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You are hereby notified that the Court has entered the following opinion and order:

2016AP1060-CR

State of Wisconsin v. John F. Dohm (L.C. # 2015CF2646)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

The State appeals the circuit court's order that dismissed the State's criminal complaint charging John Dohm with second-degree recklessly endangering safety. The State contends that the circuit court erred by dismissing the complaint following the preliminary hearing for lack of probable cause. Based upon our review of the briefs and record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We summarily reverse and remand for further proceedings.

The State charged Dohm with two counts of second-degree recklessly endangering safety based on an incident, on a “two-lane road out in the country,” in which Dohm’s car made contact with a bicyclist, causing the bicyclist to hit a companion bicyclist, causing both riders to fall off their bicycles. Dohm filed a motion to dismiss on the ground that the facts alleged in the complaint did not provide probable cause. The circuit court addressed the motion at the beginning of the preliminary hearing. The court denied the motion as to the first count, explaining why the complaint provided probable cause as to that count.²

As is common, the State relied on the criminal complaint to provide probable cause for purposes of the hearing. The State also presented brief testimony from an investigating officer. On cross-examination, defense counsel questioned the officer about a diagram of the traffic incident that a different investigating officer had prepared. The diagram, which was admitted into evidence, indicates that Dohm’s vehicle drove southbound and moved into the opposite lane of travel and back again while passing the two bicyclists. The diagram has arrows that represent the bicyclists, with one bicyclist riding very close to the center line at a point where Dohm’s car was still partially in the southbound lane, but moving further into the oncoming northbound lane. The diagram indicates that, just after Dohm’s car passed the bicyclists, the right-hand side of

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² The court dismissed as to Count 2, concluding that probable cause was lacking on that count but observing that this ruling did Dohm little good because the two counts were transactionally related. *See State v. White*, 2008 WI App 96, ¶11, 312 Wis. 2d 799, 754 N.W.2d 214 (if a defendant is properly bound over on one count, the State may include any transactionally related charges in the information).

Dohm's car was even with the center line of the road, that is, just to the left of the southbound lane that the bicyclists were riding in. In sum, viewed in a light most favorable to Dohm, the diagram could be interpreted as showing that the bicyclists were riding side by side in a manner that forced Dohm to pass them by driving fully into the oncoming northbound lane and that, when Dohm did pass, contact occurred near the center line while most of Dohm's car was in the northbound lane.

The prosecutor rested, and the defense again moved to dismiss. The court again denied the motion, indicating, with respect to probable cause, that not "much has changed since" the court earlier found probable cause.

The defense then attempted to call one of the bicyclists to the stand. The prosecutor objected, arguing that the court should require the defense to make an offer of proof as to the relevance of the proffered testimony and explain why it might undercut the plausibility of the evidence showing probable cause. The court, in an apparent reference to the diagram, stated that there was evidence in the record that indicated that Dohm's vehicle had moved into the opposite lane of travel to make the pass, and that the court would think that the prosecutor would want the court to hear one of the bicyclists say "whether this happened in the northbound lane or the southbound lane."

Addressing the prosecutor's objection to presenting testimony from the bicyclist, the court repeatedly asked the State whether it wanted the court to rule on the evidence before the court rather than allow further testimony. The prosecutor repeatedly failed to directly answer the court's question, instead repeatedly responding with argument indicating both that the diagram

did not undercut probable cause and the prosecutor's belief that the record was already sufficient to establish probable cause. The exchange ended with the following:

THE COURT: One more chance. Do you want me to rule on the evidence as it stands or do you want to hear from [the bicyclist]?

MR. O'CONNELL: Your Honor, my evidence is in.

THE COURT: Your case is dismissed. The evidence that's been put in shows the Dohm vehicle traveling south in the northbound lane of travel and there's no way you can call that reckless. Maybe [the bicyclist] could have cleared that up but you don't want to have him testify, so that's your record. The case is dismissed.

We review de novo whether the facts at a preliminary hearing establish probable cause. See *State v. Ploeckelman*, 2007 WI App 31, ¶21, 299 Wis. 2d 251, 729 N.W.2d 784. “Probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony.” *State v. Koch*, 175 Wis. 2d 684, 704, 499 N.W.2d 152 (1993). “The focus of the judge at a preliminary hearing is to ascertain whether the facts and the reasonable inferences drawn therefrom support the conclusion that the defendant probably committed a felony.” *State v. Anderson*, 2005 WI 54, ¶24, 280 Wis. 2d 104, 695 N.W.2d 731 (quoted source omitted). Accordingly, “A preliminary hearing is not a proper forum to choose between conflicting facts or inferences, or to weigh the state's evidence against evidence favorable to the defendant.” *Id.* (quoted source omitted).

The State contends that the evidence at the preliminary hearing established probable cause that Dohm committed a felony and that the circuit court erroneously ruled otherwise based on a conflicting version of the events. We agree. Indeed, the circuit court's decision to dismiss is puzzling because the court had earlier explained why the allegations in the criminal complaint

supplied probable cause and the court reaffirmed that conclusion even after the diagram was admitted into evidence. In effect, from an evidentiary standpoint, nothing changed between the time the circuit court concluded that there was probable cause and the time the court reached the opposite conclusion.

Regardless of the circuit court's reasoning, our review of the record shows that the following information in the complaint easily supplies probable cause.

The bicyclists, J.M. and M.A., were riding side by side southbound on the road when a black Jaguar approached behind them. The driver, later identified as Dohm, began honking his horn as he approached the bicyclists, and continued to honk as he passed them without making physical contact. As Dohm passed, J.M. waved his arms in what he described as a "What are you doing?" motion. Dohm, now ahead of the bicyclists, pulled over and exited his vehicle. Dohm said to J.M. and M.A., "Do you want to talk?" J.M. responded that he had Dohm's license plate and did not need to talk, and the two bicyclists continued riding.

Dohm got back in his car and again approached the bicyclists from behind while honking his horn. There were no other vehicles in either lane of traffic. M.A. was riding within a few inches of the fog line and J.M. was riding alongside M.A. "bar to bar," or about six inches to the left of M.A.'s handlebars. When Dohm's car approached this time, M.A. and J.M. moved slightly further right, with M.A. riding very close to or on the fog line. As J.M. attempted to move into a single-file position with M.A., the Jaguar made contact with J.M., causing J.M. to collide with M.A. and injuring both bicyclists. During all relevant times, the complaint indicates that there was no oncoming traffic.

A reasonable view of the facts above is that, although Dohm had plenty of room to pass safely, Dohm drove recklessly close to J.M. while J.M. was a couple of feet from the right-hand fog line.

The complaint also contains Dohm's conflicting version of the events. In essence, Dohm alleged that the bicyclists rode side by side, taking up the southbound lane and forcing Dohm to pass them by moving fully into the oncoming lane of traffic. Dohm alleged that the bicyclists "flipped him off" and called out "Fuck you" as he passed them the first time and that, when he passed the second time, contact occurred because J.M. moved closer to Dohm's car and made contact with it. Dohm provides more detail, but we do not dwell on Dohm's account because it simply provides a conflicting alternative that would, in turn, provide a factual conflict for a fact finder to resolve, should the case proceed to trial.

The diagram that the circuit court relied on to dismiss Count 1 also conflicts with the account in the complaint provided by the bicyclists. The most that can be said in Dohm's favor is that the diagram supports Dohm's version of the events and, thus, does nothing more than support a conflicting version. We further observe that the record does not show the source of the information that the diagram was based on. The diagram may be nothing more than an attempt by one of the investigating officers to put Dohm's version of the collision on a diagram.

On appeal, Dohm argues that the diagram was the only evidence as to the lane of travel at the time of the collision because the complaint did not set forth whether the collision occurred in the northbound or southbound lane. We disagree. If believed, the facts in the complaint provided by the bicyclists show that the collision occurred well within the southbound lane and that Dohm had ample room to pass safely, but instead passed recklessly close. For that matter,

even when viewed favorably to Dohm, the diagram does not indicate that the collision might have occurred in the northbound lane. Rather, the factual dispute raised by the diagram is *where in the southbound lane* the collision occurred, to the right or to the left in that lane. Because the probable cause inquiry does not allow us to resolve conflicts in the evidence, the diagram does not negate probable cause.

Dohm also argues that the State forfeited its “right to argue and challenge the circuit court’s determination that [the State’s] evidence was insufficient” to establish probable cause. Dohm argues that this forfeiture occurred when the State objected to the presentation of J.M.’s testimony at the preliminary hearing. This argument is based on a flawed premise. It assumes that the existing record at the time of the objection was insufficient to show probable cause. We have already explained that this premise is incorrect. Moreover, if the premise was correct, the objection would be irrelevant because, in that event, the State would lose on appeal based on a lack of probable cause.

Because we conclude that the State presented probable cause at the preliminary hearing as to Count 1 of the complaint, we reverse the circuit court’s order dismissing Count 1, and remand for further proceedings consistent with this opinion and order.

Therefore,

IT IS ORDERED that the order is summarily reversed and the cause remanded pursuant to WIS. STAT. RULE 809.21 for further proceedings consistent with this opinion and order.

Diane M. Fremgen
Clerk of Court of Appeals