IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	**Case No. S-2021-378**
v.	)	
	)	**FILED**
	)	IN COURT OF CRIMINAL APPEALS
EMILY SUZANNE AKERS,	)	STATE OF OKLAHOMA
	)	JAN 27 2022
Appellee.	)	
	)	JOHN D. HADDEN
	)	CLERK

SUMMARY OPINION

HUDSON, VICE PRESIDING JUDGE:

The State of Oklahoma, Appellant, appeals to this Court from an order entered by the reviewing judge, the Honorable Gerald Neuwirth, District Judge, affirming a ruling by the Magistrate, the Honorable Grant Sheperd, Special Judge, which sustained the defendant's demurrer to the evidence in Comanche County District Court Case No. CF-2020-130. *See* 22 O.S.2011, §§ 1089.1–1089.7; Rule 6.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022).

STATEMENT OF THE CASE

Appellee, Emily Suzanne Akers, was charged with First Degree Manslaughter, in violation of 21 O.S.2011, § 711. The State alleged that Appellee caused the death of her unborn child while she was engaged in the misdemeanor of knowingly and intentionally possessing and consuming methamphetamine, amphetamines and cannabinoids. At the preliminary hearing, Judge Sheperd sustained Appellee's demurrer to the evidence. The State announced its intent to appeal from Judge Sheperd's adverse ruling and the matter was assigned to Judge Neuwirth. *See* 22 O.S.2011, § 1089.2(C). Following a hearing on April 20, 2021, Judge Neuwirth affirmed Judge Sheperd's ruling. The State brought this appeal and raises the following propositions of error before this Court:

I. THE STATE PROVIDED SUFFICIENT EVIDENCE AT PRELIMINARY HEARING FOR THE TRIAL COURT TO FIND PROBABLE CAUSE APPELLEE COMMITTED THE MISDEMEANOR CRIME OF POSSESSION OF CONTROLLED DANGEROUS SUBSTANCE (METHAMPHETAMINE);

II. THE TRIAL COURT ERRED BY FAILING TO FIND PROBABLE CAUSE OF A CAUSAL RELATION BETWEEN APPELLEE'S USE, AND THEREFORE, POSSESSION OF METHAMPHETAMINE DURING PREGNANCY

AND THE DEATH OF [HER SON] AT 20 WEEKS GESTATION; AND

III. THE TRIAL COURT ERRED BY FAILING TO CONSIDER ALL OF THE EVIDENCE PRESENTED AT THE PRELIMINARY HEARING ON MARCH 18, 2021, AND THE MEDICAL EXAMINER'S ENTIRE REPORT IN DETERMINING WHETHER THERE WAS PROBABLE CAUSE APPELLEE COMMITTED FIRST DEGREE MANSLAUGHTER WHILE IN THE COMMISSION OF A MISDEMEANOR IN VIOLATION OF 21 O.S. § 711(1).

Pursuant to Rule 11.2(A)(4), *Rules of the Oklahoma Court of Criminal* Appeals, Title 22, Ch.18, App. (2022), this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions were presented to this Court in oral argument on December 2, 2021, pursuant to Rule 11.2(E). At the conclusion of oral argument, this Court took the matter under advisement.

After thorough consideration of the argument of counsel and the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we **AFFIRM** the order of the District Court of Comanche County sustaining Appellee's demurrer to the evidence on the charge of First Degree Manslaughter. However, for the reasons discussed below, we **REMAND** the matter

to the Magistrate for further proceedings in compliance with 21 O.S.2011, § 264.

SUMMARY OF FACTS

The appeal record shows that on June 9, 2019, Appellee delivered a stillborn baby boy at the Comanche County Memorial Hospital. Appellee was approximately 20 weeks pregnant and high on methamphetamine when she arrived at the hospital in labor. Subsequent toxicology testing revealed the presence of methamphetamine and amphetamine in the stillborn baby's liver and brain. The Medical Examiner determined the probable cause of death was "intrauterine fetal demise at 20 weeks gestation" due to "placental abruption and chorioamnionitis." The autopsy further listed "maternal methamphetamine and tobacco use" as "other significant contributing factors." The medical examiner listed the manner of death as "Not Assigned."

At the conclusion of the preliminary hearing, Appellee demurred to the evidence asserting the State had not remotely met its probable cause burden of showing that Appellee's methamphetamine use caused the death of her stillborn son. As to methamphetamine being listed as a significant contributing factor, Appellee argued "a

contributing factor is not the proximate cause and on top of that . . . [the medical examiner's report] says the other significant conditions contribut[ing] to death [did] not result[ ] in the underlying cause given." In sustaining Appellee's demurrer, Judge Sheperd referenced the manslaughter statute (21 O.S.2011, § 711) and found that the medical examiner's report does not in any way show that the child's death resulted from Appellee's methamphetamine use. On appeal to the reviewing district court judge, Judge Neuwirth affirmed Judge Sheperd's decision finding the "plain language of the autopsy" stated methamphetamine use was not the cause of the baby's death.

ANALYSIS

At center of each of the State's propositions is the issue of whether the State presented sufficient evidence at preliminary hearing to show that a crime was committed. *See* 22 O.S.2011, § 258(8) ("The purpose of the preliminary hearing is to establish probable cause that a crime was committed and probable cause that the defendant committed the crime."). *See also State v. Bradley*, 2018 OK CR 34, ¶ 12, 434 P.3d 5, 9; *State v. Vincent*, 2016 OK CR 7, ¶ 5, 371 P.3d 1127, 1129. "The standard of review to be used by the reviewing District Court Judge in a State appeal from an adverse

ruling of the preliminary hearing magistrate is 'whether the evidence, taken in the light most favorable to the state, is sufficient to find that a felony crime has been committed and that the defendant probably committed said crime.'" *Bradley*, 2018 OK CR 34, ¶ 12, 434 P.3d at 9 (quoting 22 O.S.2011, § 1089.5). As this Court reiterated in *Bradley*:

> When considering whether or not a crime has been committed, the State is required to prove each of the elements of the crime. . . . The magistrate must consider the proof established by the State in light of the statutory elements of the given offense. If the elements of the crime are not proven, then the fact of the commission of a crime cannot be said to have been established. A defendant cannot be held to answer for actions which do not amount to a crime as defined by our statutes.

Id., 2018 OK CR 34, ¶ 12, 434 P.3d at 9-10 (quoting *State v. Berry*, 1990 OK CR 73, ¶ 9, 799 P.2d 1131, 1133).

Absent an abuse of discretion, this Court will not disturb the reviewing District Court Judge's determination of whether a crime has been committed. *Id.*, 2018 OK CR 34, ¶ 12, 434 P.3d at 10; *Vincent*, 2016 OK CR 7, ¶ 5, 371 P.3d at 1129. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented

or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. From the limited facts presented in this case, we cannot say that the district court abused its discretion in sustaining Appellee's demur to the charged offense.

The record, however, is devoid of any evidence that the Magistrate or reviewing District Court Judge examined the evidence presented at preliminary hearing to determine whether the crime of Child Neglect was committed in this case. *See* 21 O.S.2011, § 264 (providing that when it appears from the evidence presented at a preliminary hearing that any public offense has been committed, the magistrate must order that the offense be endorsed on the Information). Notably, Appellee's preliminary hearing was held a few months after our decision in *State v. Green*, 2020 OK CR 18, 474 P.3d 886 (holding an unborn child constitutes a "child" and is protected under Oklahoma's child neglect statute). In reaching our decision in *Green*, this Court thoroughly reviewed multiple pertinent Oklahoma statutes, including 21 O.S.2011, § 691, which defines the phrase "human being" to include an "unborn child," as defined in 63

O.S.Supp.2009, § 1-730(4), which in turn defines "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus[.]" *Id.* at ¶ 13, 474 P.3d at 891. Further, Appellee's district court appeal hearing was held on the same day we decided *State v. Allen*, 2021 OK CR 14, 492 P.3d 27 (reaffirming *Green* and applying it to a new factual context).

In light of the timing of our decisions in *Green* and *Allen*, we remand this matter to the Magistrate for further proceedings in compliance with 21 O.S.2011, § 264 to consider whether Appellee should be boundover on the charge of Child Neglect.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**, except the matter is **REMANDED** to the District Court for consideration of whether Appellee should be boundover on the charge of Child Neglect. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF COMANCHE COUNTY
THE HONORABLE GERALD NEUWIRTH, DISTRICT JUDGE

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OPINION BY: HUDSON, V.P.J.
ROWLAND, P.J.: CONCUR IN PART/DISSENT IN PART
LUMPKIN, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT

ROWLAND, P.J. CONCURRING IN PART/DISSENTING IN PART:

I agree that the district court did not abuse its discretion in upholding the dismissal of the manslaughter charge against Akers due to insufficient evidence. I respectfully dissent, however, to remanding this case for the magistrate to reevaluate the evidence to consider binding Akers over on a felony charge of child neglect.

Six months before this preliminary hearing was held, this Court held in *State v. Green,* 2020 OK CR 18, ¶ 19, 474 P.3d 886, 893 that exposing an unborn child to methamphetamine causing death could be prosecuted as child neglect under 21 O.S.Supp.2014, § 843.5. Unlike in *Green,* however, the State in this case neither charged Akers with child neglect nor argued the existence of evidentiary support for that offense at the preliminary hearing. And, child neglect has never been raised or mentioned in any of the pleadings.

It is true that 22 O.S.2011, § 264 requires a defendant be bound over for any charge supported by the evidence, but this Court has never interpreted that section to require the preliminary hearing magistrate to search the law books to make sure the district attorney has not inadvertently or otherwise failed to file some supported charge. To direct the district court to revisit the case with an eye

toward charging it differently than elected by the prosecution, when there has been no intervening change in the law or facts, seems to me an improvident incursion into the discretion of the district attorney that could invite future mischief we have not considered.

It is also a departure from this Court's role, which is to decide the issue(s) raised and briefed by the parties. In this case, that issue is whether sufficient evidence was presented at the preliminary hearing to support the charge of manslaughter in the first degree. Appellate courts generally rely upon what is known as the party presentation principle. "That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States,* 554 U.S. 237, 243 (2008). Departures from the party presentation principle in criminal cases has been approved by some courts, but most often to protect a *pro se* litigant's rights. *Id.,* 544 U.S. at 244. The Supreme Court explained in *United States v. Sineneng-Smith,* 140 S. Ct. 1575, 1579 (2020):

> In short: "[C]ourts are essentially passive instruments of government." They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties."

(citations omitted). *See also Castro v. United States,* 540 U.S. 375, 386 (2003)("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.")(Scalia, J., concurring in part and concurring in judgement).

It may be that the State could still file and prosecute a charge of child neglect against Akers, but it may also be that the defense could successfully thwart that prosecution. *See Jones v. State,* 1971 OK CR 27, ¶¶ 5-6, 481 P.2d 169, 171–72, *modified by State ex rel. Fallis v. Caldwell,* 1972 OK CR 158, 498 P.2d 426 (holding when a magistrate at a preliminary hearing rules the evidence insufficient to hold the defendant for trial, neither the magistrate nor any other magistrate should entertain another filing against the same defendant for the same offense unless the State makes an offer of additional evidence or proves other good cause to justify another preliminary examination); *Reeves v. State,* 1991 OK CR 101, ¶¶ 26-27, 818 P.2d 495, 500-01 (citing *Jones* rule with approval, but finding case on review factually distinguishable). I offer no opinion on the State's ability to maintain a charge of child neglect against Akers at this time because that issue is not properly before me. Deciding

whether the State could refile the case violates the party presentation principle, instead of waiting for the case to come to us in the normal course of the exercise of prosecutorial discretion in criminal charging. Bypassing that procedure would give the prosecution a second bite at the apple without refiling a case and depriving the defense of its ability to mount such a challenge.

In my view, a better display of our judicial restraint may be found in *State v. Smith*, 1980 OK CR 67, 617 P.2d 232, wherein we affirmed the dismissal of a charge of larceny of domestic animals:

> It should be noted at this point that the magistrate can order an accused held for trial on a charge different from the one in the information, but which the facts warrant. *Webster v. District Court of Oklahoma County*, Okl.Cr., 473 P.2d 277 (1970). There is a strong possibility that the evidence presented at the preliminary hearing might have been adequate to bind the appellee over on a charge of receiving stolen property, in violation of 21 O.S.1971, s 1713. But the evidence was not sufficient to justify holding the appellee for trial on a charge of larceny.

Id., 1980 OK CR 67, ¶ 6, 617 P.2d at 234.

Smith's approach is sound and dictates addressing only the correctness of the ruling appealed as presented by the parties. Even if we suggest the preliminary hearing evidence might support a charge of child neglect, the wise course is to leave the filing and

resolution of that charge to the normal machinery of the system and decide only the issue before us.