STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2001
v	No. 214695 Wayne Circuit Court
DIMAS GARZA, Defendant-Appellant.	Criminal Division LC No. 97-010243

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529; MSA 28.797, for which he was sentenced to concurrent terms of life imprisonment for one count and twenty-five to fifty years' imprisonment for the second count. He appeals as of right. We affirm defendant's convictions, but modify the judgment of sentence to remove the term "natural" in reference to the sentence of life imprisonment, and the premature recommendation for no parole.

Defendant argues that the trial court erred by denying his pretrial motion to quash the information, which charged defendant with additional counts of first-degree felony murder and assault with intent to commit murder. The court ultimately dismissed both of those charges at trial, after the prosecution presented its proofs. We conclude that any error does not merit reversal.

In reviewing a magistrate's decision to bind a defendant over for trial, a circuit court must consider the entire record of the preliminary examination. It may not substitute its judgment for that of the magistrate and may reverse only if it appears on the record that the magistrate abused his discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). This Court likewise reviews the circuit court's decision de novo to determine whether the magistrate abused his discretion. *Id.*

If, at the conclusion of the preliminary hearing, it appears to the magistrate that there is probable cause to believe that a felony has been committed and that the defendant committed it, the magistrate must bind the defendant over for trial. MCL 766.13; MSA 28.931; MCR 6.110(E); *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). Probable cause that the defendant has committed the crime is established by evidence sufficient to cause a person of

ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997).

We conclude that the magistrate did not err in binding defendant over for trial on the charge of first-degree felony murder. The elements of felony murder are: (1) the killing of a human being, (2) malice, and (3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in the statute, among them armed robbery. *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999); *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). To establish guilt under an aiding and abetting theory, the prosecution must proffer evidence that: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Carines, supra* at 768; *Turner, supra* at 568.

The evidence presented at the preliminary examination was sufficient to support the bindover decision with respect to the felony murder charge. *Justice*, *supra* at 344. Defendant's statement to the police supports a finding that defendant not only planned the robbery, but also knew, at some point, that his codefendants were armed. Defendant's knowledge, or at least opinion, that the decedent's occupation was that of a drug dealer also supports an inference that defendant knew the decedent might be armed and that there was a good chance that violence might result from the robbery. Based on this knowledge, a reasonable person could conclude that defendant intentionally set in motion a force likely to cause death or great bodily harm. *Turner, supra* at 567, 572-573. Under the circumstances, the magistrate properly left the question of malice for resolution by the trier of fact. See *Goecke*, *supra* at 469-470. Thus, the trial court properly denied defendant's motion to quash with respect to the felony murder charge.

However, we conclude that the trial court erred in denying the motion to quash with respect to the charge of assault with intent to commit murder. As explained in *Warren v Smith*, 161 F3d 358, 361-362 (CA 6, 1998), the same evidence which gives rise to a conviction for felony murder of one who aids and abets may not be enough to support a conviction for assault with intent to commit murder:

> In Michigan, the crime of assault with intent to commit murder requires proof of three elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." The second element, the intent to kill, does not equate with murder. Thus, an intent to kill for purposes of this offense may not be proven by an intent to inflict great bodily harm or a wanton and willful disregard of the likelihood that the natural tendency of the acts will likely cause death or great bodily harm. The specific intent to kill "may be proven by inference from any facts in evidence." In determining intent, we may take into consideration the nature of the defendant's acts constituting the assault, the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other

> circumstances calculated to throw light upon the intention with which the assault was made.
>
> Where the state seeks to convict an aider and abettor of the substantive offense of assault with intent to commit murder, the prosecution must establish that the aider and abettor "himself possess[ed] the required intent or participate[d] while knowing that the principal possessed the required intent." The aider and abettor's "specific intent or his knowledge of the principal's specific intent may be inferred from circumstantial evidence." [Footnotes and citations omitted; brackets in original.]

It is this second element of intent that is at issue here. In order to properly bind defendant over on the charge of assault with intent to murder, the magistrate should have found that the prosecution had presented enough evidence to show that defendant either possessed a specific intent to kill or that he was aware of his codefendants' intent to kill. We conclude that the evidence presented at the preliminary examination does not support a finding that defendant possessed such an intent. We therefore conclude that the magistrate abused her discretion in binding defendant over on the charge of assault with intent to commit murder.

Nonetheless, we disagree with defendant that he was unfairly prejudiced by the consideration of this charge at trial. Because the assault with intent to commit murder charge was dismissed at trial, after the prosecution rested its case, the jury was not presented with a charge unsupported by the evidence. Further, the record does not support the conclusion that it is more probable than not that the jury would have acquitted defendant of the two armed robbery counts had it been unaware of defendant's charge of assault with intent to commit murder. Under the circumstances, therefore, we conclude that the error was harmless. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999); *People v Graves*, 458 Mich 476, 483; 581 NW2d 229 (1998).

In light of the foregoing rationale, defendant's ineffective assistance claim must also fail~~,~~ because defendant is unable to show prejudice resulting from trial counsel's failure to pursue a dismissal of the felony murder and assault with intent to murder charges at the preliminary examination. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Finally, considering the circumstances of the robbery~~,~~ and defendant's prior criminal record, we conclude that defendant's life sentence for armed robbery does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Contrary to defendant's argument, the trial court did not impose a nonparolable life sentence for the armed robbery conviction. Nonetheless, to avoid any possible confusion, we order that the term "natural" in reference to the life sentence be stricken. The trial court's objection to defendant being paroled upon becoming eligible for parole is premature under MCL 791.234(6); MSA 28.2304(6). However, because this error implicates only defendant's future eligibility for parole, not the validity of the life sentence itself, we conclude that the appropriate remedy is to simply eliminate the premature objection by striking it from the judgment of sentence, which we so order. MCR 7.216(A)(1). Defendant's convictions and sentences are affirmed in all other respects.

Affirmed as modified and remanded to the trial court for preparation of an amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald