EXAMINERS' ANALYSIS OF QUESTION NO. 10

The district judge should reject all defense arguments and bind Marty and Joe over to stand trial on armed robbery.

The court should reject the legal arguments on elemental insufficiency. MCL 750.530, Michigan's robbery statute, says:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

This statute does not require an actual taking or larceny but rather contemplates an attempted larceny. The Michigan Supreme Court so held in *People v Williams,* 491 Mich 164 (2012). Accordingly, Marty and Joe's joint argument regarding the lack of a larcenous taking must be rejected.

The elements of robbery are (1) using force or violence against or putting complainant in fear, (2) while in the course of committing, and (3) the complainant was present while the defendant was in the course of committing a larceny. M Crim JI 18.2 and *Williams, supra.* The challenged element is the taking of money. But the facts indicate (1) a demand for money; (2) resorting to force or instilling fear in Caroline and her gathering the money to hand to the robbers; and finally, (3) while the facts indicate the police siren scared off the robbers, their actions certainly qualify as "acts that occur in an attempt to commit the larceny." M Crim JI 18.2(3).

Marty and Joe's individual arguments regarding the absence of a gun fare no better. MCL 750.529, Michigan's armed robbery statute, states in pertinent part:

> A person who engages in conduct proscribed under Section 530 and who in the course of engaging in that conduct,]possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty . .

A clear reading of this statute reveals there is no requirement that the perpetrator actually had a gun or other dangerous weapon, in order to establish the elements of armed robbery.

A robbery is considered armed if, while in the course of committing the larceny, the defendant possessed a dangerous weapon; or, even if not dangerous, possessed any object that was used or fashioned in a way to lead someone present to reasonably believe that it was a dangerous weapon; or if the defendant "represents orally or otherwise" that he is in possession of a dangerous weapon, even if he was not. See MCL 750.529, emphasis added.

Marty's argument that his words alone are insufficient misses the mark. The words he chose, "we will blow you away" qualify as language that "represents orally or otherwise" possession of a dangerous weapon. MCL 750.529. Similarly, Joe's hand in his jacket and pointing at Caroline would qualify as an article used or fashioned in a manner to lead her to reasonably believe the article is a dangerous weapon. Similarly, Joe's act qualifies as a non-oral representation as to the possession of a gun used to make Caroline fearful.

The district judge should also reject Marty's and Joe's argument that dismissal is warranted based on insufficient identification. The test for bind over is not proof beyond a reasonable doubt but rather probable cause. *People v Plunkett,* 485 Mich 50 (2010); *People v Lowery,* 274 Mich App 684 (2007); MCL 766.13; and MCR 6.110(E) and (F). Probable cause is defined as evidence "sufficient to make a person of ordinary caution and prudence to conscientiously entertain a reasonable belief of defendant's guilt. *People v Waltonen,* 272 Mich App 678, 684 (2006). A conflict in testimony is to be resolved by a jury or judge at trial, not by the district judge at preliminary examination.

Here the testimony reveals a clear conflict as to the identity of the robbers. But this conflict is not to be resolved by dismissal. Rather, the district judge--so long as probable cause is established as to the identity of the robbers--should let a jury decide the matter at trial. Caroline's identification suffices to establish probable cause. See *People v Lunsford,* 20 Mich App 325, 328 (1969) and *People v Angers,* 36 Mich App 28, 30-31 (1971).

Accordingly, both the defendants' legal arguments and factual arguments for dismissal of the armed robbery charge should be rejected.