

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

BARBARA ANN JOHNSON,

Defendant-Appellee.

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UNPUBLISHED

November 16, 2010

No. 294242

Oakland Circuit Court

LC No. 2009-227287-FH

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting defendant's motion to quash the information charging her with third-degree child abuse, MCL 750.136b(5) (knowing or intentional physical harm to a child). We reverse and remand for further proceedings.<sup>1</sup>

**I. BASIC FACTS**

At the preliminary examination in the district court, defendant's 15-year-old daughter testified that she had falsely accused defendant of abuse. The victim testified that she had inflicted bruises on her arms because she was angry with her mother and that a bruise on her back resulted from figure skating. However, other evidence was introduced that the victim told her school counselor that defendant hit her on the arms and back with a hair straightener and had also told a school liaison officer and a protective services worker that her mother slapped her and hit her on the left arm with a hair straightener while she was backed against a door. Apparently, the victim had reported that the door's handle caused bruising to her back. Shortly before the preliminary examination, the victim repeated the allegations to the prosecutor. A cell phone picture that the victim had taken of the bruise on her back was admitted into evidence. Two other pictures, which the police had taken and showed bruising on the victim's arm, were also admitted.

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<sup>1</sup> This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In binding defendant over for trial, the district court did not find the victim's recantation credible. On defendant's motion to quash the information, the circuit court concluded that the hearsay evidence was not as credible as the sworn testimony, that substantive evidence linking the bruising to defendant was lacking, and that other explanations for the bruising existed. Accordingly, the circuit court granted defendant's motion to quash the information.

## II. ANALYSIS

On appeal, the prosecution argues that the circuit court erred by granting defendant's motion to quash the information. We agree. When reviewing a district court's decision to bindover a defendant, we review its determination regarding the sufficiency of the evidence for an abuse of discretion, while we review questions of law de novo. *People v Flick*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2010). We review the district court's original exercise of discretion and give no deference to the circuit court's decision. *People v Kim*, 245 Mich App 609, 613 n 3; 630 NW2d 627 (2001). In other words, we apply the same standard of review to the issue as that applied by the circuit court. *Id.*

A district court must bindover a defendant if the prosecution has "presented competent evidence sufficient to support probable cause to find both that a felony was committed and that defendant committed it." *People v Cervi*, 270 Mich App 603, 616; 717 NW2d 356 (2006). More specifically:

The prosecutor is not required to prove all elements of the offense charged at the preliminary hearing, but must only produce evidence sufficient for a finding of probable cause. "Probable cause to believe that the defendant committed the crime is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged." *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993). "Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to justify binding over a defendant." *Id.* [*Cervi*, 270 Mich App at 616.]

"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." *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998). The introduction of incompetent evidence at the preliminary examination can be harmless error, where sufficient competent evidence is presented to support a bindover. *People v Fiedler*, 194 Mich App 682, 695; 487 NW2d 831 (1992).

Here, we need not address whether the victim's statement to the counselor or the prosecutor amounted to incompetent evidence, because we conclude that the statement to the liaison officer constituted sufficient competent evidence in support of the district court's bindover decision. See *id.* The victim's statement to the liaison officer was admitted under MCL 768.27c, which provides in pertinent part:

(1) Evidence of a statement by a declarant is admissible if all of the following apply:

(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement's trustworthiness.

(e) The statement was made to a law enforcement officer.

(2) For the purpose of subsection (1)(d), circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

In making the statement to the liaison officer, the victim was describing an instance of physical injury caused by domestic violence. The statement was made within 48 hours of the incident. While there may have been some possibility that the victim was lying, her statements nonetheless had earmarks of trustworthiness; there is no indication that she made the statement in anticipation of litigation and it was corroborated by photographs. Given these facts, the statement was admissible and competent evidence. MCL 768.27c.

Moreover, coupled with the photographs, the victim's statement to the liaison officer created probable cause to believe that defendant committed third-degree child abuse. This evidence, in conjunction with the victim's conflicting testimony at the preliminary examination, resulted in competent evidence that both supported and negated an inference that defendant committed the crime. Resolution of the issue is a factual question for a jury. See *Northey*, 231 Mich App at 575. Accordingly, the district court did not abuse its discretion in binding defendant over for trial, and the circuit court erred in granting the motion to quash.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly  
/s/ Kirsten Frank Kelly  
/s/ Stephen L. Borrello