes are indicative of arson—is sufficient to compel bindover, pointing out that "when reasonable inferences from the evidence cut both for and against the [S]tate's case, the magistrate lacks discretion to choose between them and must leave such a determination to the fact-finder at trial." *See* *Schmidt*, 2015 UT 65, ¶ 1, 356 P.3d 1204. But while Investigator's conclusion represents a reasonable inference drawn from evidence, Marshal's conclusion—on this record—does not. In contrast to Investigator's conclusion, which was based on facts following an investigation, Marshal's conclusion was simply a "theor[y] about matters over which there is no certain knowledge." *See* *Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067 (quotation simplified). After all, the presence of the holes themselves is not, in itself, indicative of arson; the holes lead to a reasonable inference of arson only if they were created *before* the fire. Only Investigator—and not Marshal—made efforts to thoroughly investigate when the holes were created. Marshal simply asked two individuals (rather than all of the fire crews) if the holes had been created by their water streams (rather than through any other means). After being told that the holes had not been created by fire crews' water streams, Marshal jumped to the unexamined conclusion that the holes must have been created prior to the fire. He did not attempt to ground that conclusion in any actual investigatory facts. He did not examine the holes to compare the burn or water damage on ***1136** each side of the wall, and did not talk to any members of the fire crews other than Chief and the local fire marshal.

¶36 After considering all of the evidence as presented at the preliminary hearing, the magistrate determined that the State's case was based on speculation and not on reasonable inferences grounded in evidentiary facts. To be sure, Prisbrey lit six candles in a Christmas village display in his house, and did not extinguish them in his haste to leave the house—with his dog—to propose to Girlfriend. The fire did seem to have spread quickly, perhaps due to the presence of a dry Christmas tree in the vicinity. But beyond that, the State's inferences of arson are simply theoretical, and not grounded in evidence. The State did nothing—or, at least, presented no evidence that it did anything—more to investigate its suspicions. And the State's theories did not hold up against an actual investigation by an entity with every incentive to validate them. Under these unique circumstances, we cannot conclude that the magistrate abused his limited discretion in determining that the State's case was too speculative to support bindover, on either an aggravated arson charge or an insurance fraud charge, which charges in this case rise and fall together.

CONCLUSION

¶37 Accordingly, we affirm the magistrate's decision to decline bindover.

POHLMAN, Judge (dissenting):

¶38 The magistrate, and the majority alike, recognizes that the State's burden of proof at the preliminary hearing is light. Our supreme court characterizes the standard as setting a "low bar," equating it to the "reasonable belief" formulation of the probable cause standard applicable to arrest warrants. *See* *State v. Lopez*, 2020 UT 61, ¶¶ 46, 48, 474 P.3d 949; *State v. Jones*, 2016 UT 4, ¶ 12, 365 P.3d 1212. Similarly, the majority likens it to the "fair probability" formulation of the probable cause standard applicable to search warrants. *See supra* ¶ 20.

¶39 Without affirmatively stating that the State could have met that standard with the evidence it amassed had it sought a search warrant on New Year's Day, the majority assumes for the sake of its analysis that the standard would have been met. But it then concludes that this is an "exceptional" case

where the defense overcame that showing in the preliminary hearing. *See supra* ¶¶ 27–28. I respectfully disagree.

¶40 The lens through which we must view the evidence presented at the preliminary hearing is from the perspective of a reasonable arresting officer. *Jones*, 2016 UT 4, ¶ 22, 365 P.3d 1212. "We ask whether *any officer*, viewing the evidence in the light most favorable to the prosecution, could reasonably conclude that a crime was committed and that the defendant committed it." *Id.* (quotation simplified). "And in making that assessment we are required to give the benefit of all reasonable inferences to the prosecution." *Id.* Applying these principles here, I believe the State presented enough evidence to sustain a reasonable determination of probable cause to arrest Prisbrey for aggravated arson and insurance fraud,[4] and I do not share my colleagues' view that Prisbrey undermined that evidence in such a way as to defeat that showing.

¶41 The evidence, when viewed in the light most favorable to the State, paints an incriminating picture. No more than two days before the fire, Prisbrey applied paint thinner all over the house, and he made two large holes in the wall between the garage and the great room. On the garage side of the wall, he stacked up three containers of gasoline in line with the two holes and within inches of the water heater. He also left a plastic garbage can full of various aerosols and flammable liquids in the garage. On the great room side of the wall, Prisbrey created a Christmas village display, decorated with candles, fake snow, wood, and other combustible materials. And on New Year's Eve, Prisbrey lit ***1137** the six candles and then left the house at 10:00 p.m., taking Girlfriend and his dog with him. The house was in flames minutes later, and after surveying the scene Marshal opined that the fire was intentionally set. In my opinion, this is enough evidence to sustain an arresting officer's reasonable belief that Prisbrey took intentional steps to burn down his house.

¶42 The majority disagrees, concluding that these facts were largely innocuous or speculative. *See supra* ¶ 29. I see it differently. For example, the majority labels the evidence of Prisbrey's application of flammable accelerants in the house as speculative, stating that neither Chief nor Marshal had gathered enough evidence to know whether "Prisbrey had applied flammable accelerants on a location near the Christmas village display on a date recent enough to matter." *Supra* ¶ 29. But even if these details were not established with fine precision, Prisbrey's own statements were incriminating enough. As far as whether the paint thinner Prisbrey applied was of the flammable variety, Prisbrey admitted it was when he identified the paint thinner in response to Marshal's inquiry about whether there were any ignitable or flammable liquids in the house.[5] And regarding when and where the paint thinner was applied, Marshal testified that Prisbrey told him that he had applied it recently—"over the last two days"—and that he had applied it "all over the place."[6]

¶43 Similarly, the majority labels Chief's testimony that the house was sparsely furnished as supposition, stating that his testimony about a storage unit "was speculative." *See supra* ¶ 30. But Chief's testimony about the furnishings, or lack thereof, in the house was based on his own personal observations of the house when he inspected it on the night of the fire. And his testimony about the storage unit was based on a report he received from another officer who told him that Prisbrey "had put stuff" there.[7] Thus, while Chief's testimony on this point may have been less than compelling, I do not believe it was improper for the State to rely on it as one piece of the evidentiary puzzle.[8] *See Carter v. State*, 2019 UT 12, ¶ 75, 439 P.3d 616 ("The line between a reasonable inference and speculation can be difficult to draw, but a reasonable inference exists when there is at least a foundation in the evidence upon which the ultimate conclusion is based, while in the case of speculation, there is no underlying evidence to support the conclusion." (quotation simplified)).

¶44 Next, the majority concludes that certain evidentiary facts "are entirely innocuous, and do almost nothing to support an inference of arson." *See supra* ¶ 31. In particular, ***1138** it finds that the existence of flammable materials in Prisbrey's garage and his house "was entirely unremarkable." *See supra* ¶ 31. Even putting aside the overly dry Christmas tree and camping fuel, I do not consider the flammable materials in Prisbrey's garage to be unremarkable. Marshal did not suspect arson simply because Prisbrey was storing some gasoline in his garage. Rather, it was the presence of a plastic garbage can full of various aerosols and flammable liquids along with three containers of gasoline, one with the top removed, stacked up within inches of a water heater bearing a warning label to keep flammable liquids away and lined up directly behind two holes in the wall of the great room in which six lit candles were left unattended that caused him concern. My colleagues believe it would be the exceptional homeowner who would not fall under suspicion if these facts were indicative of arson. *See supra* ¶ 31. I submit that these are exceptional facts.

¶45 Finally, I do not agree that evidence of the insurance company's investigation presented by the defense overcame the probable cause established by the State. The evidence presented by Prisbrey is compelling, and a jury could very well doubt Prisbrey's guilt in light of the evidence produced by the insurance company's investigation. But our role "is not to decide whether we think the charges are likely to produce a conviction, or even whether we would be inclined to produce charges if we were in a position to exercise prosecutorial discretion." *Jones*, 2016 UT 4, ¶ 39, 365 P.3d 1212. Rather, our task is to decide whether a reasonable police officer, viewing the record in the light most favorable to the State, could conclude that Prisbrey committed arson. *See id.* And the insurance company's evidence does not conclusively disprove the State's evidence; it instead presents a conflict in the evidence that neither we, nor the magistrate, are permitted to weigh. *See id.* ¶ 24.

¶46 In particular, the fact that Investigator's samples yielded no evidence of paint thinner in the house, *see supra* ¶ 33, does not disprove Prisbrey's own admissions that he spread accelerant throughout the home. It instead presents a conflict for the factfinder to resolve. Similarly, that Investigator opined that the two holes in the wall between the great room and the garage were created after the fire, and not before, *see supra* ¶ 34, does not establish it as fact. Marshal testified that he asked Chief and the local fire marshal if the fire department made the holes "during suppression" of the fire, and they said they did not.[9] While a factfinder may not be allowed to rely on such hearsay at trial, for purposes of the preliminary hearing, the State was entitled to rely on it to demonstrate probable cause. *See supra* ¶ 43 note 7. And while a factfinder would have every right to reject the firefighters' recollections in favor of Investigator's opinion and scientific investigation, the State was not obligated to rebut the defense's theories to meet the liberal bindover standard. "A strong argument the other way isn't enough to foreclose a trial on the merits. Weighing evidence in search of the most reasonable inference to be drawn therefrom is the role of the factfinder at trial." *Jones*, 2016 UT 4, ¶ 24, 365 P.3d 1212 (quotation simplified).

¶47 In sum, I conclude that the magistrate exceeded his discretion in refusing to bind Prisbrey over for trial, and I would reverse its decision and remand this case for further proceedings. The State's case was met with a persuasive rebuttal, and weaknesses in its case were exposed in the preliminary hearing. But the question before us is whether the State, considering the evidence in the light most favorable to it, demonstrated ***1139** probable cause to arrest Prisbrey for arson. For all these reasons, I believe that it did.

All Citations

479 P.3d 1126, 2020 UT App 172

Footnotes

1 When we review a "magistrate's bindover decision, we view all evidence in the light most favorable to the prosecution, draw all reasonable inferences in favor of the prosecution, and recite the facts with that standard in mind." *State v. Nihells*, 2019 UT App 210, n.1, 457 P.3d 1121 (quotation simplified).

2 The dissent states that Marshal posed only "a more general question," asking only "if the holes were made by the fire department's suppression, and the answer was no." *See infra* ¶ 46 note 9. But in our view, the evidence indicates otherwise. While Marshal, in his testimony, did describe his question in rather general terms, he then testified that the answer to his question was that crews "did not" make the hole "during suppression," and that the crews "said if they had, their water pressure from their hose streams would have likely knocked over everything on the other side of the great room and moved the gas cans and other things around and created more water damage in the garage, which we had very little of." And he later stated that Chief and the local fire marshal told him, in answer to his question, that "they didn't make those [holes] with a water stream." From context, then, it is clear that the question Marshal asked had to do with whether the holes were created by water streams during fire suppression efforts, and not whether the holes were created while looking for hot spots after the fire was already out.

3 The dissent contends that "[t]he only suggestion that the holes could have been made by the fire department in search of a hot spot came from defense counsel in cross examination of Chief." *See infra* ¶ 46 note 9. We view the record differently. As noted, the subject came up during Marshal's testimony as well, and although the question was posed by defense counsel, Marshal acknowledged in response that the holes could "[p]ossibly" have been made by fire crews after the fire had been controlled.

4 The State presented evidence at the preliminary hearing that Prisbrey represented to his insurance company, as part of an insurance claim, that he did not intentionally set the fire. Thus, to the extent there was probable cause to bind Prisbrey over for arson, there was also probable cause to bind him over for knowingly making a false or fraudulent insurance claim.

5 In addition to Prisbrey's own suggestion that the paint thinner he applied was flammable, Marshal testified that "the overwhelming majority" of paint thinner "is flammable" and that while there probably is a non-flammable variety "out there," it was not something he had seen. This testimony lends further support to the inference that Prisbrey's paint thinner was flammable.

6 In my view, Prisbrey's admission that he spread paint thinner in his home could be indicative of guilt even if the paint thinner was not found near the Christmas village display. If Prisbrey intended to burn down his house, he could have distributed the paint thinner in other areas to aid the fire's spread.

7 While not speculative, Chief's testimony about the storage unit was admittedly hearsay. However, rule 7B(b) of the Utah Rules of Criminal Procedure provides that "findings of probable cause may be based on hearsay, in whole or in part." Utah R. Crim. P. 7B(b); *see also* Utah R. Evid. 1102(a) ("Reliable hearsay is admissible at criminal preliminary examinations."); *State v. Lopez*, 2020 UT 61, ¶ 45, 474 P.3d 949 (recognizing that hearsay evidence may be relied upon to establish probable cause in preliminary hearings).

8 Prisbrey and the majority fault the State for not investigating the existence of the storage unit. *See supra* ¶ 30. The State did not introduce evidence of the storage unit, but the absence of that evidence does not establish that no other investigation was undertaken and that no additional evidence was adduced. The State may have believed Marshal's testimony on this point was sufficient for purposes of the preliminary hearing. Plus, there is an assumption at the preliminary hearing stage "that the prosecution's case will only get stronger as the investigation continues." *State v. Clark*, 2001 UT 9, ¶ 10, 20 P.3d 300 (quotation simplified). The fact that the State could have presented a stronger case had it brought more witnesses or done a more thorough investigation before the preliminary hearing is not a relevant consideration as long as the liberal bindover standard is met.

9 The majority states that Marshal specifically asked if the holes were created by the firefighters' water streams. *See supra* ¶ 35. To be sure, there was discussion of what evidence would have been present had the holes been created by water streams. But Marshal asked a more general question. He twice testified that he asked if the holes were made by the fire department's suppression, and the answer was no, the firefighters "did not make them." The only suggestion that the holes could have been made by the fire department in search of a hot spot came from defense counsel in cross-examination of Chief. And Chief testified that at times drywall is pulled down to look for hot spot exposure, but that the department tries to do minimal overhaul in the area where it believes the fire originated.

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