

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2247-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DEAN M. NORDALL,

Defendant-Respondent.

APPEAL from an order of the circuit court for Price County: PATRICK J. MADDEN, Judge. *Reversed and cause remanded for further proceedings.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The sole issue on appeal is whether, following a preliminary hearing, the court erred by dismissing a felony child abuse complaint when relying upon the child's testimony denying that the abusive conduct occurred as opposed to the child's prior inconsistent statement to a social worker detailing the abusive conduct. Because the State established the necessary probable cause for a bindover on the felony child abuse charge, the order is reversed and the matter is remanded to the trial court for further proceedings.

The State charged Dean Nordall with abusing his twelve-year-old son after the son described to the Price County social worker, Cherie Bunde, how three days earlier his father had pushed him against a wall, thrown him on a bed, jumped on him, choked him and blocked off his breathing by pinching his nose and covering his mouth. This occurred after the son had left his bike on the lawn at his residence and Nordall became angry after backing over the bike with his car, causing damage to the bike.

At the preliminary hearing, the son denied that his father had abused him after the bike incident and also denied that he ever told Bunde about his father physically assaulting him. The prosecution then called Bunde who testified as to what the son had told her earlier describing the assault. The court denied the bindover, concluding there was no showing of bodily harm because the son testified that he was not assaulted.

In *State v. Koch*, 175 Wis.2d 684, 704, 499 N.W.2d 152, 162 (1993), the supreme court discussed the meaning of probable cause in the context of a preliminary hearing and the standard under which appellate courts should review bind over decisions. The court stated:

The probable cause that is required for a bindover is greater than that required for arrest, but guilt beyond a reasonable doubt need not be proven. *State v. Berby*, 81 Wis.2d 677, 683, 260 N.W.2d 798 (1978). A preliminary hearing is not a preliminary trial or evidentiary trial on the issue of guilt beyond a reasonable doubt. *State v. Dunn*, 121 Wis.2d 389, 396, 359 N.W.2d 151 (1984). The role of the judge at a preliminary hearing is to determine whether the facts and reasonable inferences that may be drawn from them support the conclusion that the defendant probably committed a felony. The judge is not to choose between conflicting facts or inferences, or weigh the state's evidence against evidence favorable to the defendant. Probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony. *Id.*, 121 Wis.2d at 397-98, 359 N.W.2d 151;

State v. Cornelius, 152 Wis.2d 272, 276, 448 N.W.2d 434 (Ct. App. 1989).

Id. at 704, 499 N.W.2d at 162.

A preliminary hearing is intended to be a summary proceeding to determine essential or basic facts as to probability. *State v. Webb*, 160 Wis.2d 622, 625 n.4, 467 N.W.2d 108, 109 n.4 (1991). Probable cause for bindover is satisfied when evidence presents a believable or plausible account of the defendant's commission of a felony. *State v. Dunn*, 121 Wis.2d 389, 398, 359 N.W.2d 151, 155 (1984).

Thus, the court at the preliminary hearing is limited to determining the plausibility of a witness' testimony, and it is not to delve into the credibility of witnesses. *Id.* at 397, 359 N.W.2d at 154. If a plausible account of the commission of a felony by the defendant exists, the defendant must be bound over for trial, even if a contrary but believable or plausible account also exists. *State v. Sorenson*, 152 Wis.2d 471, 481, 449 N.W.2d 280, 284 (Ct. App. 1989). Finally, we observe that appellate review of a bindover decision is de novo. *State v. Moats*, 156 Wis.2d 74, 84, 457 N.W.2d 299, 304 (1990).

The crime of felony child abuse is defined in § 948.03(2), STATS. It requires the State to prove that the defendant intentionally caused bodily harm to a child less than eighteen years of age. Bodily harm is defined as "physical pain or injury, illness, or any impairment of physical condition." Section 939.22(4), STATS. Although the son at the preliminary hearing denied that the abuse ever took place, the State presented the son's prior inconsistent statement to Bunde describing the physical abuse. Bunde's testimony is admissible as substantive evidence of the offense. See § 908.01(4)(a)1, STATS. (Prior oral inconsistent statement of a party's own witness is admissible as substantive evidence). From this testimony, it is reasonable to draw an inference that the father's actions intentionally caused bodily harm to his twelve-year-old son.

Here, the court erred when it based its refusal to bind the charge over for trial on a credibility determination, concluding that the son's denial the abuse occurred was more credible than the social worker's testimony. Although there is conflicting testimony at the preliminary hearing, Bunde's

testimony provided a plausible account that Nordall committed felony child abuse.

Therefore, we are satisfied that the State met its burden of proving probable cause at the preliminary hearing and the court erred by denying the bindover and dismissing the complaint. The matter is remanded to the court with directions to enter a finding of probable cause that Nordall committed a felony and bindover the charge for trial.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.