

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TRAVIS ALLEN BULMER,

Defendant-Appellee.

UNPUBLISHED

December 19, 2000

No. 226796

Eaton Circuit Court

LC No. 99-000353-FH

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

PER CURIAM.

The prosecution appeals by leave granted from a circuit court order affirming the district court magistrate's decision to bind defendant over on a charge of involuntary manslaughter, MCL 750.321; MSA 28.553, and the circuit court's refusal to reinstate the original charge of second-degree murder, MCL 750.317; MSA 28.549. We affirm.

This case arises out of the death of the fifteen-month-old son of defendant's girlfriend. Testimony presented at the preliminary examination indicated that the child died from brain injuries consistent with shaken baby syndrome. Following the preliminary examination, the magistrate determined that the prosecution presented insufficient evidence of defendant's malice to support the second-degree murder charge.

"A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed for error, and a decision to bind over a defendant is reviewed for abuse of discretion." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). In reviewing the district court's decision to bind over a defendant, a circuit court may reverse only if it appears on the record that the district court abused its discretion. *Id.* "An abuse of discretion is found only where an unprejudiced person, considering the facts upon which the court acted, would say there was no justification or excuse for the ruling." *Id.* "Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion." *Id.*

It is the magistrate's duty to bind a defendant over for trial if, at the conclusion of the hearing, it appears to the magistrate that there is probable cause to believe that a felony was committed and that the defendant committed it. MCL 766.13; MSA 28.931; MCR 6.110(E); *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). Probable cause is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously

entertain a reasonable belief in the defendant's guilt. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). To establish that a crime has been committed, the prosecution need not prove each element beyond a reasonable doubt but must present some evidence on each element. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989); *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). Circumstantial evidence and reasonable inferences from the evidence may suffice. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). In determining whether the crime has been established, the magistrate is not limited to determining whether evidence on each element has been presented. Rather, the magistrate must make his determination after an examination of the whole matter. *People v Stafford*, 434 Mich 125, 133; 450 NW2d 559 (1990). Although the magistrate may weigh the credibility of the witnesses, if the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for resolution of the questions by the trier of fact. *Goecke, supra* at 469-470; *In re Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999).

The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *Goecke, supra* at 463-464; See also *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). Malice is the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Goecke, supra* at 464. The element of malice necessary for second-degree murder reflects the principle that criminal culpability must be tied to the actor's state of mind. *Id.* at 466. The offense, however, does not require the specific intent to harm or kill. It is enough that the actor possesses an intent to do an act that is in obvious disregard of life-endangering consequences. *Id.* As an alternative way to view this mental state, malice can be implied when a 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. *Id.* at 467.

The prosecution contends that in reaching his conclusion that insufficient evidence supported the element of malice, the magistrate erred by ignoring the forensic pathologist's testimony and instead focusing solely on defendant's statement to police that he gently shook the child. We disagree. Although the forensic pathologist did testify that the child's injuries were inflicted by another and were not the result of an accidental event, she was then equivocal in her testimony regarding the extent of action necessary to cause such injuries. As to causation, her testimony included a statement 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" (emphasis added). She went on to describe the amount of force that would have to be applied to cause the types of injuries, stating, "[i]t's a violent shaking that requires—a gentle shaking doesn't *typically* cause these types of injuries. And *often* it's a violent shaking that is sustained for—for *typically* over a minute" (emphasis added). We agree with the circuit court that in light of the equivocal nature of the pathologist's testimony, the magistrate did not abuse his discretion in determining that the evidence could not support an inference that defendant possessed the requisite malice.

The prosecution also argues that because defendant stated that he only shook the baby gently, while the pathologist testified that the injuries she observed are not typically caused by a gentle shaking, the magistrate was required to bind defendant over for the jury's resolution of this

factual issue. However, we do not agree that the magistrate's decision against bindover on the second-degree murder charge was based on defendant's statement that he only shook the baby gently. We believe, rather, that the magistrate's conclusion was based on a finding that presuming defendant's shaking of the baby was more violent than he described, the totality of the evidence was not sufficient to provide probable cause that defendant acted with wanton disregard of human life or a base antisocial motive, or that defendant knew that the natural consequence of his act would be great bodily harm or death. *Id.*

In defendant's statement to police, he indicated that at no time was he angry with or frustrated by the baby, rather he was merely trying to help the baby who was coughing forcefully. Defendant stated that he did not know what the result of his shaking would be, and his description of the subsequent events indicates that he responded immediately and appropriately when he realized moments later that the baby was in distress. We are not convinced that the magistrate's determination to bind defendant over on a charge of involuntary manslaughter after his examination of the whole matter constituted an abuse of discretion. *Stafford, supra* at 133; *Orzame, supra* at 557.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin