STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GARY LEE BURNS,

Defendant-Appellee.

UNPUBLISHED
May 25, 1999

No. 215030
Oakland Circuit Court
LC No. 98-DA7053 AR

Before: Griffin, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

The prosecution appeals from an order of the trial court denying leave to appeal the examining magistrate's decision to reduce the charge against defendant from second-degree murder, MCL 750.317; MSA 28.549, to involuntary manslaughter, MCL 750.321; MSA 28.553. We reverse and remand for reinstatement of the second-degree murder charge. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case stems from the 1987 death of defendant's then eleven-month-old daughter, who suffocated to death as a result of a 1" x 1" plastic teething "ice cube" becoming lodged in her throat. Relying in part upon the testimony of Dr. Dragovic and Ms. Iveson, the magistrate stated that he was satisfied the incident was not an accident, but a homicide. In this manner, the magistrate indicated his acceptance of the prosecution's theory that the plastic cube became lodged in the child's throat as a result of defendant's deliberate act of pushing it inside the child's mouth, not the child's own conduct or any subsequent attempt by defendant to remove the cube. In light of the magistrate's determination in this regard, the magistrate abused his discretion in concluding that there was insufficient evidence of the malice element of second-degree murder.

Malice is defined as the intent to kill, the intent to do great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The accused need not actually intend the harmful result; rather, it is sufficient that the accused intends to do an act in obvious disregard of life-endangering consequences. *Id*. at 466. Accordingly, the prosecution

need not prove that defendant actually intended to push the plastic cube so far into the child's mouth that it would become lodged in her throat and obstruct her breathing. Rather, it is sufficient that defendant did a deliberate act, i.e., forcefully pushing the plastic cube inside the child's mouth, in wanton and wilful disregard of the likelihood that the natural tendency of such behavior would be to cause serious injury to the child.

We have no doubt that the act of pushing a 1" x 1" plastic cube inside the mouth of an eleven-month-old child, with sufficient force to cause the cube to travel far enough into the child's throat to obstruct the child's breathing, as opposed to merely placing the cube in the child's mouth, is behavior that is likely to have a natural tendency to cause death or great bodily harm. It cannot be said that there is no evidence that defendant was aware of the risk involved in treating a very young child in such a rough manner. According to witness Iveson, defendant admitted that he knew that he was treating the child too roughly at the time. Given the fact that the magistrate specifically relied on the testimony of witness Iveson and others to find probable cause to believe that the child's death was not an accident, the magistrate's conclusion that the evidence only supports a charge of involuntary manslaughter is wholly unjustified. *People v Northey*, 231 Mich App 568, 574-575; ___ NW2d ____ (1998).

Reversed and remanded for reinstatement of the second-degree murder charge. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald