

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WAYNE KEITH EATON,

Defendant-Appellee.

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UNPUBLISHED

February 28, 2006

No. 264295

St. Joseph Circuit Court

LC No. 04-012251-FH

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

The prosecutor appeals by leave granted from an order denying a motion to amend the information to reinstate a second-degree murder charge against defendant. We reverse and remand for further proceedings consistent with this opinion.

I. Basic Facts and Procedure

This case arises out of a traffic accident in December, 2003. Defendant is alleged to have had a seizure while driving and losing control of his pickup. The vehicle then struck and killed Mary VanDosen and injured Carl Schalow. The prosecutor sought to bind over defendant for second-degree murder arguing that, because of defendant's extensive history of seizures, defendant's decision to drive constituted evidence of malice. After the district court refused to bind over defendant on the charge, the prosecutor filed a motion to amend the information to reinstate the charge. The motion was denied by the circuit court, and this appeal ensued.

II. Analysis

B. Standard of Review

This Court reviews de novo a circuit court's determination of whether a district court abused its discretion in failing to bind over a defendant for second-degree murder. *People v Green*, 260 Mich App 710, 714; 680 NW2d 477 (2004). An abuse of discretion occurs when an unbiased person reviewing the same facts before the trial court would conclude that there was no justification for the court's ruling. *Id.* On review, the circuit court is limited to the entire record of the preliminary examination and may not substitute its judgment for that of the district court. *Id.* at 713-714.

### C. Bind Over

Generally, a district court must bind over a defendant for trial if it finds a felony has been committed and there is probable cause to believe the defendant committed it. MCL 766.13; MCR 6.110(E). “Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt.” *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997) (citing *Coleman v Burnett*, 155 US App DC 302, 316-317; 477 F2d 1187 (1973)). When credible evidence exists both supporting and negating the existence of malice, a factual question exists that should be left to the jury. *People v Neal*, 201 Mich App 650, 655; 506 NW2d 618 (1993).

More specifically, to bind over a defendant for second-degree murder the prosecution must establish with probable cause the following four elements: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice can be established by showing a defendant had “the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* at 464. This Court described this method of establishing malice using slightly different language, stating, “[t]he malice element of second-degree murder is satisfied by showing that the defendant possessed the intent to . . . create a high risk of death or great bodily harm with the knowledge that death or great bodily harm would be the probable result.” *People v Djordjevic*, 230 Mich App 459, 461-462; 584 NW2d 610 (1998). This Court also noted, “[m]alice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm.” *Id.* at 462. Finally, CJI2d 16.5(3) states that malice can be established if the defendant “knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.”

Though the descriptions of malice set forth in *Goecke*, *Djordjevic*, and CJI2d 16.5 each use different terminology, all the descriptions of malice indicate a defendant need not *intend* to cause a harmful result in order to act with malice. What is necessary, however, is evidence establishing that defendant willfully (and therefore knowingly) disregards the fact that his actions would likely cause death or great bodily harm to others. Our Supreme Court summed up this idea by stating, “one may be guilty of other offenses for which malice is required . . . although he did not intend the resulting harm but acted under circumstances that there was a plain and strong likelihood that it might happen.” *Goecke, supra* at 466-467 (citing Perkins & Boyce, Criminal Law (3d ed), ch 7, § 4, p 858).

### D. Evidence of Malice

In this case, the district court ruled that credible evidence indicated defendant lacked the requisite malice to be found guilty of second-degree murder. We conclude the district court disregarded credible evidence supporting the prosecutor’s assertion that defendant acted with malice by wantonly and willfully driving in disregard of the likelihood that he could have a seizure while driving, thus resulting in a serious accident.

The prosecutor presented evidence that defendant continued driving in spite of a history of having severe seizures while driving. Defendant’s three ex-wives, sisters and current girlfriend all testified to occasions in which they were passengers in defendant’s car when

defendant had a seizure; three of these individuals also testified they each had to grab the wheel to prevent an accident. Furthermore, defendant's driving record, as well as the testimony of three witnesses, also indicated defendant had been in previous traffic accidents due to having seizures while driving.

The prosecutor also presented evidence that defendant lied about his history of seizures in order to get a favorable physician's statement indicating his driver's license could be reinstated. Other evidence indicated defendant was aware he must be seizure-free for six months before his license could be reinstated and that he lied to doctors regarding his seizure history to avoid losing his license.

The prosecutor also offered evidence to show that after getting his license reinstated in October, 2003, defendant began to have seizures every few days, and noticed that these seizures arose so quickly he had no time to react. The evidence indicated defendant admitted that he had a seizure a few days before the accident of December, 2003, and that his medication was becoming less effective at controlling his seizures. The evidence presented by the prosecutor also indicated defendant never consulted a physician regarding his changed medical condition.

#### E. Conclusion

Given the proffered evidence, we conclude a reasonable trier of fact could find that defendant had ample knowledge that he could have a seizure while driving; that the seizure would seriously impair or disable his ability to control his automobile; and that such loss of control creates a risk of death or serious bodily injury to others, i.e., that the trier of fact could reasonably find defendant acted with malice by driving his vehicle.

Therefore, we find the district court abused its discretion by failing to bind over the defendant on the charge of second-degree murder, and the circuit court erred by failing to amend the information to include this charge. Because we reverse the circuit court's decision and remand for further proceedings consistent with this opinion, we need not address the prosecution's other issues on appeal.

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

/s/ Brian K. Zahra  
/s/ William B. Murphy  
/s/ Janet T. Neff