

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>2 East 14<sup>th</sup> Avenue Denver, CO 80203</p>	
<p>District Court of El Paso County, Colorado Honorable Kirk S. Samelson, District Court Judge Division 14 Case No. 08CR272</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>Plaintiff-Appellant,</p> <p>v.</p> <p>MFT,</p> <p>Defendant-Appellee.</p>	<p>▲ <b>COURT USE ONLY</b> ▲</p> <p>Case No.: 08CA1479</p>
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**PEOPLE'S OPENING BRIEF**

## ISSUE ON APPEAL

**The evidence at preliminary hearing indicated that defendant had worked at the restaurant before it was robbed, the robber entered the restaurant just as the manager began counting receipts from her shift, the manager recognized defendant as the robber and called his name, and the manager identified defendant as the robber for police and the district court. Given this, did the court err in concluding that there was no probable cause to establish the robber's identity?**

## STATEMENT OF THE CASE

This is a criminal case in which, after a preliminary hearing where the Honorable District Court Judge Kirk S. Samelson [hereinafter "the district court"] dismissed all charges against defendant, the district attorney filed this interlocutory appeal.

### **a. Course of Proceedings**

The prosecution charged defendant with two counts of aggravated robbery in violation of § 18-4-302(1)(b), C.R.S. 2008; two related crime of violence counts under § 18-1.3-406(2)(a)(I)(A), C.R.S. 2008; three felony menacing counts in violation of § 18-3-206(1)(a)(b), C.R.S. 2008; and one count of misdemeanor theft in violation of § 18-4-401, C.R.S. 2008. See Complaint and Information, Court File. On June 2, 2008, the parties litigated the issue of probable cause at a preliminary hearing. See Transcript. At the end of the hearing, the district court

dismissed all charges after concluding that there was no probable cause to establish the robber's identification. Transcript, p. 37, line 22 to p. 38, line 7. The prosecution filed a notice of interlocutory appeal from the court's ruling on July 16, 2008. See Notice of Appeal, Court File.

**b. Jurisdictional Basis for this Appeal**

This is an appeal of the district court order dismissing all charges against defendant. The court's order is appealable under § 16-12-102(1), C.R.S. 2008. Jurisdiction for this appeal exists under § 16-12-102(1), C.R.S. 2008, and that jurisdiction is properly in the Court of Appeals under C.A.R. 4(b)(2).

**STATEMENT OF THE FACTS**

The charges against defendant arose from the robbery of a Burger King that occurred between 4:40 a.m. and 4:45 a.m. on December 1, 2007. Transcript, p. 5, lines 16-17, line 19; p. 21, lines 23-24. Defendant was an ex-employee at the Burger King and lived across the street from the restaurant's night manager. Transcript, p. 6, lines 11-12; p. 8, lines 7-8; p. 22, lines 13-14; p. 27, lines 15-16.

Four employees were on duty when the robbery occurred. The night manager was in a back office where she had just started counting the cash receipts from her shift and was preparing to "rebank" the restaurant's registers and safe.

Transcript, p. 5, lines 18-20; p. 6, lines 17-21; p. 21, lines 16-25. The manager began this process every day at 4:30 a.m. Transcript, p. 21, lines 17-20.

The robber knocked on the office door while the manager was handling the cash. Transcript, p. 5, line 21; p. 21, lines 23-24. Another employee let the robber in because she believed the person at the door was an employee who had taken out the trash. Transcript, p. 5, lines 22-23; p. 22, lines 2-5. The robber came inside, pointed a gun at the employee who had opened the door, ordered her to the ground, and crouched over her. Transcript, p. 5, lines 23-24; p. 7, lines 8-11; p. 22, lines 7-9; p. 28, lines 17-18.

The robber was wearing dark clothes and his face was covered by bandannas above and below his eyes. Transcript, p. 9, lines 13-16; p. 26, lines 13-20. He had his back turned toward the manager when she first saw him. Transcript, p. 28, lines 17-18. Nevertheless, the manager recognized defendant as the robber and called him by name several times. Transcript, p. 10, lines 1-2; p. 22, lines 10-11 & 18-19; p. 28, lines. Defendant turned, walked over to the manager, placed his gun against her head, and demanded that she open the safe. Transcript, p. 10, lines 12-14; p. 22, lines 20-22. The manager opened the safe and defendant gathered all the money from the safe and the register drawers. He left with the money after putting

it in a jacket belonging to one of the employees. Transcript, p. 5, line 23 to p. 6, line 1; p. 23, lines 6-20.

When police officers interviewed the manager on the morning of the robbery, she told them that she did not know the robber's identity. Transcript, p. 13, lines 9-15. The officers reinterviewed the manager after another employee told them that she heard the manager call the robber by defendant's name. Transcript, p. 13, line 25 to p. 14, line 8. The manager explained that she initially believed the robber might be defendant but she later determined that her initial belief was wrong. Transcript, p. 14, lines 9-12.

A police detective interviewed the manager on January 8 and 10, 2008. Transcript, p. 13, lines 4-8. At the January 10 interview the manager said that defendant was the robber, and she picked his photograph out of a lineup. Transcript, p. 8, line 13 to p. 9, line 4; p. 15, lines, 20-25. The manager told the detective that she identified defendant as the robber based on his eye color and the fact that defendant frequently wore a bandanna on his head. Transcript, p. 9, lines 17-21. The manager gave conflicting descriptions of the robber's eyes in her interviews with the detective, describing their color at the first interview as "either green or blue" and at the second interview as "brown." Transcript, p. 16, lines 6-12.

When asked why she waited until January 10 to identify defendant as the robber, the manager explained that she lived across the street from defendant and she feared for her safety. Transcript, p. 20, lines 1-5.

The manager testified at defendant's preliminary hearing and identified him in court as the robber. Transcript, p. 27, line 24 to p. 28, line 10. She based her identification of defendant on his eyes and the fact that defendant occasionally wore a bandanna on his head. Transcript, p. 27, lines 1-2 & 9-11. The manager also testified that the time she had spent with defendant played a role in her identification of him as the robber: "And just – I've been working with him for about a month. I just take notice to people and I know who I'm looking at if I've looked at you before." Transcript, p. 27, lines 2-4. The manager further testified that defendant had attended parties in her home. Transcript, p. 27, line 17.

When asked why she first told the police that she did not know the robber's identity, the manager answer "I was really scared to say that. I was really scared to name him off, and I'm still not even happy about being in this seat right now . . . ." Transcript, p. 24, lines 9-11.

On cross-examination, the manager testified that the robber's eyes were blue, and said that she was "95 percent sure" defendant was the robber. Transcript, p. 31, lines 8-13. Defendant's attorney asked the manager to look into defendant's

eyes, and she refused. Transcript, p. 32, lines 2-9. At the district court's direction, the manager looked into defendant's eyes and stated for the record that they were brown. Transcript, p. 34, lines 2-9. She then testified that she could not say that defendant was the robber, though she was previously certain of it. Transcript, p. 34, lines 18-20; p. 35, lines 17-24.

The district court dismissed all charges against defendant at the end of the preliminary hearing, finding that the prosecution had not established probable cause. Transcript, p. 38, lines 4-7. The court explained its ruling as follows:

[L]ooking at the evidence in the light most favorable to the People, the only testimony I've heard from [the victim] is that she was able to identify the robber based on his eyes, and the fact that he wore a bandanna – Mr. MFT oftentimes wore a bandanna. [The victim] indicated that the robber had blue eyes; Mr. MFT has brown eyes.

Transcript, p. 37, line 22 to p. 38, line 3.

### **SUMMARY OF THE ARGUMENT**

A preliminary hearing is limited to a determination of whether probable cause exists to believe the defendant committed the crime charged. It is not necessary for the prosecution to present evidence that will support a conviction of the offense beyond a reasonable doubt. The district court must view the evidence

in the light most favorable to the prosecution and draw all reasonable inferences in favor of finding probable cause. Witness credibility is not at issue.

Here, the district court did not give the prosecution's evidence the deference to which it was entitled at the preliminary hearing. That evidence showed that the victim of a robbery, who knew defendant both socially and from work, identified defendant to police and in court as the perpetrator of the crime. Moreover, the victim referred to defendant by name during the robbery. Although the victim gave contradictory statements regarding defendant's eye color and expressed doubt in her belief that he was the robber, it is not required that a witness be able to identify the accused positively or that the witness be free from doubt as to the correctness of his or her opinion.

Similar evidence has been held sufficient in other cases to establish proof beyond a reasonable doubt that the accused committed a crime. It follows that the evidence here is sufficient to meet the much lower probable cause burden of proof required of the prosecution at a preliminary hearing.

The appropriate remedy in this case is to vacate the district court's order and remand with an instruction to reinstate the charges.

## STANDARD OF REVIEW

Although a trial court's determination that probable cause has not been established is generally reviewed for an abuse of discretion, its conclusions of law are reviewed de novo. People v. Collins, 32 P.3d 636, 640 (Colo.App. 2001). If the lower court applied an erroneous construction of law at the preliminary hearing, the appellate court looks to the record to determine whether the facts, viewed in the light most favorable to the prosecution, would induce a reasonably cautious and prudent person to entertain a belief that the defendant committed the crime charged. People v. Hall, 999 P.2d 207, 221 (Colo. 2000).

## ARGUMENT

**The evidence at preliminary hearing indicated that defendant had worked at the restaurant before it was robbed, the robber entered the restaurant just as the manager began counting receipts from her shift, the manager recognized defendant as the robber and called his name, and the manager identified defendant as the robber for police and the district court. Given this, the court erred in concluding that there was no probable cause to establish the robber's identity.**

The purpose of a preliminary hearing is to determine whether there is probable cause to believe that an offense has been committed and that the accused committed it. Probable cause exists if there is evidence sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the

accused committed the crime. While the prosecution must establish probable cause at a preliminary hearing, it need not present evidence sufficient to support a conviction for the crime charged. People v. Villapando, 984 P.2d 51, 55 (Colo. 1999).

A judge's findings at a preliminary hearing are limited to a determination of probable cause. People v. Fry, 92 P.3d 970, 977 (Colo. 2004). The judge must view the evidence in the light most favorable to the prosecution. People v. District Court, 926 P.2d 567, 570 (Colo. 1996). The judge must refrain from weighing the evidence, as that is a jury function. See People ex rel. VanMeveren v. District Court, 195 Colo. 1, 5, 575 P.2d 405, 408 (1978). Witness credibility is not at issue. People v. Fry, *supra*, 92 P.3d at 977. Circumstantial evidence may establish probable cause at a preliminary hearing. See People v. District Court, 779 P.2d 385, 388-389 (Colo. 1989) (holding that circumstantial evidence of deliberation and intent established probable cause for those elements at preliminary hearing on first-degree murder charge).

Here, the district court erroneously applied the law governing preliminary hearings in concluding that the prosecution failed to establish the robber's identity under the probable cause standard. The court based its conclusion on the

discrepancy between the color of defendant's eyes and the victim's testimony about the color of the robber's eyes. Transcript, p. 37, line 22 to p. 38, line 3. The court's conclusion is flawed in at least two respects.

The first flaw in the court's conclusion is that it weighed conflicting evidence to reach it. When interviewed by a police detective approximately a month after the robbery, the victim gave varying descriptions of the color of the robber's eyes to a police detective, describing them as "either green or blue" in one interview and as "brown" in another. Transcript, p. 16, lines 6-12. At the preliminary hearing six months after the robbery, the victim testified that the robber's eyes were blue. Transcript, p. 31, lines 8-13. Viewed in the light most favorable to the prosecution, the victim's conflicting statements could support a finding that the robber's eye color matched defendant's. The district court made the opposite finding, however, and acted contrary to the law in doing so. See People v. Collins, supra, 32 P.3d at 640 (the trial court must draw the inference most favorable to the prosecution from conflicting testimony at a preliminary hearing).

The second flaw in the district court's ruling is that it overlooked circumstantial evidence that defendant was the robber. Defendant had

worked with the night manager at the restaurant that was robbed. The robber carried out his crime in a manner that indicated he was familiar with the restaurant's procedures. The manager processed the receipts from her shift at the same time every morning, and the robbery arrived at the restaurant shortly after the manager began this task. Although there was an employee attending the front counter (Transcript, p. 7, lines 16-18; p. 24, line 20 to p. 25, line 2), the robber went to the back of the restaurant and entered it through a door that led him directly to where the manager was working. Additionally, when the manager called the robber by defendant's name, the robber came over to her and pointed a gun at her head.

In People v. Walker, 675 P.2d 304, 305, n. 5 (Colo. 1984), a case with facts similar to those here, the trial court dismissed criminal charges for lack of probable cause after witnesses to a robbery failed to identify the defendant at a preliminary hearing "with any degree of certainty." The supreme court reversed, noting that the trial court had applied an improper standard in evaluating the prosecution's evidence: "the trial court in effect required the People to introduce evidence sufficient to prove defendant's guilt beyond a reasonable doubt. Such level of proof is not required at preliminary hearings." People v. Walker, *supra*, 675 P.2d

at 306. In Walker, as in this case, there was circumstantial evidence that indicated the defendant was the robber, and a witness who could not identify the defendant with certainty at the preliminary hearing had previously identified him as the robber to the police. People v. Walker, *supra*, 675 P.2d at 306-307.

Conflicting evidence regarding a criminal's identity is not only sufficient to meet the probable cause standard used at a preliminary hearing; it is sufficient to support a conviction beyond a reasonable doubt:

Inconsistencies in trial testimony “are not uncommon to the adversary process which, of necessity, must rely upon the sometimes contradictory and often incomplete testimony of human observers in attempting to reconstruct the historical facts underlying an event.” [Citation omitted.] Indeed, it is precisely because “issues of credibility and weight are difficult to resolve and yet essential to the ultimate issue of guilt or innocence that the law entrusts these matters to the collective and diverse experience and judgment of the jury.” [Citation omitted.]

People v. Parks, 749 P.2d 417, 421-422 (Colo. 1988) (reversing judgment of acquittal notwithstanding a jury verdict in case where identification of robber was in dispute). See also Vigil v. People, 171 Colo. 518, 520, 470 P.2d 837, 838 (1970) (inconsistent testimony from witness held sufficient to identify defendant as the driver of get-away car; it is not essential that a witness be free from doubt as to

the correctness of his opinion or that he identify the accused positively).

Under the deferential standards governing preliminary hearings, the evidence in this case was sufficient to establish that defendant committed the crimes charged. Thus, for purposes of the preliminary hearing, the prosecution met the low threshold required to show identity. The district court improperly weighed the prosecution's evidence in reaching a contrary conclusion. Had the court applied the law correctly, it would not have dismissed the charges against defendant.

In these circumstances, the appropriate remedy is to vacate the district court's dismissal order and remand with instructions to reinstate all charges. See People v. District Court, supra, 926 P.2d at 572.

## **CONCLUSION**

For the foregoing reasons and authorities, the district court's order of dismissal should be vacated, and this case should be remanded with instructions to reinstate all counts for trial.

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**CERTIFICATE OF SERVICE**

I certify that a copy of this Opening Brief has been mailed by United States

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