

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 19, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0668-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CLIFFORD D. LONDO,

Defendant-Respondent.

APPEAL from an order of the circuit court for Door County:
JOHN D. KOEHN, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The State appeals an order dismissing its criminal complaint against Clifford D. Londo. The trial court concluded that the State presented insufficient evidence at the preliminary hearing to justify a bindover on a attempted bailjumping charge. Because we conclude that sufficient evidence supports the bindover, we reverse the order and remand the cause for further proceedings.

Londo is charged with attempting to violate the terms of his bond by attempting to have contact with his daughter. Londo had been charged with sexually assaulting the child and was ordered to have "no contact direct or indirect with the victim." Londo violated the terms of his bond if he was released from custody on bail and intentionally failed to comply with the terms of his bail bond. See *State v. Nelson*, 146 Wis.2d 442, 449, 432 N.W.2d 115, 118 (Ct. App. 1988). To prove attempt, the State was required to show that Londo intended to violate the terms of his bond accompanied by sufficient acts to demonstrate unequivocally that it was improbable he would have desisted of his own free will. *State v. Stewart*, 143 Wis.2d 28, 31, 420 N.W.2d 44, 45 (1988). If Londo, acting with the requisite intent, committed acts sufficient to constitute an attempt, voluntary abandonment of the crime after that point is not a defense. *Id.* The trial court found that the State failed to present sufficient evidence to establish probable cause to support the bailjumping charge.

The probable cause required for a bindover is greater than that required for issuance of an arrest warrant, but guilt beyond a reasonable doubt need not be proven. See *State v. Berby*, 81 Wis.2d 677, 683, 260 N.W.2d 798, 801 (1978). The role of the magistrate at a preliminary hearing is to determine whether the facts and reasonable inferences that may be drawn from them support the conclusion that the defendant probably committed a felony. Probable cause at a preliminary hearing is satisfied when there exists a plausible account of the defendant's commission of a felony despite contrary inferences that might be drawn. *State v. Dunn*, 121 Wis.2d 389, 398, 359 N.W.2d 151, 155 (1984). The magistrate may not engage in determining the truthfulness of the State's witnesses but must determine whether the evidence, if believed, would support a bindover. See *State v. Sorenson*, 143 Wis.2d 226, 251, 421 N.W.2d 77, 87 (1988).

The State presented sufficient evidence to establish that Londo intended to violate the terms of his bond by having contact with his daughter and did not desist of his own free will. Londo's wife and daughter testified at the preliminary hearing. Their testimony established that while Londo was speaking with his wife on the telephone, Jennifer yelled in the background that Londo was not her father anymore. Londo hung up the phone. His wife went outside anticipating his arrival and attempt to contact his daughter. His wife and daughter discussed a plan that if Londo came to see the daughter, she should run out the back door if there was not time to call the police. When Londo arrived, he approached the door without stopping to talk to his wife. He

put the key in the door. His daughter testified that she saw and heard him unlock the door and start to enter before she ran out the back door. Her mother testified that she did not observe whether Londo actually unlocked the door and went in because she was distracted by watching for the daughter's safe exit by the back door. A reasonable inference can be drawn from this testimony that Londo went to his residence intending to confront his daughter in violation of his bond, and that he left only when he realized that she had exited through the back door and was leaving to report the incident to police.

Although the trial court acknowledged that it was to judge plausibility and not the credibility of the State's witnesses, its decision to deny the bindover is based on a finding that the daughter's testimony was not believable. The trial court's finding of "implausibility" appears to be based on the fact that the daughter testified that she saw her father enter but did not know if he could see her. This finding is based on its view of the daughter's credibility, not the plausibility of her story. Even if aspects of the daughter's testimony may lack credibility, her testimony regarding the elements of this offense are not implausible. While her mother's testimony could be read to imply that the daughter ran out the back door before Londo entered, the daughter's testimony that he began to enter before she fled is not implausible. Even if an inference can be drawn that Londo did not actually enter the home before his daughter, that is not dispositive. It is not necessary that Londo had face-to-face contact with his daughter to constitute the crime charged. Face-to-face contact would have constituted a completed crime.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.