

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS RICHARDSON,

Defendant-Appellant.

UNPUBLISHED

September 25, 2001

No. 234208

Wayne Circuit Court

Criminal Division

LC No. 00-500094

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant seeks interlocutory relief from the order of the circuit court reinstating a charge of involuntary manslaughter. We affirm.

This case arises out of the June 22, 2000, death of Frederick Finley in the parking lot outside of the Lord & Taylor department store in Fairlane Town Center in Dearborn. Defendant was employed by Lord & Taylor as a loss prevention/security officer. Security personnel allegedly witnessed persons accompanying Finley in the Lord & Taylor store shoplift approximately \$200 worth of merchandise. Several security officers followed the Finley party out of the store and into the parking lot. When confronted by the security officers, Finley and his girlfriend, Carla Sullivan, physically attacked the officers. Defendant was eventually able to restrain Finley on the ground. Finley died as a result of the altercation.

The prosecutor's theory of the case is that defendant placed Finley in a neck hold and used excessive force, causing Finley to asphyxiate. Defendant's theory is that he was acting to protect himself and the other security personnel, and that Finley died from a heart condition, not asphyxia.

Following the preliminary examination, the magistrate found that the prosecutor's expert witness, Wayne County assistant medical examiner Boguslaw Pietak, lacked credibility regarding the cause of Finley's death. According to the magistrate, Pietak's opinion that Finley was asphyxiated as a result of force applied to his neck was not based on medically objective findings. The magistrate found it significant that normal objective findings for asphyxiation, such as broken blood vessels in the eyelids, eyes and face, were not present. The magistrate further questioned Pietak's credibility because his opinion regarding the cause of death was rendered before reviewing the toxicology results. Instead, the magistrate found defendant's expert witness, Oakland County Chief Forensic Pathologist Ljubisa Jovan Dragovic, to be

credible, and found, consistent with Dragovic's opinion, that the cause of Finley's death was acute heart failure.

The magistrate went on to find that there was no evidence that defendant used excessive force or acted in a grossly negligent manner. According to the magistrate, defendant exercised the ordinary care and diligence expected of a loss prevention officer. In light of those findings, the magistrate concluded that there was insufficient evidence to establish probable cause to believe that defendant committed the offense of involuntary manslaughter.

The prosecutor appealed the magistrate's decision to circuit court. The circuit court found that the magistrate erred by analyzing the credibility of the expert testimony, and straying into the domain of the jury. The circuit court also found that the fact that defendant restrained Finley and deprived him of oxygen is not in the dispute, and that the question of whether, under the totality of the circumstances, defendant's restraint amounted to gross negligence is a jury question.

Defendant sought leave to appeal the circuit court's order in this Court, which denied defendant's application. Defendant subsequently sought relief in the Supreme Court. In lieu of granting defendant's application, the Supreme Court remanded the matter to this Court for consideration as on leave granted and directed this Court to address, among other issues:

(1) whether the district court clearly abused its discretion when it determined that the evidence here was insufficient to establish probable cause that defendant acted with gross negligence in this involuntary manslaughter case, i.e., whether defendant's conduct exhibited a "wantonness and disregard of the consequences which may ensue, an indifference to the rights of others that is equivalent to a criminal intent." *People v Datema*, 448 Mich 585, 596[; 533 NW2d 272] (1995); (2) assuming that sufficient evidence existed on the issue of gross negligence, what precise conduct on defendant's part constituted such gross negligence; and (3) assuming that sufficient evidence existed on the issue of gross negligence, what evidence in particular supports the conclusion that defendant's conduct satisfied the "wantonness [sic] and disregard of the consequences" standard of *People v Datema*. [See 464 Mich 852 (2001).]

At a preliminary examination, the proofs adduced must only establish probable cause to believe that a crime was committed and probable cause to believe that the defendant committed it. *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). The proofs must be sufficient to cause an individual marked by discreetness and caution to have a reasonable belief that the defendant is guilty as charged. *People v Justice (After Remand)*, 454 Mich 334, 343; 562 NW2d 652 (1997). To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). If probable cause is established, the magistrate must bind the defendant over for trial. MCL 766.13.

In reviewing a magistrate's bind-over decision, a circuit court must consider the entire record of the preliminary examination. It may not substitute its judgment for that of the

magistrate, and may reverse only if it appears on the record that the magistrate abused his discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). This Court in turn reviews the circuit court's decision de novo to determine whether the magistrate abused his discretion. *Id.* An abuse of discretion occurs if the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

In this case, the magistrate refused to bind defendant over for two reasons: (1) she found the prosecutor's expert, Pietak, to lack credibility with regard to the cause of Finley's death; and (2) she found that there was no evidence that defendant's conduct amounted to gross negligence. We conclude that these findings amount to an abuse of discretion.

With regard to the magistrate's credibility determination, while a magistrate does have a duty to pass judgment on the credibility of witnesses, the role of the magistrate is not that of the ultimate trier of fact; where the evidence conflicts, the issue is one for the jury, and the defendant should be bound over. *People v King*, 412 Mich 145, 153-154; 312 NW2d 629 (1981).

In this case, the grounds on which the magistrate's credibility judgment were based are not supported by the record. Contrary to the magistrate's finding, Pietak's opinion was based on objective medical evidence. For example, Pietak noted bruising in the deep layers of the neck muscle, congestion in the head and neck, hemorrhaging in the soft tissue surrounding the carotid artery, and petechiae in the larynx and epiglottis. Pietak testified that these conditions are not naturally occurring, and are consistent with pressure being applied to the neck. While the magistrate was correct in her finding that many of the "classic" signs of asphyxiation were not present, there was testimony that not all of the "classic" signs are always present, and that, in fact, in some cases of asphyxiation the evidence of injury is minimal. Discounting Pietak's testimony on this ground was improper.

In addition, while Pietak testified that he did come to his conclusion that Finley died of asphyxiation prior to reviewing the toxicology results, his report was not released until after the results were disclosed, and from the testimony it appears as if he reviewed the toxicology results prior to issuing his report. Further, even if he did not review the results, there appears to be nothing in the toxicology results that would call the substance of Pietak's conclusion regarding the cause of death into serious question. The only "positive" result was for caffeine. We simply find no justification for the magistrate's discounting Pietak's credibility on this ground.

Further, it is of note that even defendant's expert did not appear to find that Pietak lacked credibility. In fact, Dragovic testified that he did not disagree with Pietak's findings, and that the evidence was entirely consistent with the manner of death advocated by Pietak. Dragovic simply disagreed with Pietak's overall interpretation of the findings.

In our opinion, the medical testimony regarding the cause of death amounted to the differing opinions of two credible experts, and resolving the conflicting aspects of their testimony is for the jury. While the magistrate may have found defendant's expert to be more persuasive on the issue, that does not necessarily mean that the prosecutor's expert lacked credibility. In light of the fact that the grounds on which the magistrate based her credibility finding are not supported by the record, her finding amounted to an abuse of discretion.

Further, even before the opinion of defendant's expert, Dragovic, with regard to the cause of death can be accepted, certain issues of fact must be resolved. Dragovic based his opinion that Finley was not asphyxiated, in large part, on the assumption that Finley was breathing and had a pulse after he was released from defendant's hold. However, while much of the evidence did indicate that Finley was initially breathing when defendant released him, there was some evidence that he was not. Further, there was evidence that disputed Dragovic's premise that heart activity ceased upon asphyxiation. By accepting Dragovic's opinion, the magistrate essentially resolved these open questions of fact, and usurped the role of the jury.

In any event, even assuming that the magistrate had sufficient grounds on which to find Pietak's testimony incredible, Dragovic's testimony alone still required a finding that defendant's action was the cause of Finley's death.

A criminal defendant takes the victim as found. *People v McKenzie*, 206 Mich App 425, 430; 522 NW2d 661 (1994). A defendant can be found guilty of manslaughter if his actions were "a" rather than "the" substantial or proximate cause of the victim's death. *People v Stewart*, 219 Mich App 38, 41; 555 NW2d 715 (1996). The phrase "proximate cause" does not imply that a defendant is responsible for harm only when his act is the sole antecedent, and the presence of an additional cause is not a complete defense. *People v Tims*, 449 Mich 83, 96-97; 534 NW2d 675 (1995).

In this case, Dragovic's opinion was that

[t]he precipitous strain of the physical confrontation (head lock; restraint) on this overweight, violently resisting and physically exhausted man placed suddenly increased functional demand on Mr. Finley's already reduced heart pumping reserve and resulted in fatal heart failure.

According to Dragovic, Finley's death was a homicide, i.e., it was the result of the purposeful action of another person, and, while Finley's death was not, as Pietak advocated, solely caused by asphyxiation, defendant's act of placing Finley in a headlock deprived Finley of oxygen and was a factor in his death. As a result, even accepting Dragovic's opinion as to the cause of death, there was some evidence that defendant's action was the proximate cause of Finley's death.

The remaining question that must be answered is whether defendant's action amounted to gross negligence.

Involuntary manslaughter is defined as the killing of another without malice and unintentionally, but (1) in doing some unlawful act neither amounting to a felony nor naturally tending to cause death or great bodily harm, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. *Datema, supra* at 595-596. Where, as here, the theory is a lawful act carelessly performed,

"the carelessness must have been gross, implying an indifference to consequences; . . . [i]t means wantonness and disregard of the consequences which may ensue, an indifference to the rights of others that is equivalent to a criminal intent. . . . Therefore gross negligence is criminal, and within limits

supplies the place of affirmative criminal intent. [*Id.* at 596, quoting *People v Barnes*, 182 Mich 179, 198-199; 148 NW 400 (1914).]

Ordinarily, whether a defendant acted with gross negligence under the totality of the circumstances is a question for the jury. *People v McCoy*, 223 Mich App 500, 504; 566 NW2d 667 (1997).

We agree with the magistrate that simply restraining Finley on the ground using a headlock does not necessarily amount to gross negligence. In our opinion, whether defendant acted in a grossly negligent manner is largely dependent upon how much force he applied to Finley's neck while Finley was in the headlock.

Our problem with the magistrate's finding that defendant did not act with gross negligence is that the finding was inextricably intertwined with the magistrate's improper determination of credibility. By finding Pietak to lack credibility, and disregarding his testimony as to the cause of death, and finding Dragovic credible, the magistrate thereby found that Finley was not asphyxiated, but died of heart failure, a finding that directly bore on the question whether defendant acted with gross negligence.

According to Dragovic, it was not simply the pressure placed on Finley's neck that caused his death, but there were more complex mechanisms at work; mainly the inability of Finley's cardiovascular system to withstand the stress of the entire incident. Based on Dragovic's opinion, and the evidence that Finley was a large man who put up a physical struggle before being restrained by defendant, an individual marked by discretion and caution might not believe that defendant's restraint of Finley was so unnecessarily forceful that it amounted to an indifference to consequences or a wantonness and disregard of the consequences; at least we would not consider it to amount to an abuse of discretion for the magistrate to so find. In other words, were we to consider only the evidence that the magistrate considered with regard to the cause of Finley's death, we could not conclude that the magistrate abused her discretion in refusing to bind defendant over on the charge of involuntary manslaughter.

However, as previously discussed, the magistrate erred by finding Pietak's testimony to be lacking in credibility with regard to the cause of Finley's death. As a result, the magistrate failed to take into consideration his testimony in arriving at her finding that there was no evidence of gross negligence.

Pietak testified that Finley's death was caused by a "very large amount" of force applied to Finley's neck, which led to asphyxiation. Based on this evidence, and evidence that defendant's restraint of Finley lasted up to two minutes, and that the restraint continued despite the fact that Finley ceased resisting, an individual marked by discretion and caution could reasonably believe that defendant's restraint of Finley was so unnecessarily forceful that it amounted to an indifference to the consequences or a wantonness and disregard of the consequences. In other words, such evidence provides probable cause to believe that defendant acted with gross negligence and committed the crime of involuntary manslaughter.¹ In the

¹ In addition, there was evidence that after defendant released his hold on Finley, defendant was "very angry," and when he and another security guard attempted to pick Finley up off the
(continued...)

presence of evidence that defendant may have placed such a large amount of force on Finley's neck that it caused Finley to asphyxiate, the magistrate's finding that there was insufficient evidence to establish probable cause that defendant acted with gross negligence was a clear abuse of discretion.

The evidence presented at the preliminary examination was sufficient to establish probable cause that the crime of involuntary manslaughter was committed and that defendant committed it. The circuit court correctly reinstated the charge.

Affirmed.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen

(...continued)

ground, but were unsuccessful, defendant "threw" Finley back onto the ground. While there is no reason to believe that this action on defendant's part led to Finley's death, it is additional evidence that defendant may have possessed a state of mind that amounted to an indifference to Finley's rights.