STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARTY ALAN FRENCH,

Defendant-Appellee.

UNPUBLISHED
December 4, 2003

No. 242564
Allegan Circuit Court
LC No. 01-012287-FH

Before: Griffin, P.J., and Neff and Murray, JJ.

GRIFFIN, P.J. (*dissenting*).

I respectfully dissent. I would reverse the circuit court and hold that the district court did not clearly abuse its discretion in finding that the prosecutor presented sufficient evidence constituting probable cause to believe that a felony was committed and that defendant committed it. MCL 766.113; MCR 6.110(E).

At the outset, it must be noted that because a preliminary examination is a *probable cause* hearing and not a trial on the merits, minimal evidence establishing probable cause is sufficient evidence to support a bindover. See *People v Doss*, 406 Mich 90, 100-101; 276 NW2d 9 (1979). Further, in accessing whether the district court abused its discretion in binding a defendant over, we are guided by the following well-established principles:

> Circumstantial evidence, coupled with those inferences arising therefrom, is sufficient to establish probable cause to believe that the defendant committed a felony. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). Although the district court should consider the weight of the evidence and the credibility of the witnesses in determining whether to bind the defendant over for trial, *People v Neal*, 201 Mich App 650, 655; 506 NW2d 618 (1993), it may not usurp the role of the jury. *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996). Competent evidence that both supports and negates an inference that the defendant committed the crime charged raises a factual question that the district court must leave to the jury. *Neal*, *supra* at 655. [*People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998).]

In my view, the prosecutor sustained his burden of establishing probable cause at the preliminary examination hearing. In this regard, the only medical expert to testify was Kent County Deputy Chief Medical Examiner Stephen Cohle, M.D. After being qualified as an expert

witness, Dr. Cohle expressed his expert opinion that the deceased child lived for four days after birth:

> *Q.* The child did live for four years – four days after the C-section, is that correct?
>
> *A.* That's right.

Consistent with his medical examiner's report, which indicates a date of accident of January 3, 2001, and a date of death of January 7, 2001, Dr. Cohle also testified, "[t]he child was *delivered by cesarean section about four days before death* following the fact that the mother was involved in a motor vehicle crash." (Emphasis added.)

The above testimony by Dr. Cohle is admissible evidence as an opinion by an expert witness, MRE 702, MRE 704.[1] Nevertheless, defendant and the majority argue that Dr. Cohle's expert opinion should be disregarded because it is contrary to undisputed facts. First, there was no objection to Dr. Cohle's testimony on the basis of lack of foundation and accordingly, the issue is not preserved. MRE 103(a)(1). Second and most importantly, the underlying evidence that supports or refutes Dr. Cohle's opinion is incomplete and certainly not beyond dispute. Because Dr. Cohle was not the treating physician and never examined the child, his testimony and report were based on hearsay and his limited review of some of the medical records:

> *Q.* So your review of is only limited to the paper records in this matter?
>
> *A.* Well, that and speaking with Dr. Beaumont and Judy Miller [the ambulance operator].

While the majority speculates that an Apgar test may have been performed immediately after the cesarean section and may have revealed no brain activity, Dr. Cohle testified that he did not review the Apgar testing results and therefore did not know the child's Apgar scores:

> *Q.* . . . And now your report that you've initialed has a statement saying the child never had brain activity. *Do you have other documentation as to when that brain activity was first looked for*?
>
> *A. No, I don't.* The usual, I can say this in a general sense that if that as soon as a child is delivered, whether it is by cesarean section or with a vaginal delivery, that the child is checked. There is a procedure or a test called an Apgar, A-p-g-a-r test. And this tests five different functions of the baby, alertness, response to pain, heart rate, respirations. That's four. There's another one I don't

[1] MRE 704 provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

remember right now, but each of these – and there is a score that is given. And if all those functions are fully intact, in other words if the baby is jiggled a little bit and screams, then that's good. And if all of those things are intact, the maximal score is two points per item on the test and ten is the maximum score. They check that at one and at five minutes after the baby is delivered. What I'm reading here, and *I did not review those records*, but it implies to me that the Apgar scores were probably zero and zero at one and five minutes and the child was on life support, but *I don't know that for a direct fact*. But that's what it implies. (Emphasis added.)

Further, when asked what results an ultrasound showed, Dr. Cohle admitted that he had not read all of the medical records:

Q. Would that normally be recorded in writing? Would that normally be–

A. Oh, yes.

Q. – an observation that we could look at the medical report and see whether they made that observation or not?

A. Yes, and again I didn't read all the records. Most of my information was talking with Dr. Beaumont. [Emphasis added.]

From the following testimony it can be inferred that the child showed signs of life following his delivery on January 3, 2001, and prior to being pronounced dead on January 7, 2001:

Q. Now the date of the death is listed as January 7th.

A. Yes, I'm sure that's true.

Q. Now is that the date that this infant had no viable brain waves that you were referring to as being clinically dead I believe?

A. Well, yes, certainly – what I'm looking at in my report, the child was pronounced dead at 12:10 p.m. on January 7th. Obviously the brain testing would have been conducted prior to that whether there was some degree of brain wave testing done on January 6th I don't know for sure. I just know that on that date on the 7th that the child was found to have no brain activity, and apparently never did have any brain activity from the time of the –

Q. Do your records reflect what date that brain activity was tested?

A. Well, I don't have that kind of specificity. *All I know is that the obviously the brain activity would have to be determined to be absent prior to withdrawal of life support. Generally there is a period of hours, sometimes longer depending on the case*. But there are multiple tests at different times of brain activity. And these all have to be consistently negative before the child is pronounced dead.

Q. And who would have made those tests? Dr. Beaumont?

A. Well he would have at least overseen them. I don't know if he personally performed them, but he at least would have reviewed them and been in charge of them.

In summary, it was Dr. Cohle's clear and unequivocal opinion on direct examination that the child was born alive and lived for four days before he died. In view of this direct evidence, the majority and the circuit court err by concluding that the prosecutor was required to prove a negative: "that a point existed where the child was *not* brain *dead*." (Emphasis added.) While the underlying facts[2] may or may not support Dr. Cohle's opinion that the child was born alive, based on the scant evidence contained in the record, I disagree that uncontroverted facts mandate the opposite conclusion.

In my view, the unobjected-to expert opinion by Dr. Cohle regarding a live birth and the date of death provides the minimal evidence necessary to support the bindover. No clear abuse of discretion has been demonstrated. *Doss, supra; People v Dellabonda,* 265 Mich 486, 491; 251 NW 594 (1933). In this respect, our case is similar to *People v Selwa*, 214 Mich App 451; 543 NW2d 321 (1995), where our Court stated:

> We acknowledge the extreme difficulty in the present case in deciding whether the defendant should have been bound over for trial. Of course, at trial, the prosecutor will be required to prove beyond a reasonable doubt that the child was born alive and was thus a "person" under the negligent homicide statute. However, at this stage in the proceedings, that is not required. It is unnecessary for us to articulate exactly what evidence suffices to demonstrate that one has been "born alive." Evidence has been presented to support the position of both parties. It is not the function of the district court to discharge the accused when the evidence is conflicting or raises a reasonable doubt with regard to guilt. Such questions are for the trier of fact. *People v Flowers*, 191 Mich App 169, 179; 477 NW2d 473 (1991); *People v Hill*, 433 Mich 464, 469*;* 446 NW2d 140 (1989). The prosecutor has shown some reasonable evidence supporting the element of "death of another [person]." Thus, the district court did not abuse its discretion in binding defendant over for trial and the circuit court erred in quashing the information.

I would reverse the circuit court and remand for further proceedings.

/s/ Richard Allen Griffin

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[2] MRE 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.