

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 6, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2895-CR

Cir. Ct. No. 2005CF1392

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MARY R. DUNDON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. The State of Wisconsin appeals from the judgment of dismissal entered in Waukesha county circuit court. The State argues that the court erred when it found that the State had not produced sufficient evidence to find probable cause to bind over Mary Dundon for trial on the charge of first-

degree reckless homicide. Because we conclude that the circuit court did not err when it dismissed the charge for lack of probable cause, we affirm.

¶2 In January 2003, Dundon and two other women drove from Milwaukee to a nightclub in Chicago, Illinois. During the evening, the group tried to find drugs to use during their night out. When they were at the nightclub in Chicago, Dundon purchased some LSD and gave it to one of the other women, Angela Franceschetti. The three returned to Milwaukee early the next morning. Later that afternoon, the police were called to Franceschetti's home, where they found her dead. The officers found a methadone pill in a pocket of the pants she had worn the night before. The police also found a message on Franceschetti's cell phone from Dundon. In the message, Dundon said she was sorry for giving Franceschetti "so many of those things yesterday" and that she was "kind of fucked up and wasn't really keeping track."

¶3 An autopsy was performed on Franceschetti's body. The doctor found that Franceschetti had "heavy lungs" from pulmonary edema and an abnormal heart. After a toxicology report was prepared, the doctor concluded that the cause of death was "combined drug intoxication."

¶4 Three years later, the State charged Dundon with first-degree reckless homicide. At the preliminary hearing, the person who prepared the toxicology report, Dr. Christopher Long, testified. Dr. Long stated that he found methadone, citalopram, an antidepressant, and LSD in Franceschetti's blood and urine. Dr. Long testified that the amount of methadone was "well into the fatal range" and was "consistent with resulting in a fatality." He also testified that there were "significant" levels of LSD that would be consistent with a coma. He then stated: "It would be very hard to die from a hallucinogen. It would be

contributory, but as far as being causal, there—I haven't seen any documentation reporting an LSD overdose.” He answered “yes” when asked if it was the combined presence of both of those drugs in her blood that “in his opinion” resulted in her death. He said that “they’re both well into the toxic, if not fatal, range.” He also testified that the citalopram did not play a significant role in Franceschetti’s death.

¶5 When cross-examined, Dr. Long again said that he was not aware of any LSD fatalities. On redirect, he was asked: “[A]lthough the LSD in and of itself, at least in the literature you’re familiar with, did not cause death, in your opinion would the LSD [have] been a substantial factor in producing [Franceschetti’s] death?” He answered, “[Y]es.” He also gave the same answer to a similar question for methadone.

¶6 At the close of evidence, the circuit court dismissed the charge and refused to bind Dundon over for trial. The court found that Dundon had committed a felony by delivering LSD, but that offense occurred in Illinois, and not in Wisconsin. The court further found that the evidence established that Dundon gave Franceschetti LSD, but “that it’s not the LSD that caused the death, but rather it was a fatal cocktail, a mixture of methadone and LSD.” The court found that the State had not established that Dundon gave Franceschetti the methadone and that “it was clear” that the LSD alone would cause a person to go into a coma but would not have caused Franceschetti’s death. The court found that the State had not established probable cause to bind over Dundon for trial.

¶7 “A defendant may be bound over for trial when the evidence at the preliminary hearing is sufficient to establish probable cause that a crime has been committed and that the defendant probably committed it.” *State v. Berby*, 81

Wis. 2d 677, 683, 260 N.W.2d 798 (1978). The probable cause for bindover requires more evidence than is required for other determinations of probable cause. *State v. Dunn*, 121 Wis. 2d 389, 396, 359 N.W.2d 151 (1984). It is “greater than that required for the issuance of an arrest warrant, but guilt beyond a reasonable doubt need not be proven.” *Id.* (citation omitted).

¶8 A preliminary hearing is intended to be “a summary proceeding to determine essential or basic facts as to probability.” *Id.* at 396-97. Although the court must determine the plausibility of a witness’s story and whether the testimony supports bindover, the court “cannot delve into the credibility of a witness.” *Id.* at 397. The distinction between plausibility and credibility is one of degree. *Id.* “[All] that is needed is a believable account of the defendant’s commission of a felony.” *Id.* (citation and emphasis omitted).

If the hearing judge determines after hearing the evidence that a reasonable inference supports the probable cause determination, the judge should bind the defendant over for trial. Simply stated, 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. at 398. Regardless of who prevails, we review the record of a preliminary hearing to determine whether “there is competent evidence for the judicial mind of the examining magistrate to act on in determining the existence of the essential facts.” *Berby*, 81 Wis. 2d at 684.

¶9 In order to meet its burden to bind Dundon over for trial on the charge of first-degree reckless homicide, the State had to prove that the delivery of LSD was a “substantial factor” in Franceschetti’s death. *See* WIS JI—CRIMINAL 1021. To establish that the conduct was a “substantial factor,” the State must prove that

“the accused’s conduct was an antecedent ‘but for’ which the result in question would not have occurred.” However, this is not always enough. The state must further establish that “the harmful result in question be the natural and probable consequence of the accused’s conduct.”

State v. Bartlett, 149 Wis. 2d 557, 566, 439 N.W.2d 595 (Ct. App. 1989) (citation omitted).

¶10 We agree with the circuit court that the State did not meet its burden of proving that Franceschetti would not have died “but for” Dundon’s conduct. The State established that Dundon gave Franceschetti LSD. The State did not offer any evidence that Dundon gave her methadone. Dr. Long testified that it would be “hard to die” from LSD, but that it would likely result in a coma. He further testified that the amount of methadone in Franceschetti’s system “was consistent with resulting in a fatality.” Dr. Long also stated that it was a combination of the drugs that led to her death. The State, however, never asked him to explain how LSD led to Franceschetti’s death. Given Dr. Long’s testimony that LSD was not known to cause death and the level of methadone he found in her blood and urine was fatal, we conclude that the State did not offer sufficient evidence to establish that death was “the natural and probable consequence” of Dundon’s conduct when she gave Franceschetti the LSD.¹ Consequently, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

¹ Dundon also argues that the circuit court did not err when it found that the State had not proven that it had territorial jurisdiction over the offense. Because we conclude the evidence did not establish probable cause that LSD caused Franceschetti’s death, we do not need to address the jurisdiction issue.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

