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AT \_\_\_\_\_ O'clock \_\_\_\_ M  
CLERK, DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,** )  
 )  
 *Plaintiff,* )  
 )  
 vs. )  
 )  
 **JOSHUA MICHAEL MOSES,** )  
 )  
 )  
 *Defendant.* )  
 )

Case No. **CRF 2010 15159**

**MEMORANDUM DECISION AND  
ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS**

Defendant JOSHUA MICHAEL MOSES's Motion to Dismiss is DENIED.  
Arthur Verharen, Dep. Prosecuting Attorney, lawyer for the Plaintiff.  
Anne C. Taylor Coeur d'Alene, lawyer for Defendant Moses.

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**I. FACTUAL BACKGROUND.**

Defendant (Moses) moves this Court to dismiss the Information in this matter claiming substantial evidence on each element of the crime was not adduced at the preliminary hearing. Motion to Dismiss, p. 1. This matter originally came before Magistrate Judge Quentin Harden on August 12, 2010, for preliminary hearing. When Joshua Branam (Branam), the victim named in the original Complaint, refused to testify and the State was unable to grant him immunity such that he would testify, the matter was continued and a new preliminary hearing was scheduled. The matter next came for preliminary hearing before Magistrate Judge Barry Watson and the State again called Branam. Branam again

refused to testify. After being unable to grant Branam immunity this second time, the State moved to dismiss the count of first degree kidnapping and proceeded only on the count of theft by extortion, naming a different victim. The original complaint charged Grand Theft by Extortion, read:

That the Defendant, JOSHUA M. MOSES, on or about the 24<sup>th</sup> day of July, 2010, in the County of Kootenai, State of Idaho, did compel and induce Walter Ward to deliver \$2,500.00 to himself [Moses] by means of instilling in Joshua M. Braham a fear that if the property was not so delivered, the defendant and/or Holly Brown would cause physical injury to some person in the future, to-wit: Joshua M. Braham [sic] and/or his family members.

Complaint, pp. 1-2. The Amended Criminal Complaint, filed August 10, 2010, had the exact same language charging Grand Theft by Extortion. The Second Amended Criminal Complaint, filed August 23, 2010, reads:

That the Defendant, JOSHUA M. MOSES, on or about the 24<sup>th</sup> day of July, 2010, in the County of Kootenai, State of Idaho, did compel and induce Walter Ward to deliver \$2,500.00 to the Defendant by means of instilling in Walter Ward a fear that if the property was not so delivered, the Defendant would cause physical injury to some person in the future, to-wit: Joshua M. Branam and/or his family members.

Second Amended Complaint, pp. 1-2.

After the preliminary hearing, the matter was bound over to District Court Judge John Luster, and Moses moved to dismiss. Judge Luster remanded the matter for another preliminary hearing before another Magistrate. On December 10, 2010, Judge Caldwell heard the third preliminary hearing in this matter, and bound the matter over to this Court. Moses has again moved to dismiss.

On February 16, 2011, Moses filed his Memorandum in Support of Motion to Dismiss. On February 23, 2011, the State filed its Memorandum in Opposition to Defendant's Motion to Dismiss, the day before oral argument. Because that brief was filed so close to the hearing on February 24, 2011, the Court did not have the opportunity to

read the State's brief prior to oral argument, and the Court had to take the matter under advisement at the conclusion of oral argument.

## **II. STANDARD OF REVIEW.**

Idaho law provides that a criminal defendant who is charged, by complaint, with a felony is entitled to a preliminary hearing at which a magistrate determines whether a public offense has been committed, and if so, whether probable cause exists to believe the defendant committed it. I.C. § 19-804, I.C.R. 5.1; *State v. Pole*, 139 Idaho 370, 372, 79 P.3d 729, 731 (Ct.App. 2003). Based on the magistrate's determination of probable cause, the defendant will either be held to answer to the public offense in the district court, or the defendant will be discharged and the complaint dismissed. I.C. §§ 19-814, 19-815; I.C.R. 5.1. At the preliminary hearing, the State is not required to produce all of its evidence, but must show that a crime was committed and that there is probable cause to believe the accused committed it. *Pole*, 139 Idaho 370, 372, 79 P.3d 729, 731; *Carey v. State*, 91 Idaho 706, 709, 429 P.2d 836, 839 (1967). A magistrate's finding of probable cause should be overturned only upon a showing that the magistrate abused his discretion. *State v. Gibson*, 106 Idaho 54, 57, 675 P.2d 33, 36 (1983). A reviewing Court will not substitute its judgment for the magistrate's as to the weight of evidence and the magistrate's finding of probable cause at a preliminary hearing will not be disturbed if, under any reasonable view of the evidence including permissible inferences, it appears likely that the offense occurred and the accused committed it. *State v. Munhall*, 118 Idaho 602, 606, 798, P.2d 61, 65 (Ct.App. 1990); *State v. Holcomb*, 128 Idaho 296, 299, 912 P.2d 664, 667 (Ct.App. 1995).

## **III. ANALYSIS.**

Moses argues Judge Caldwell erred in finding probable cause to bind him over where the "state failed to produce substantial evidence that Mr. Moses caused Walter Ward

to deliver to Mr. Moses \$2,500.” Memorandum in Support of Motion to Dismiss. Moses contends the State has not set forth sufficient evidence to lead one to the conclusion that Moses induced Ward to hand over the \$2,500. *Id.*, p. 6.

Testimony at the preliminary hearing established that while the victim Walter Ward (Ward) was at his home, he received a telephone call from Joshua Branam (Branam). December 10, 2010, Preliminary Hearing Transcript, p. 14, LI. 5-19. During that conversation with Ward, another person got on the phone at Branam’s end of the line. Ward testified this third individual had what sounded like a Hispanic accent. *Id.*, p. 15, L. 1 – p. 17, L. 6. When that individual got on the phone, that individual demanded \$2,500 from Ward, because Branam (who is Ward’s brother-in-law, *Id.*, p. 13, LI. 15-22) owed this individual’s uncle \$2,500 for drugs which that individual’s uncle had fronted. *Id.*, p. 22, L. 13 – p. 23, L. 1. After that demand from this third individual, Branam got back on the phone with Ward and spoke with Ward briefly before Ward terminated the telephone conversation. Ward then traveled to several banks to withdraw \$2,500 from his wife’s (Branam’s sister’s) checking account, picked up a friend of his, and drove to the Post Falls Wal-Mart. *Id.*, p. 17, L. 7 – p. 18, L. 20. Ward waited in the Wal-Mart parking lot for approximately 40 minutes before being approached by an individual Ward identified as the defendant Moses at the preliminary hearing. *Id.*, p. 18, L. 21 – p. 20, L. 4. Ward showed Moses the money, Ward then asked Moses where Branam was, and Moses said he would take Ward to Branam. *Id.*, p. 20, LI. 5-19. Ward then handed Moses the money. *Id.*, p. 20, LI. 16-19. Moses eventually took Ward to Branam. *Id.*, p. 20, L. 20 – p. 28, L. 10. Ward testified this other individual on the phone with Branam, later identified as defendant Ward, implied that Branam would be killed if Ward did not come up with the money. *Id.*, p. 23, LI. 2-5.

On direct examination by Moses’ counsel, Branam testified that he had a plan to get

money from his brother-in-law because Branam's own account was frozen and he could not obtain money from his own account:

I told him [Ward] that I was gonna be hurt, that I needed the money, that I was being kidnapped, made up a really good story. He went for it. He told me he'd bring the money.

*Id.*, p. 53, LI. 15-18. Branam testified he had his friend, defendant Moses, pick up the money from Ward. Tr., p. 54, LI. 12-14. Branam testified he did not explain to Moses what he was going to retrieve from Ward, and Branam testified Moses was not part of the telephone calls to Ward. Tr., p. 54, LI. 23-25, p. 55, LI. 1-3. On cross-examination by the State, Branam testified to not knowing precisely what day or time he called Ward, because "I was pretty high during those couple weeks..." Tr., p. 62, LI. 4-5. Branam conceded that Moses may have been nearby while Branam was on the telephone with Ward, but he could not recall; nor could Branam recall whether Moses had a Hispanic accent. Tr., p. 66, LI. 1-13. Most of Branam's testimony corroborates Ward's testimony. As to whether defendant Moses was also involved in the phone call with Ward and Branam, or not, the testimony of Ward and Branam are divergent. It is up to Judge Caldwell to make credibility determinations. Judge Caldwell stated: "And quite candidly, I don't give a lot of weight to Mr. Branam's testimony." *Id.*, p. 91, LI. 17-18. That credibility determination is supported by several features found in the preliminary hearing transcript. First, by his own admission Branam's recollection is suspect due to his drug use: "I was pretty high during those couple weeks..." *Id.*, p. 62, LI. 2-5. Branam was high on the day in question, and was injecting, smoking and eating methamphetamine. *Id.*, p. 62, LI. 17-25. Branam admitted it could have affected his memory. *Id.*, p. 63, LI. 18-23. Second, Moses is Branam's friend (*Id.*, p. 49, LI. 2-8; p. 54, LI. 10-14; p. 59, LI. 17-21), so Branam has motive to shade his own testimony to save Moses' hide. Third, it does not make any sense for Moses *not* to

have been involved in the conversation as otherwise Branam would be claiming to be held hostage with no third person to verify such, and obviously, Ward was convinced to go to several banks, round up the money and deliver the money to this unknown person. Fourth, Moses' involvement (or not) in this initial call is not all that relevant because it is not clear from Ward's testimony at what point in time this other individual (identified by Ward at the hearing as Moses) told Ward that Branam owed this other individual's uncle \$2,500 for drugs that had been fronted, and that if Ward did not deliver the \$2,500 to Moses, Branam would be killed. *Id.*, p. 23, LI. 2-5. Branam testified he only told Moses to retrieve a package from Ward in the Wal-mart parking lot, not that Moses would be retrieving \$2,500. *Tr.*, p. 67, LI. 9-24. Branam testified that it was he, not Moses, that told Ward to bring the \$2,500:

I told him that I was gonna be hurt, that I needed the money, that I was being kidnapped, made up a really good story. He went for it. He told me he'd bring the money.

*Id.*, p. 53, LI. 14-18. Again, this would be a situation where Branam is trying to convince Ward that Branam is being held hostage, with no third party verifying such. Then there is the obvious reason for Branam to shade his testimony, *he has been granted immunity*. *Id.*, p. 73, LI. 13-16.

A finding of probable cause by a magistrate may be challenged by filing a motion to dismiss in district court. I.C. § 18-815A. A defendant challenging the sufficiency of evidence presented at the preliminary hearing must demonstrate the State failed to present substantial evidence as to every material element of the offense charged. Idaho Criminal Rule 5.1(b). Reviewing courts will not substitute their judgment for that of the magistrate as to the weight to evidence and a probable cause finding will not be disturbed if any reasonable view of the evidence, including permissible inferences, support that the offense

occurred and the accused committed it. *State v. Pole*, 139 Idaho 370, 372, 79 P.3d 729, 731 (Ct.App. 2003) (citing *State v. Holcomb*, 128 Idaho 296, 299, 912 P.2d 664, 667 (Ct.App. 1995)).

Idaho Criminal Jury Instruction (ICJI) 545 on Theft by Extortion states:

In order for the defendant to be guilty of Theft by Extortion, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] caused [name of victim] to deliver [to the defendant] [or] [to another person] [description of property],
4. the defendant did so by creating in [name of victim] a fear that if the property were not so delivered then the defendant or some other person would [do one or more of the following:]

[physically injure some person in the future,] [or]

\* \* \*

[engage in conduct constituting a crime,] [or]

\* \* \*

And

5. when the property was delivered, the defendant had the specific intent to deprive the owner of the property or to appropriate the property to the defendant or to some person other than the owner.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Moses claims in his motion to dismiss, that in light of the testimony of Branam (and that of Larry Hertz, Moses' step-father who only testified Moses is 75% Native American and does not speak with a Hispanic accent), the State has failed to produce substantial evidence that Moses caused Ward to deliver the \$2,500 or that Moses created fear in Ward that Moses would injure some person in the future. Memorandum in Support of Motion to Dismiss, pp. 5-6. According to Moses' argument, the State has only set forth that Ward "believed" the voice on the telephone demanding the money was Moses', and that there is no proof that

Moses ever threatened Ward while in the Wal-Mart parking lot or en route to find Branam.  
*Id.*

Judge Caldwell had the benefit of observing the witnesses' testimony. It is his province to evaluate the credibility of the witnesses before him and to weigh the evidence. See *State v. Bush*, 131 Idaho 22, 33, 951 P.2d 1249, 1260 (1997) (reviewing courts' function is to examine supporting evidence, not reweigh to specific evidence); *State v. Owens*, 101 Idaho 632, 640, 619 P.2d 787, 795 (1979) ("In Idaho the credibility of a witness is to be considered by the trier of fact in its determination of the weight to be given the testimony of the witness").

This Court finds Judge Caldwell did not abuse his discretion. Judge Caldwell acted within the bounds of his discretion and reached his decision by an exercise of reason. *State v. Pole*, 139 Idaho 370, 372, 79 P.3d 729, 731 (Ct. App. 2003). This Court finds Judge Caldwell's probable cause determination is more than supported by substantial evidence. This Court has set forth above the problems with Branam's testimony. As mentioned above, Judge Caldwell stated on the record, "[q]uite candidly, I don't give a lot of weight to Mr. Branham's testimony." Tr., p. 91, Ll. 17-18. Additionally, Judge Caldwell stated that based on Walter Ward's testimony, he would in fact bind over Moses on the single count of theft by extortion. *Id.*, p. 91, Ll. 17-21. While there is evidence (through Branam's testimony) contrary to the State's theory that it was Moses who caused Ward to deliver the \$2,500, there simply has been no showing that Judge Caldwell abused his discretion by discounting the testimony of Branam and giving more weight to the testimony of Ward. As to many of the issues, Branam's testimony corroborates Ward's testimony. On the issues where Branam's testimony diverges from Ward's testimony, there are a plethora of reasons why Branam may not be telling the truth, and no reasons given as to

why Ward's testimony should not be believed. "A magistrate's finding of probable cause at a preliminary hearing will not be disturbed if, under any reasonable view of the evidence including permissible inferences, it appears likely that an offense occurred and that the accused committed it." *Pole*, 139 Idaho 370, 372, 79 P.3d 729, 731, citing *State v. Holcomb*, 128 Idaho 296, 299, 912 P.2d 664, 667 (Ct.App. 1995). Moses has failed to meet this high burden on his motion to dismiss.

#### IV. CONCLUSION AND ORDER.

For the reasons set forth above, this Court must deny defendant Moses' motion to dismiss.

IT IS HERBY ORDERED THAT defendant JOSHUA MICHAEL MOSES' Motion to Dismiss is **DENIED**.

DATED this 25<sup>th</sup> day of February, 2011

\_\_\_\_\_  
JOHN T. MITCHELL District Judge

#### CERTIFICATE OF MAILING

I hereby certify that on the \_\_\_\_\_ day of February, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Anne C. Taylor  
Prosecuting Attorney – Arthur Verharen

Hon. Robert Caldwell

CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY

BY: \_\_\_\_\_  
Deputy