

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DARRON KILGORE,

Defendant-Appellee.

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UNPUBLISHED

January 24, 2003

No. 241965

Wayne Circuit Court

LC No. 02-005078

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

The prosecution appeals by leave granted an order granting defendant’s motion to quash the information charging him with first-degree murder, MCL 750.316. The circuit court reduced the first-degree murder charge to manslaughter, MCL 750.321, and accepted, over the prosecutor’s objection, defendant’s guilty plea to manslaughter. We reverse and remand.

The prosecutor argues on appeal that, although the district court abused its discretion in binding defendant over on a first-degree murder charge, the circuit court erred in reducing the charge to manslaughter instead of to second-degree murder. We agree.

This Court reviews de novo a circuit court’s decision to grant or deny a motion to quash charges to determine if the district court abused its discretion in binding over a defendant for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). In *People v Goecke*, 457 Mich 442, 469-470; 579 NW2d 868 (1998), the Michigan Supreme Court explained the standard for establishing probable cause to bind over a defendant:

For purposes of preliminary examination, the proofs adduced must only establish probable cause to believe that a crime was committed and probable cause to believe that the defendant committed it. If the district court determines that “probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it,” the defendant must be bound over for trial. MCR 6.110(E). Some evidence must be presented regarding each element of the crime or from which those elements may be inferred. *People v Doss*, 406 Mich 90, 100-101; 276 NW2d 9 (1979). It is not, however, the function of the examining magistrate to discharge the accused when the evidence conflicts or raises a reasonable doubt of the defendant’s guilt; that is the province of the jury. *Id.* at 103.

The prosecution argued that the proofs were sufficient to bind over defendant for second-degree murder. In order to demonstrate probable cause for a charge of second-degree murder, the prosecution must show some evidence of the following elements: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Goecke, supra* at 463-464. Further, malice can be inferred from the circumstances. *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

The circuit court rejected the prosecution’s argument and concluded that the evidence only supported a finding of probable cause for the offense of involuntary manslaughter. Involuntary manslaughter is defined as:

the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty. The kind of negligence required for manslaughter is something more than ordinary or simple negligence, however, and is often described as “criminal negligence” or “gross negligence.” [*People v Herron*, 464 Mich 593, 604-605; 628 NW2d 528 (2001) (citations omitted).]

This Court has “distinguished between involuntary manslaughter and second-degree murder (based upon the creation of a high risk of death or great bodily harm) by whether death or great bodily harm is the natural tendency of the act (second-degree murder) or whether the defendant merely acted in wanton disregard that death or great bodily harm may follow (manslaughter).” *Djordjevic, supra* at 462.

In this case, the prosecution presented evidence that defendant fired a gun into the air in a residential neighborhood where children were playing. An eyewitness testified that the victim had said to defendant, “You stupid, why you playing with that gun. You know that gun ain’t got no safety on it.” Defendant raised the gun up near the victim’s left eye, the gun discharged, and the victim fell to the ground. The victim died from her injuries. Thus, contrary to defendant’s contention, there was some evidence indicating that defendant knew the gun was operational, that he knew or should have known that the gun did not have a safety, and that he wilfully and wantonly disregarded the natural tendency of his act of pointing the gun at the victim’s head to cause death or great bodily harm.

We find that there was probable cause to charge defendant with second-degree murder, as requested by the prosecutor, because it would be reasonable for a jury to conclude that death or great bodily harm was the natural tendency of defendant’s act. *Djordjevic, supra* at 463. Therefore, we hold that the circuit court abused its discretion in reducing the charge to manslaughter. It is a fact question for the jury to decide whether the evidence supports finding defendant guilty of second-degree murder beyond a reasonable doubt. *Goecke, supra* at 469.

The prosecutor further contends that this appeal and defendant’s subsequent adjudication on the charge of second-degree murder is not barred by double jeopardy. We agree. This Court reviews a double jeopardy issue de novo. *Herron, supra* at 599.

The United States and the Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. In other words, the Double Jeopardy Clause “protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.” *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002), quoting *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000).

This Court’s decision in *People v Howard*, 212 Mich App 366; 538 NW2d 44 (1995), is directly on point. In that case, the circuit reduced the defendant’s felony charge to a misdemeanor and allowed him to plead guilty. *Id.* at 368. This Court found that the basis for the charge reduction was invalid, and remanded the case for reinstatement of the felony charge. *Id.* at 370. In rejecting the defendant’s double jeopardy claim, this Court stated that “[w]hen a plea and sentencing occur on a reduced charge, and the basis for the reduction is later overturned on appeal, jeopardy does not attach.” *Id.* Further, as our Supreme Court pointed out in *People v Garcia*, 448 Mich 442, 449 n 10; 531 NW2d 683 (1995), MCR 6.312 provides:

If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered.

Therefore, because we are vacating defendant’s plea, jeopardy did not attach and defendant can be tried on the charge of second-degree murder.

Defendant argues that *Howard, supra*, is bad law because the case on which it relies, *Genesee Co Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 123; 215 NW2d 145 (1975), was overruled by the United States Supreme Court in *Grady v Corbin*, 495 US 508; 110 S Ct 2084; 109 L Ed 2d 548 (1990), and *Brown v Ohio*, 432 US 162; 97 S Ct 2221; 53 L Ed 2d 187 (1977). However, defendant is mistaken. *Grady* and *Brown* are inapplicable because they dealt with under what circumstances a defendant can be subject to a second prosecution when he was already convicted for an offense, and that conviction stands.<sup>1</sup> Here, defendant’s plea is being vacated. We are not allowing him to be prosecuted for second-degree murder, while his conviction of involuntary manslaughter stands.

Defendant’s argument that *Howard, supra*, is sufficiently distinguishable is also without merit. In *Howard*, the prosecution could not appeal the reduction in charges by the time defendant pleaded guilty because the court had not yet entered the final order. In this case, the court entered the final order reducing the charge on May 24, 2002, and that same day the prosecution informed the court that it would appeal. One week later, defendant entered his plea over the prosecution’s objection. On June 12, 2002, the prosecution filed its application for leave to appeal. We do not find the timing of the prosecution’s appeal sufficiently distinguishes this case from *Howard* to warrant a different result. Moreover, there is no indication in *Howard*

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<sup>1</sup> We note that *Brown, supra* at 166, used the “same elements test” enunciated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), while *Grady, supra* at 510, used the “same conduct test.” *Grady* was subsequently overruled by *United States v Dixon*, 509 US 688, 711; 113 S Ct 2849; 125 L Ed 2d 556 (1993), and the “same elements test” reinstated.

that its holding was contingent on the fact that the prosecution could not appeal the circuit court's order before the defendant entered his plea.

Accordingly, the circuit court's order reducing the charge to manslaughter is reversed, defendant's plea and sentence is vacated, and this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Bill Schuette