STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 19, 2000
v	No. 226796 Eaton Circuit Court
TRAVIS ALLEN BULMER, Defendant-Appellee.	LC No. 99-000353-FH

Before: Murphy, P.J., and Griffin and Wilder, JJ.

WILDER, J. (*dissenting*)

I respectfully dissent from the majority opinion. I would hold that the prosecution presented sufficient evidence of intent to bind defendant over on second-degree murder, reverse the circuit court's order denying the prosecution's motion to amend the information, and reinstate the charge of second-degree murder.

A district court's decision to bind over a defendant is reviewed for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). When reviewing a district court's decision to bind over a defendant for trial, the circuit court must consider the entire record. *In re Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). This Court's review of the circuit court is de novo to determine whether the district court abused its discretion. *Id.*

A magistrate's responsibility when presiding over a preliminary examination has been described as follows:

> The magistrate is *not* required to find that the evidence at the time of the preliminary examination proves the defendant's guilt beyond a reasonable doubt in order to bind the defendant over for trial on the charge.
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> Despite this rather low level of proof, the magistrate must always find that there is "evidence regarding each element of the crime charged or evidence from which the elements may be inferred" in order to bind over a defendant. If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the factfinder at trial resolve those questions of fact. This requires binding the defendant over for trial. In other words, the magistrate may not weigh the evidence to determine

> the likelihood of conviction, but must restrict his or her attention to whether there is evidence regarding each of the elements of the offense, after examining the whole matter. The evidence that factors into the magistrate's decision may be direct or circumstantial, and it meets the "probable cause" standard when, "by a reasonable ground of suspicion, [it is] supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged[.]" [*Hudson, supra* at 278-279; citations omitted.]

Thus, a bindover is not a finding of guilt beyond a reasonable doubt; rather, it is a preliminary hearing which is "a much less searching exploration into the merits of a case than a trial . . . ." *People v Justice (After Remand)*, 454 Mich 334, 343; 562 NW2d 652 (1997), quoting *Coleman v Burnett*, 155 US App DC 302, 316; 477 F2d 1187 (1973).

After reviewing the entire record, I believe that the prosecution presented competent evidence at the preliminary examination to support an inference that defendant possessed the requisite malice for second-degree murder. Malice for second-degree murder is defined as (1) the intent to kill, (1) the intent to cause great bodily harm, or (3) the intent to do an act in wanton or willful 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); *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). It is this third type of malice, commonly referred to as depraved-heart malice, that is at issue in the instant case. Malice may be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *Mayhew, supra* at 125, quoting *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). Further, malice may be implied when "the defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with wanton disregard for human life." *Goecke, supra* at 467, quoting *People v Fuller*, 86 Cal App 3d 618, 628; 150 Cal Rptr 515 (1978).

In the instant case, there are notable inconsistencies between defendant's version of the events and the forensic pathologist's testimony regarding the injuries sustained by the child. These inconsistencies permit an inference that defendant possessed the requisite malice sufficient for second-degree murder (i.e., that defendant's actions were done with wanton and willful disregard for the likelihood that great bodily harm or death would result to the child). Joyce DeJong, the forensic pathologist at Sparrow Hospital who examined the child after his death, testified that the child's death was caused by craniocerebral trauma inflicted by another person and not sustained in an accident. DeJong noted external bruises on the child's forehead, the right side of his face and his lower extremities, and a cut or break in the frenulum (the flap of tissue on the underside of the upper lip). During her internal examination of the child's body, DeJong found a hemorrhage under his scalp, internal bleeding under the bruises and around the central nervous system, and hemorrhages on both retinas and around the optic nerves. She stated that the child's injuries were consistent with a violent shaking of the baby for a minute or more (and possibly impact during the shaking) and that a gentle shaking would not typically cause such injuries. She further stated that a child injured in such a manner would typically show signs of distress within seconds of the injury, including breathing difficulties and loss of neural control such as seizure or limpness.

On the other hand, Michigan State Police Detective Sergeant Douglas Barrett testified at the preliminary examination that the first time he interviewed defendant at the police station, while the child was still alive, defendant stated that he never shook the child at any time and the child appeared to be in good health and behaving normally when defendant put him to bed in his playpen. However, at a subsequent interview a few days later, after the child had died, defendant admitted to Barrett that, after he put the child to bed, he heard the child coughing forcefully and went into his bedroom to check on him. Defendant admitted that he leaned over the playpen, took the baby by the shoulders, and shook him gently two or three times to try to help him stop coughing.[1] According to defendant, the child stopped coughing and defendant started to walk out of the room. As he left, defendant heard the baby make a strange gurgling noise and returned to the playpen where he observed blood on the child's mouth. Defendant noticed that the baby was having difficulty breathing and he picked up the child, who was virtually limp at this time, and placed him on a bed in the master bedroom. Defendant then carried the child to the living room, placed the baby on the floor, and called 911.

Viewing these facts and circumstances in their entirety, defendant's delayed admission to shaking the baby coupled with DeJong's unequivocal opinion that the child's injuries were not the result of an accident, but were instead the result of a violent shaking of the child,[2] establish sufficient evidence of depraved-heart malice to warrant a bindover. More specifically, DeJong's testimony supported a reasonable inference for purposes of bindover that defendant shook the baby more violently, and for a longer time, than he admitted to Barrett. See *People v Vasher*, 167 Mich App 452, 458; 423 NW2d 40 (1988) (child's testimony, coupled with that of her mother and the examining physician that the three-year-old child was sexually penetrated, was sufficient to warrant the inference that defendant penetrated the child). Further, defendant's

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[1] The record is unclear whether the child's face collided with the floor of the playpen when defendant shook the child; however, in view of the injuries sustained to the child (e.g., subdural, retinal and petechical hemorrhages) it is not unreasonable to infer that defendant's actions of shaking the baby caused the child's face to impact the floor of the playpen and produce the resulting injuries. Further, such an inference is wholly consistent with DeJong's testimony that "there may have been impact during the course of the shaking of the forehead."

[2] DeJong's acknowledgment on cross-examination that "a gentle shaking doesn't typically cause these type of injuries" does not, in my view, make her testimony equivocal and thus insufficient to establish causation. DeJong stated quite clearly that "[t]his is not an accidental-type event," and that "[t]he injuries to the head *most likely occurred* with a shaking, a violent shaking, and there may have been impact during the course of this shaking of the forehead." Such testimony bind this matter over for trial. See *People v Thomas*, 85 Mich App 618, 627; 272 NW2d 157 (1978) (physician's testimony that the trauma to the victim's legs caused the chain of events that led to the victim's death and that causation was not only medically probable but *medically likely.* was sufficient to establish causal relationship between injury and death); *People v McFee*, 35 Mich App 227, 230; 192 NW2d 355 (1971) (physician's testimony that, in his best medical judgment, there was a definite causal relationship between the injuries inflicted on the victim by the defendant and the victim's death, was sufficient to establish a causal relationship necessary for a second-degree murder conviction). See also *People v Flenon*, 42 Mich App 457; 202 NW2d 471 (1972); *People v Geiger*, 10 Mich App 339; 159 NW2d 383 (1968).

initial denial and subsequent admission to shaking the baby supports the inference that defendant knew that shaking the baby could be harmful, and lied about the shaking to avoid responsibility while simultaneously denying knowledge of the risk of harm. Even if defendant did not realize that his conduct might cause death or great bodily harm, however, the conduct of shaking the baby is itself so risky that defendant should have recognized the likely consequences of his actions, particularly where the baby's distress would have been immediately apparent. *Goecke, supra* at 465, n 25.[3] Indeed, the prosecution was not required to show that defendant was subjectively aware of the risk created by his conduct. *Id.* at 464-467.

For these reasons, I would find that the evidence presented at the preliminary examination would permit a person of ordinary caution and prudence to conscientiously entertain a reasonable belief that defendant intended the consequences of his act or that he knew there was very high risk of great harm from his action and, by shaking the child, he acted in disregard of that risk. *Justice, supra* at 344. Further, I would find that a jury could also reasonably conclude from the evidence presented that death or great bodily harm was the natural tendency of the defendant's actions (the mens rea necessary for second-degree murder). See *Djordjevic, supra* at 462-463.

As stated above, the law requires the magistrate to bind a defendant over for trial on a charge where the evidence is conflicting or raises a reasonable doubt about the defendant's guilt. *Hudson, supra* at 278; *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998). I would hold that the district court resolved the discrepancy between defendant's version of the events and DeJong's testimony that the child's injuries could not have resulted from a gentle shaking, thereby engaging in impermissible fact finding and usurping the role of the jury. *Northey, supra* at 575. Because the evidence presented at the preliminary examination, taken as a whole, was conflicting on the issue of defendant's intent (i.e., there was evidence both supporting and negating an inference of malice), I believe that the district court was compelled to bind defendant over on second-degree murder and allow the jury to resolve the factual question of defendant's intent. *Hudson, supra*; *Northey, supra*.

/s/ Kurtis T. Wilder

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[3] In *Goecke, supra* at 465, n 25, our Supreme Court noted that "[m]ost depraved-heart murder cases do not require a determination of the issue of whether the defendant was actually aware of the risk entailed by his conduct; his conduct was very risky and he himself was reasonable enough to know it to be so. It is only the unusual case which raises the issue [whether defendant was subjectively aware of the risk created by his conduct]—where the defendant is more absent-minded, stupid or intoxicated than the reasonable man."