

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TANNICA HENRY,

Defendant-Appellee.

UNPUBLISHED

September 26, 1997

No. 195385

Recorder's Court

LC No. 96-002650

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

After a preliminary examination, defendant, Tannica Henry, was bound over for trial on charges of second-degree murder for the shooting of her husband, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant then moved to quash the information, the trial court granted defendant's motion and the case was dismissed without prejudice. The prosecutor now appeals as of right from the trial court's order granting defendant's motion to quash the information. We reverse and remand with instructions to bind defendant over for trial on charges of second-degree murder and felony-firearm.

In reviewing a trial court's decision regarding a motion to quash an information, this Court determines whether the district court abused its discretion in binding the defendant over. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). Although a reviewing court may not agree with the findings of the magistrate, it has no right to substitute its judgment absent a clear abuse of discretion. See *People v Doss*, 406 Mich 90, 101; 276 NW2d 9 (1979). An abuse of discretion occurs only when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *People v Talley*, 410 Mich 378, 387; 301 NW2d 809 (1981).

The function of the magistrate at a preliminary examination is to determine whether a crime has been committed and whether there is probable cause for charging the defendant with that crime. MCL 766.13; MSA 28.931; *People v King*, 412 Mich 145, 152-153; 312 NW2d 629 (1981). To bind a

defendant over for trial, there must be some evidence of each element of the crime charged, or evidence from which those elements may be inferred. *Doss, supra* at 100-101. The ultimate determination, however, must be based on an examination of the matter as a whole. *King, supra* at 154. The magistrate should not discharge the defendant if the evidence at the preliminary hearing conflicts or raises a reasonable doubt about defendant's guilt. Such issues should instead be resolved by the trier of fact. *King, supra* at 153-154; *Neal, supra* at 654.

The elements of second-degree murder are (1) that a death occurred, (2) that it was caused by the defendant, (3) that the killing was done with malice, and (4) without justification or excuse. *People v Smith*, 148 Mich App 16, 21; 384 NW2d 68 (1985). Malice requires either an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). Malice may be inferred from the use of a deadly weapon. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995); *Smith, supra* at 21.

At the preliminary examination in the instant case, it was undisputed that the decedent, defendant's husband, died of a single gunshot wound to the chest and that defendant pulled the trigger of the gun. At issue was whether there was sufficient evidence that defendant did so with malice and without justification or excuse.

Defendant asserted in her statement to the police that she discharged the gun accidentally, as a matter of reflex, when her philandering husband returned home in a drunken and abusive state. However, because malice may be inferred from the use of a deadly weapon, see *Turner, supra* at 567, and because defendant earlier told an emergency police operator that she had a gun and was prepared to use it on the decedent if he returned to the apartment, there was also evidence supporting a finding of malice as opposed to one of accident. Where there is evidence both supporting and negating a finding of malice, the issue of the existence of malice should be resolved by the trier of fact. *Neal, supra* at 655; *Wayne County Prosecutor v Recorder's Court Judge*, 92 Mich App 119, 123; 284 NW2d 507 (1979). Moreover, although defendant told the police that the decedent had beat her on the night of the shooting as well as in the past, she did not claim that she shot him in self-defense. Her claim to the police that the shooting was accidental is inconsistent with her theory that the shooting was justifiable as self-defense because self-defense requires a finding that defendant acted intentionally. See *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990). Therefore, the issue of whether the killing was justified should be left for resolution by the trier of fact. See *Doss, supra* at 103; *People v Hampton*, 194 Mich App 593, 598; 487 NW2d 843 (1992); *Smith, supra* at 21-22. Accordingly, we hold that the district court did not abuse its discretion when it found that a crime had been committed and that there was probable cause to believe that defendant had committed the crime. *Peebles, supra* at 664. In so holding, we do not address the wisdom of the prosecutor's decision in bringing the instant charge but only whether there was sufficient evidence to justify the decision of the district court.

Reversed and remanded with instructions to bind defendant over for trial on charges of second-degree murder and felony-firearm.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald