STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANDREA NEAL,

Defendant-Appellee.

UNPUBLISHED
January 14, 1997

No. 188160
LC No. 95-05586

Before: Cavanagh, P.J., and Reilly, and C.D. Corwin,* JJ.

PER CURIAM.

The prosecution appeals by leave granted a Recorder's court order quashing the information and reducing the charge from first-degree murder, MCL 750.316(1)(b); MSA 28.548(1)(b) to involuntary manslaughter, MCL 750.321; MSA 28.553 or first degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2). We reverse and remand for reinstatement of the first-degree felony murder charge.

The prosecutor argues that the district court did not abuse its discretion in binding over defendant for trial on a first-degree murder charge and therefore the circuit court erred in quashing the information and ordering the charge reduced. We agree.

> In reviewing a district court's decision to bind a defendant over for trial, the circuit court may not substitute its judgment for that of the district court and may reverse only if it appears on the record that the district court abused its discretion. *People v Brannon*, 194 Mich App 121, 124; 486 NW2d 83 (1992). This Court generally applies the same standard on review as applied by the circuit court in reviewing a district court's decision to bind over a defendant. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993).
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> A defendant must be bound over for trial on the prosecutor's information if the evidence presented at the preliminary examination establishes that a felony has been

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* Circuit judge, sitting on the Court of Appeals by assignment.

committed and there is probable cause to believe that the defendant was the perpetrator. MCL 766.13; MSA 28.931; *People v Woods*, 200 Mich App 283, 287; 504 NW2d 24 (1993). The prosecutor is not required to prove each element of the offense beyond a reasonable doubt. *Id*. at 288. However, there must be evidence regarding each element of the crime charged or evidence from which the elements may be inferred. *Brannon*, *supra* at 124. If the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for resolution of the issue by the trier of fact. *People v Cotton*, 191 Mich App 377, 384; 478 NW2d 681 (1991); *Neal*, *supra* at 655. [*People v Selwa*, 214 Mich App 451, 456-457; 543 NW2d 321 (1995).]

In this case, defendant was charged with first-degree felony murder, the underlying felony being child abuse. The victim was defendant's two-year old son. At the preliminary examination, the parties stipulated to the admission of the report of the medical examiner, which was read into the record. In pertinent part, it stated as follows:

> It is my opinion that death was caused by inflicted blunt force injuries. Although there were no significant injuries evident externally, there were extensive injuries of the abdominal cavity from inflicted blow or blows. There was a near complete transection of the transverse colon with hemorrhage and purulent exudate and early abscess formation from the fecal matter in the colon oozing out into the abdominal cavity.
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> Although, there were a few bruises to the forehead, there were no discernable [sic] internal head injuries.
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> * * *
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> The manner of death was a homicide.

A statement given by defendant was also admitted and read into the record. She described how the injuries to her son occurred as follows:

> I told [the victim] to let me know when he had to use the bathroom. I checked him and he had wet his pants. I asked [the victim] why didn't you come and tell me that you had to use the pot. And that's when I hit him two or three times in his stomach with my fist. [The victim] started crying. I sat him on the pot and then I put his night clothes on him.

According to defendant's statement, the victim only cried for a few minutes after she hit him. Around 11:00 p.m., she noticed that he had a fever, for which she gave him Tylenol before she put him in bed. She checked him at 4:30 a.m. and his temperature was normal. The next morning, at about 11:30 a.m., she checked on him and noticed that he was not breathing. Defendant explained that the bump on her son's head occurred when he fell getting out of bed and he hit his head on a table. Defendant stated, "I didn't mean to hurt [the victim]. I was just trying to make him use the potty."

Felony murder is (1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Hutner*, 209 Mich App 280, 282-283; 530 NW2d 174 (1995). First-degree child abuse is one of the felonies included in MCL 750.316; MSA 28.548. First-degree child abuse is the knowing or intentional causing of serious physical or serious mental harm to a child. MCL 750.136b(2); MSA 28.331(2)(2).

The circuit court concluded that the proof of first-degree child abuse was adequate, but that the evidence of malice necessary to support a felony murder charge was lacking.

> . . . I'm gonna rule that there is adequate evidence of the felony involved, child abuse first degree, because it is not required in order to prove child abuse first degree that you intend the result of death. All that's required is an act knowingly or intentionally causing serious physical harm as defined in the statute. And I think if you strike a child two or three times in the stomach with a fist and it results in death, that that makes out the elements of a child abuse first degree.
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> * * *
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> I don't think there's any question based on the transcript, or forget the transcript, in reality, that this defendant did not intend to kill her own child. I think it is doubtful, although someone might disagree with me, that she intended to do great bodily harm to her child. The question is whether she knowingly and intentionally by striking the child two or three times in the stomach with a fist knowingly and intentionally create [sic] a very high risk of death or great bodily harm with knowledge that death or great bodily harm was probable.
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> * * *
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> I don't think that this person in striking her own two-year-old knew that the act she was engaged in would probably result in death.

After further arguments and discussion by the court regarding the difference between the intent required for manslaughter and second-degree murder, the court granted the motion to quash.

We agree with the prosecution that the circuit court erred in dismissing the felony-murder charge. The court's comments indicate that it substituted its judgment for that of the reviewing magistrate, rather than reviewing the magistrate's decision for an abuse of discretion. Moreover, having reviewed the record, we conclude that the magistrate's decision was not an abuse of discretion. Defendant admitted that she repeatedly struck her two-year old son in the abdomen with her fist. The intensity of the blows was adequate to produce "a near complete transection of the transverse colon . . . ." A jury could infer that when defendant inflicted these blows on a two-year old child, defendant did so with the intent to create a very high risk of great bodily harm and with the knowledge that great

bodily harm would probably result. The magistrate's decision was not an abuse of discretion, and therefore, the circuit court erred when it dismissed the felony-murder charge. The circuit court's order is reversed.

Reversed and remanded for reinstatement of the first-degree felony murder charge. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin