

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ERIC LEE FELLOWS,

Defendant-Appellee.

UNPUBLISHED

June 3, 1997

No. 193643

Genesee Circuit Court

LC No. 95-053252-FC

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Defendant was charged with open murder, MCL 750.316; MSA 28.548, for his involvement in the killing of Joseph Carpenter. Following a three-day preliminary examination, the magistrate bound over defendant and two co-defendants, Harold Cannoy, Jr. and Mark Adam Smith, to circuit court on first-degree murder charges. The prosecution filed an information charging defendant with first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). Subsequently, defendant filed a motion to quash the information in circuit court arguing that probable cause had not been established at the preliminary examination. The circuit court granted defendant's motion to quash, finding that the evidence adduced at the preliminary examination did not support a finding of probable cause and, therefore, the district court's bind over decision was an abuse of discretion. The prosecution appeals as of right. We reverse and remand.

When the issue is whether there was sufficient evidence to bind over a defendant to trial, this Court reviews the decision of the circuit court de novo by reevaluating the district court's bind over decision. The decision of the district court will be upheld absent an abuse of discretion. *People v Kieronski*, 214 Mich App 222, 228; 542 NW2d 339 (1995). We will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Sawyer*, ___ Mich App ___; ___ NW2d ___ (Docket No. 159960, rel'd 2/25/97) slip opinion at 2.

If evidence is presented at the preliminary examination that a crime has been committed and there is probable cause to believe that the defendant was the perpetrator, the magistrate must

bind the defendant over for trial. *People v Tower*, 215 Mich App 318, 319-320; 544 NW2d 752 (1996). The magistrate's role is not that of the ultimate fact finder. *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996). Therefore, if there is conflicting evidence which raises a reasonable doubt regarding defendant's guilt, the magistrate should bind the defendant over for trial so that a jury can resolve the issues. *Id.*

In this case, defendant was charged with first-degree murder under an aiding and abetting theory. The crime of first-degree murder requires the prosecution to prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). In order to establish that a defendant is guilty of a crime under the aiding and abetting theory, the prosecution must prove the following elements:

(1) the charged crime was either committed by the defendant or some other person, (2) the defendant gave encouragement or performed acts that aided and 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 of giving aid and encouragement. [*People v Partridge*, 211 Mich App 239, 240; 535 NW2d 231 (1995).]

At issue in this case is defendant's intent. In order to be considered an aider and abettor, a defendant must either possess the requisite specific intent requirement for the underlying crime or know that the principal has the requisite intent. *People v King*, 210 Mich App 425, 429; 534 NW2d 534 (1995).

We find that there was sufficient evidence presented at the preliminary examination to establish probable cause that defendant assisted in the murder with knowledge of the principal's intent to kill. The district court admitted a formal statement defendant made to the Flint Police Department into evidence at the preliminary examination. This statement indicated that Cannoy had informed defendant two days prior to the murder that he wanted to kill Carpenter. Furthermore, while they were at a party together on the evening of the murder, Cannoy told defendant that they would kill Carpenter that night and informed defendant that he had hidden a gun near the river to carry out the plan. Later that night, defendant, Cannoy, Smith, and Carpenter left the party together and eventually reached the field where Cannoy had hidden the gun. Defendant was carrying a knife with him. Cannoy retrieved the gun and gave it to Smith, who shot Carpenter several times. Immediately after the shooting, Cannoy asked defendant to give him the knife. Defendant complied. Cannoy then gave the knife to Smith and instructed Smith to "finish him." Smith stabbed Carpenter several times. We find that it was not an abuse of discretion for the magistrate to bind defendant over because it can be inferred that defendant knew the knife would be used in the murder from this evidence. *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996). Accordingly, the circuit court erred by reversing the magistrate's bind over decision.¹

Reversed and remanded for reinstatement of the charges. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ Roman S. Gibbs

¹ We note that both the magistrate and the circuit court suggested that the evidence supported a defense of duress. However, duress is not a valid defense to homicide. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996).