Preliminary Examinations

Michigan Court Rule Provisions

treasury of the appropriate municipal government for a municipal court case. The balance of the judgment may be enforced and collected as a judgment entered in a civil case.

(3) If money was deposited on a bail or bond executed by the defendant, the money must be first applied to the amount of any fine, costs, or statutory assessments imposed and any balance returned, subject to subrule (I)(1).

Rule 6.107 Grand Jury Proceedings

(A) Right to Grand Jury Records. Whenever an indictment is returned by a grand jury or a grand juror, the person accused in the indictment is entitled to the part of the record, including a transcript of the part of the testimony of all witnesses appearing before the grand jury or grand juror, that touches on the guilt or innocence of the accused of the charge contained in the indictment.

(B) Procedure to Obtain Records.

(1) To obtain the part of the record and transcripts specified in subrule (A), a motion must be addressed to the chief judge of the circuit court in the county in which the grand jury issuing the indictment was convened.

(2) The motion must be filed within 14 days after arraignment on the indictment or at a reasonable time thereafter as the court may permit on a showing of good cause and a finding that the interests of justice will be served.

(3) On receipt of the motion, the chief judge shall order the entire record and transcript of testimony taken before the grand jury to be delivered to the chief judge by the person having custody of it for an in-camera inspection by the chief judge.

(4) Following the in-camera inspection, the chief judge shall certify the parts of the record, including the testimony of all grand jury witnesses that touches on the guilt or innocence of the accused, as being all of the evidence bearing on that issue contained in the record, and have two copies of it prepared, one to be delivered to the attorney for the accused, or to the accused if not represented by an attorney, and one to the attorney charged with the responsibility for prosecuting the indictment.

(5) The chief judge shall then have the record and transcript of all testimony of grand jury witnesses returned to the person from whom it was received for disposition according to law.

Rule 6.108 The Probable Cause Conference

(A) Right to a probable Cause Conference. The state and the defendant are entitled to a probable cause conference, unless waived by both parties. If the probable cause conference is waived, the parties shall provide written notice to the court and indicate whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea.

(B) A district court magistrate may conduct probable cause conferences when authorized to do so by the chief district judge and may conduct all matters allowed at the probable cause conference, except taking pleas and imposing sentences unless permitted by statute to take pleas or impose sentences.

(C) The probable cause conference shall include discussions regarding a possible plea agreement and other pretrial matters, including bail and bond modification.

(D) The district court judge must be available during the probable cause conference to take pleas, consider requests for modification of bond, and if requested by the prosecutor, take the testimony of a victim.

(E) The probable cause conference for codefendants who are arraigned at least 72 hours before the probable cause conference shall be consolidated and only one joint probable cause conference shall be held unless the prosecuting attorney consents to the severance, a defendant seeks severance by motion and it is granted, or one of the defendants is unavailable and does not appear at the hearing.

Rule 6.110 The Preliminary Examination

(A) Right to Preliminary Examination. Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. The defendant may waive the preliminary examination with the consent of the prosecuting attorney. Upon waiver of the preliminary examination, the court must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint. The preliminary examination for codefendants shall be consolidated and only one joint preliminary examination shall be held unless the prosecuting attorney consents to the severance, a defendant seeks severance by motion and it is granted, or one of the defendants is unavailable and does not appear at the hearing.

(B) Time of Examination; Remedy.

(1) Unless adjourned by the court, the preliminary examination must be held on the date specified by the court at the arraignment on the warrant or complaint. If the parties consent, for good cause shown, the court may adjourn the preliminary examination for a reasonable time. If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment. A violation of this subrule is deemed to be harmless error unless the defendant demonstrates actual prejudice.

(2) Upon the request of the prosecuting attorney, the preliminary examination shall commence immediately at the date and time set for the probable cause conference for the sole purpose of taking and preserving the testimony of the victim, if the victim is present, as long as the defendant is either present in the courtroom or has waived the right to be present. If victim testimony is taken as provided under this rule, the preliminary examination will be continued at the date originally set for that event.

(C) Conduct of Examination. A verbatim record must be made of the preliminary examination. Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. The court must conduct the examination in accordance with the Michigan Rules of Evidence.

(D) Exclusionary Rules.

(1) The court shall allow the prosecutor and defendant to subpoena and call witnesses from whom hearsay testimony was introduced on a satisfactory showing that live testimony will be relevant.

(2) If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of

(a) a prior evidentiary hearing, or

(b) a prior evidentiary hearing supplemented with a hearing before the trial court, or

(c) if there was no prior evidentiary hearing, a new evidentiary hearing.

(E) Probable Cause Finding. If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial. If the court finds probable cause to believe that the defendant has committed an offense cognizable by the district court, it must proceed thereafter as if the defendant initially had been charged with that offense.

(F) Discharge of Defendant. No Finding of Probable Cause. If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony. Except as provided in MCR 8.111(C), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge.

(G) Return of Examination. Immediately on concluding the examination, the court must certify and transmit to the court before which the defendant is bound to appear the prosecutor's authorization for a warrant application, the complaint, a copy of the register of actions, the examination return, and any recognizances received.

(H) Motion to Dismiss. If, on proper motion, the trial court finds a violation of subrule (C), (D), (E), or (F), it must either dismiss the information or remand the case to the district court for further proceedings.

(I) Scheduling the Arraignment. Unless the trial court does the scheduling of the arraignment on the information, the district court must do so in accordance with the administrative orders of the trial court.

Rule 6.111 Circuit Court Arraignment in District Court

(A) The circuit court arraignment may be conducted by a district judge in criminal cases cognizable in the circuit court immediately after the bindover of the defendant. A district court judge shall take a felony plea as provided by court rule if a plea agreement is reached between the parties. Following a plea, the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing. The circuit court judge's name shall be available to the litigants before the plea is taken.

(B) Arraignments conducted pursuant to this rule shall be conducted in conformity with MCR 6.113.

(C) Pleas taken pursuant to this rule shall be taken in conformity with MCR 6.301, 6.302, 6.303, and 6.304, as applicable, and, once taken, shall be governed by MCR 6.310.

Rule 6.112 The Information or Indictment

(A) Informations and Indictments; Similar Treatment. Except as otherwise provided in these rules or elsewhere, the law and rules that apply to informations and prosecutions on informations apply to indictments and prosecutions on indictments.

(B) Use of Information or Indictment. A prosecution must be based on an information or an indictment. Unless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives a preliminary examination. An indictment is returned and filed without a preliminary examination. When this occurs, the indictment shall commence judicial proceedings.

(C) Time of Filing Information or Indictment. The prosecutor must file the information or indictment on or before the date set for the arraignment.

(D) Information; Nature and Contents; Attachments. The information must set forth the substance of the accusation against the defendant and the name, statutory citation, and penalty of the offense allegedly committed. If applicable, the information must also set forth the notice required by MCL 767.45, and the defendant's Michigan driver's license number. To the extent possible, the information should specify the time and place of the alleged offense. Allegations relating to conduct, the method of committing the offense, mental state, and the consequences of conduct may be stated in the alternative. A list of all witnesses known to the prosecutor who may be called at trial and all res gestae witnesses known to the prosecutor or investigating law enforcement officers must be attached to the information. A prosecutor must sign the information.

(E) Bill of Particulars. The court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense.

Preliminary Examinations

Michigan Statutory Provisions

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.1 Right of state and defendant to prompt examination and determination; authority of district court magistrate.

Sec. 1. The state and the defendant are entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is the duty of all courts and public officers having duties to perform in connection with an examination, to bring it to a final determination without delay except as necessary to secure to the defendant a fair and impartial examination. A district court magistrate appointed under chapter 85 of the revised judicature act of 1961, 1961 PA 236, MCL 600.8501 to 600.8551, shall not preside at a preliminary examination or accept a plea of guilty or nolo contendere to an offense or impose a sentence except as otherwise authorized by section 8511(a), (b), or (c) of the revised judicature act of 1961, 1961 PA 236, MCL 600.8511.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17193;—CL 1948, 766.1;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Constitutionality: There is no federal constitutional right to a preliminary examination or hearing in a criminal prosecution. The procedure is left to the states. In Michigan, the right is statutory. People v Johnson, 427 Mich 98; 398 NW2d 219 (1986).

Compiler's note: Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.4 Probable cause conference and preliminary examination; dates; scope; waiver; acceptance of plea agreement; scheduling and commencement of preliminary examination; testimony of victim; definition; codefendants; examination by magistrate.

Sec. 4. (1) Except as provided in section 4 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.4, the magistrate before whom any person is arraigned on a charge of having committed a felony shall set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, and a date for a preliminary examination of not less than 5 days or more than 7 days after the date of the probable cause conference. The dates for the probable cause conference and preliminary examination shall be set at the time of arraignment. The probable cause conference shall include the following:

(a) Discussions as to a possible plea agreement among the prosecuting attorney, the defendant, and the attorney for the defendant.

(b) Discussions regarding bail and the opportunity for the defendant to petition the magistrate for a bond modification.

(c) Discussions regarding stipulations and procedural aspects of the case.

(d) Discussions regarding any other matters relevant to the case as agreed upon by both parties.

(2) The probable cause conference may be waived by agreement between the prosecuting attorney and the attorney for the defendant. The parties shall notify the court of the waiver agreement and whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea.

(3) A district judge has the authority to accept a felony plea. A district judge shall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. Sentencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken.

(4) If a plea agreement is not reached and if the preliminary examination is not waived by the defendant with the consent of the prosecuting attorney, a preliminary examination shall be held as scheduled unless adjourned or waived under section 7 of this chapter. The parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference. Upon the request of the prosecuting attorney, however, the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. For purposes of this subdivision, "victim" means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. If that testimony is insufficient to establish probable cause to believe that the defendant committed the charged crime or crimes, the magistrate shall adjourn the preliminary examination to the date set at arraignment. A victim who testifies under this subdivision shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause.

(5) If 1 or more defendants have been charged on complaints listing codefendants with a felony or felonies, the probable cause conference and preliminary examination for those defendants who have been arrested and arraigned at least 72 hours before that conference on those charges shall be consolidated, and only 1 joint conference or 1 joint preliminary examination shall be held unless the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the magistrate finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing.

(6) At the preliminary examination, a magistrate shall examine the complainant and the witnesses in support of the prosecution, on oath and, except as provided in sections 11a and 11b of this chapter, in the presence of the defendant, concerning the offense charged and in regard to any other matters connected with the charge that the magistrate considers pertinent.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17196;—CL 1948, 766.4;—Am. 1970, Act 213, Imd. Eff. Oct. 4, 1970;—Am. 1974, Act 63, Eff. May 1, 1974;—Am. 1988, Act 64, Eff. Oct. 1, 1988;—Am. 1993, Act 287, Eff. Mar. 1, 1994;—Am. 1994, Act 167, Eff. Oct. 1, 1994;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Section 2 of Act 63 of 1974 provides:

"Effective date.

"Section 2. To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Section 3 of Act 64 of 1988 provides: "This amendatory act shall take effect June 1, 1988." This section was amended by Act 175 of 1988 to read as follows: "This amendatory act shall take effect October 1, 1988."

Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

Former law: See section 13 of Ch. 163 of R.S. 1846, being CL 1857, § 5989; CL 1871, § 7855; How., § 9466; CL 1897, § 11850; and CL 1915, § 15677.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.7 Adjournment, continuance, or delay of preliminary examination.

Sec. 7. A magistrate may adjourn a preliminary examination for a felony to a place in the county as the magistrate determines is necessary. The defendant may in the meantime be committed either to the county jail or to the custody of the officer by whom he or she was arrested or to any other officer; or, unless the defendant is charged with treason or murder, the defendant may be admitted to bail. The defendant may waive the preliminary examination with the consent of the prosecuting attorney. An adjournment, continuance, or delay of a preliminary examination may be granted by a magistrate without the consent of the defendant or the prosecuting attorney for good cause shown. A magistrate may adjourn, continue, or delay the examination of any cause with the consent of the defendant and prosecuting attorney. An action on the part of the magistrate in adjourning or continuing any case does not cause the magistrate to lose jurisdiction of the case.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17199;—CL 1948, 766.7;—Am. 1974, Act 63, Eff. May 1, 1974;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Section 2 of Act 63 of 1974 provides:

"Effective date.

"Section 2. To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

Former law: See section 10 of Ch. 163 of R.S. 1846, being CL 1857, § 5986; CL 1871, § 7852; How., § 9463; CL 1897, § 11847; and CL 1915, § 15674.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.9 Closure of preliminary examination.

Sec. 9. (1) Upon the motion of any party, the examining magistrate may close to members of the general public the preliminary examination of a person charged with criminal sexual conduct in any degree, assault with intent to commit criminal sexual conduct, sodomy, gross indecency, or any other offense involving sexual misconduct if all of the following conditions are met:

(a) The magistrate determines that the need for protection of a victim, a witness, or the defendant outweighs the public's right of access to the examination.

(b) The denial of access to the examination is narrowly tailored to accommodate the interest being protected.

(c) The magistrate states on the record the specific reasons for his or her decision to close the examination to members of the general public.

(2) In determining whether closure of the preliminary examination is necessary to protect a victim or witness, the magistrate shall consider all of the following:

(a) The psychological condition of the victim or witness.

(b) The nature of the offense charged against the defendant.

(c) The desire of the victim or witness to have the examination closed to the public.

(3) The magistrate may close a preliminary examination to protect the right of a party to a fair trial only if both of the following apply:

(a) There is a substantial probability that the party's right to a fair trial will be prejudiced by publicity that closure would prevent.

(b) Reasonable alternatives to closure cannot adequately protect the party's right to a fair trial.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17201;—CL 1948, 766.9;—Am. 1988, Act 106, Eff. June 1, 1988.

Former law: See Act 138 of 1895, being CL 1897, § 11873; and CL 1915, § 15700.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.10 Exclusion of persons from examination; witness not examined, minor; separation of witnesses.

Sec. 10. The magistrate while conducting such examination may exclude from the place of the examination all the witnesses who have not been examined; and he may also, if requested or if he sees cause, direct the witnesses whether for or against the prisoner, to be kept separate so that they cannot converse with each other until they shall have been examined. And such magistrate may in his discretion, also exclude from the place of examination any or all minors during the examination of such witnesses.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17202;—CL 1948, 766.10.

Former law: See section 15 of Ch. 163 of R.S. 1846, being CL 1857, § 5991; CL 1871, § 7857; How., § 9468; CL 1897, § 11852; CL 1915, § 15679; and Act 178 of 1885.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.11 Subpoena of witnesses; taking down evidence in shorthand; appointment, oath, and fees of stenographer; signing of testimony not required; testimony to be typewritten, certified, received, and filed; testimony as prima facie evidence.

Sec. 11. (1) Witnesses may be compelled to appear before the magistrate by subpoenas issued by the magistrate, or by an officer of the court authorized to issue subpoenas, in the same manner and with the same effect and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials in the circuit court.

(2) Unless otherwise provided by law, the evidence given by the witnesses examined in a municipal court shall be taken down in shorthand by a county stenographer where one has been appointed under the provision of a local act of the legislature or by the county board of commissioners of the county in which the examination is held, or the magistrate for cause shown may appoint some other suitable stenographer at the request of the prosecuting attorney of the county with the consent of the respondent or the respondent's attorney to act as official stenographer pro tempore for the court of the magistrate to take down in shorthand the testimony of an examination. A stenographer so appointed shall take the constitutional oath as the official stenographer and shall be entitled to the following fees: $6.00 for each day and $3.00 for each half day while so employed in taking down the testimony and 10 cents per folio for typewriting the testimony taken down in shorthand, or other compensation and fees as shall be fixed by the county board of commissioners appointing the stenographer.

The fees may be allowed and paid out of the treasury of the county in which the testimony is taken. It shall not be necessary for a witness or witnesses whose testimony is taken in shorthand by the stenographer to sign the testimony. Except as provided in section 15 of this chapter, the testimony so taken under this subsection, shall be typewritten, certified, received, and filed in the court to which the accused is held for trial.

(3) Testimony taken by a stenographer appointed pursuant to subsection (2) or taken by shorthand or recorded by a court stenographer or district court recorder as provided by law, when transcribed, shall be considered prima facie evidence of the testimony of the witness or witnesses at the examination.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17203;—CL 1948, 766.11;—Am. 1954, Act 19, Imd. Eff. Mar. 22, 1954;—Am. 1978, Act 155, Eff. July 1, 1978.

Former law: See section 16 of Ch. 163 of R.S. 1846, being CL 1857, § 5992; CL 1871, § 7858; How., § 9469; CL 1897, § 11853; CL 1915, § 15680; Act 168 of 1863; Act 160 of 1915; and Act 329 of 1917.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.11a Testimony of witness; conduct by telephonic, voice, or video conferencing.

Sec. 11a. On motion of either party, the magistrate shall permit the testimony of any witness, except the complaining witness, an alleged eyewitness, or a law enforcement officer to whom the defendant is alleged to have made an incriminating statement, to be conducted by means of telephonic, voice, or video conferencing. The testimony taken by video conferencing shall be admissible in any subsequent trial or hearing as otherwise permitted by law.

History: Add. 2004, Act 20, Imd. Eff. Mar. 4, 2004;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.11b Rules of evidence; exception; hearsay testimony; "controlled substance" defined.

Sec. 11b. (1) The rules of evidence apply at the preliminary examination except that the following are not excluded by the rule against hearsay and shall be admissible at the preliminary examination without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication:

(a) A report of the results of properly performed drug analysis field testing to establish that the substance tested is a controlled substance.

(b) A certified copy of any written or electronic order, judgment, decree, docket entry, register of actions, or other record of any court or governmental agency of this state.

(c) A report other than a law enforcement report that is made or kept in the ordinary course of business.

(d) Except for the police investigative report, a report prepared by a law enforcement officer or other public agency. Reports permitted under this subdivision include, but are not limited to, a report of the findings of a technician of the division of the department of state police concerned with forensic science, a laboratory report, a medical report, a report of an arson investigator, and an autopsy report.

(2) The magistrate shall allow the prosecuting attorney or the defense to subpoena and call a witness from whom hearsay testimony was introduced under this section on a satisfactory showing to the magistrate that live testimony will be relevant to the magistrate's decision whether there is probable cause to believe that a felony has been committed and probable cause to believe that the defendant committed the felony.

(3) As used in this section, "controlled substance" means that term as defined under section 7104 of the public health code, 1978 PA 368, MCL 333.7104.

History: Add. 2007, Act 89, Eff. Dec. 29, 2007;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.12 Evidence for defense; examination, cross-examination of witnesses.

Sec. 12. After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn, examined and cross-examined and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17204;—CL 1948, 766.12.

Former law: See section 14 of Ch. 163 of R.S. 1846, being CL 1857, § 5990; CL 1871, § 7856; How., § 9467; CL 1897, § 11851; and CL 1915, § 15678.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.13 Discharge of defendant or reduction of charge; binding defendant to appear for arraignment.

Sec. 13. If the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the magistrate shall either discharge the defendant or reduce the charge to an offense that is not a felony. If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the magistrate shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the magistrate may conduct the circuit court arraignment as provided by court rule.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17205;—CL 1948, 766.13;—Am. 1974, Act 63, Eff. May 1, 1974;—Am. 2014, Act 123, Imd. Eff. May 20, 2014.

Compiler's note: Section 2 of Act 63 of 1974 provides:

"Effective date.

"Section 2. To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Enacting section 1 of Act 123 of 2014 provides:

"Enacting section 1. This amendatory act applies to cases in which the defendant is arraigned in district court or municipal court on or after January 1, 2015."

Former law: See section 17 of Ch. 163 of R.S. 1846, being CL 1857, § 5993; CL 1871, § 7859; How., § 9470; CL 1897, § 11854; and CL 1915, § 15681.

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.14 Proceedings where offense charged not felony; transfer of case to family division of circuit court; waiver of jurisdiction; "specified juvenile violation" defined.

Sec. 14. (1) If the court determines at the conclusion of the preliminary examination of a person charged with a felony that the offense charged is not a felony or that an included offense that is not a felony has been committed, the accused shall not be dismissed but the magistrate shall proceed in the same manner as if the accused had initially been charged with an offense that is not a felony.

(2) If at the conclusion of the preliminary examination of a juvenile the magistrate finds that a specified juvenile violation did not occur or that there is not probable cause to believe that the juvenile committed the violation, but that there is probable cause to believe that some other offense occurred and that the juvenile committed that other offense, the magistrate shall transfer the case to the family division of circuit court of the county where the offense is alleged to have been committed.

(3) A transfer under subsection (2) does not prevent the family division of circuit court from waiving jurisdiction over the juvenile under section 4 of chapter XIIA of 1939 PA 288, MCL 712A.4.

(4) As used in this section, "specified juvenile violation" means any of the following:

(a) A violation of section 72, 83, 86, 89, 91, 316, 317, 349, 520b, 529, 529a, or 531 of the Michigan penal code, 1931 PA 328, MCL 750.72, 750.83, 750.89, 750.91, 750.316, 750.317, 750.349, 750.520b, 750.529, 750.529a, and 750.531.

(b) A violation of section 84 or 110a(2) of the Michigan penal code, 1931 PA 328, MCL 750.84 and 750.110a, if the juvenile is armed with a dangerous weapon. As used in this subdivision, "dangerous weapon" means 1 or more of the following:

(*i*) A loaded or unloaded firearm, whether operable or inoperable.

(*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

(*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

(*iv*) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*).

(c) A violation of section 186a of the Michigan penal code, 1931 PA 328, MCL 750.186a, regarding escape or attempted escape from a juvenile facility, but only if the juvenile facility from which the individual escaped or attempted to escape was 1 of the following:

(*i*) A high-security or medium-security facility operated by the family independence agency or a county juvenile agency.

(*ii*) A high-security facility operated by a private agency under contract with the family independence agency or a county juvenile agency.

(d) A violation of section 7401(2)(a)(*i*) or 7403(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403.

(e) An attempt to commit a violation described in subdivisions (a) to (d).

(f) Conspiracy to commit a violation described in subdivisions (a) to (d).

(g) Solicitation to commit a violation described in subdivisions (a) to (d).

(h) Any lesser included offense of a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g).

(i) Any other violation arising out of the same transaction as a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g).

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17206;—CL 1948, 766.14;—Am. 1974, Act 63, Eff. May 1, 1974;—Am. 1988, Act 67, Eff. Oct. 1, 1988;—Am. 1994, Act 195, Eff. Oct. 1, 1994;—Am. 1996, Act 255, Eff. Jan. 1, 1997;—Am. 1996, Act 418, Eff. Jan. 1, 1998;—Am. 1998, Act 520, Imd. Eff. Jan. 12, 1999.

Compiler's note: Section 2 of Act 63 of 1974 provides:

"Effective date.

"Section 2. To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Section 3 of Act 67 of 1988 provides: "This amendatory act shall take effect June 1, 1988." This section was amended by Act 173 of 1988 to read as follows: "This amendatory act shall take effect October 1, 1988."

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

766.15 Certification and return of examinations and recognizances; effect of refusing or neglecting to return examinations and recognizances; written demand or motion to prepare or file written transcript of testimony of preliminary examination; listening to electronically recorded testimony, copy of recording tape or disc, or stenographer's notes.

Sec. 15. (1) Except as provided in subsection (2) or (3), all examinations and recognizances taken by a magistrate pursuant to this chapter shall be immediately certified and returned by the magistrate to the clerk of the court before which the party charged is bound to appear. If that magistrate refuses or neglects to return the same, the magistrate may be compelled immediately by order of the court, and in case of disobedience may be proceeded against as for a contempt by an order to show cause or a bench warrant.

(2) A written transcript of the testimony of a preliminary examination need not be prepared or filed except upon written demand of the prosecuting attorney, defense attorney, or defendant if the defendant is not represented by an attorney, or as ordered sua sponte by the trial court. A written demand to prepare and file a written transcript is timely made if filed within 2 weeks following the arraignment on the information or indictment. A copy of a demand to prepare and file a written transcript shall be filed with the trial court, all attorneys of record, and the court which held the preliminary examination. Upon sua sponte order of the trial court or timely written demand of an attorney, a written transcript of the preliminary examination or a portion thereof shall be prepared and filed with the trial court.

(3) If a written demand is not timely made as provided in subsection (2), a written transcript need not be prepared or filed except upon motion of an attorney or a defendant who is not represented by an attorney, upon cause shown, and when granting of the motion would not delay the start of the trial. When the start of the trial would otherwise be delayed, upon good cause shown to the trial court, in lieu of preparation of the transcript or a portion thereof, the trial court may direct that the defense and prosecution shall have an opportunity before trial to listen to any electronically recorded testimony, a copy of the recording tape or disc, or a stenographer's notes being read back.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17207;—CL 1948, 766.15;—Am. 1978, Act 155, Eff. July 1, 1978.

Former law: See section 25 of Ch. 163 of R.S. 1846, being CL 1857, § 6001; CL 1871, § 7867; How., § 9478; CL 1897, § 11862; and CL 1915, § 15689.

An error during the preliminary examination stage "does not require automatic reversal of the subsequent conviction absent a showing that defendant was prejudiced at trial." *People v. Hall*, 435 Mich. 599, 602–603; 460 NW2d 520 (1990).

People v Childs, No. 326054, 2016 WL 3639901, at *4 (Mich Ct App July 7, 2016)

435 Mich. 599
Supreme Court of Michigan.

PEOPLE of the State of Michigan,
Plaintiff-Appellant,
v.
Lisa Ann HALL, Defendant-Appellee.

No. 85050.
|
Argued Nov. 8, 1989.
|
Decided Sept. 11, 1990.

Defendant was convicted of conspiracy to deliver cocaine in the Circuit Court, Wayne County, Charles S. Farmer, J. Defendant appealed. The Court of Appeals reversed, based on insufficiency of evidence at preliminary examination to bind defendant over for trial. The People appealed. The Supreme Court, Griffin, J., held that error in binding defendant over for trial on basis of inadmissible hearsay evidence did not require reversal of subsequent conviction under applicable harmless error analysis, since defendant received fair trial and was not otherwise prejudiced.

Court of Appeals reversed and remanded.

Cavanagh, J., filed dissenting opinion, in which Levin and Archer, JJ., joined.

West Headnotes (3)

[1] **Criminal Law**
Right of accused to examination

Preliminary examination in Michigan is statutory, rather than constitutional, right.

26 Cases that cite this headnote

[2] **Criminal Law**

Where error occurs during preliminary examination involving improper admission of evidence, subsequent verdict is not to be set aside unless, on record as whole, error resulted in miscarriage of justice; automatic reversal is not called for and such pretrial evidentiary error is to be analyzed under harmless error standard; overruling *People v. Walker*, 385 Mich. 565, 189 N.W.2d 234.

44 Cases that cite this headnote

[3] **Criminal Law**
Preliminary Proceedings

Error in admission of inadmissible hearsay evidence in form of coconspirator's statements at defendant's preliminary hearing did not compel automatic reversal of defendant's subsequent conviction, even though other admissible evidence would have been insufficient by itself to bind defendant over for trial; error was subject to harmless error analysis. MRE 801(d)(2)(E).

106 Cases that cite this headnote

Attorneys and Law Firms

****521 *600** Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., John D. O'Hair, Pros. Atty., County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, Thomas M. Chambers, Asst. Pros. Atty., Detroit, for plaintiff-appellant.

Jonathan B.D. Simon, Detroit, for defendant-appellee.

OPINION

GRIFFIN, Justice.

Defendant was bound over for trial to face felony charges on the basis of hearsay testimony erroneously admitted at the preliminary examination. Although it appears that the ensuing trial was fair and error free, the Court of Appeals determined that this error compelled automatic reversal of defendant's conviction. We disagree. Concluding that a harmless error analysis is applicable, ***601** [1] we hold that such an evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error.

I

Following a preliminary examination, defendant was bound over on charges of delivery and conspiracy to deliver cocaine upon the basis of hearsay statements made to police by two alleged coconspirators.[2] Defendant made timely objection to admission of the hearsay evidence. Subsequently, the coconspirators pleaded guilty and then testified at the trial of defendant, who was convicted of the conspiracy to deliver charge. On appeal, the prosecutor conceded that the hearsay statements at the preliminary examination were not admissible under MRE 801(d)(2)(E).[3] The Court of Appeals reversed the conviction on the authority of *People v. Walker,* 385 Mich. 565, 189 N.W.2d 234 (1971).[4]

In *Walker,* the defendant's car was stopped, and the car and his person were searched by police officers on the basis of a ****522** "tip" they received from an informant. The defendant was arrested and ***602** subsequently convicted of unlawful possession of narcotics. On appeal, the defendant complained that at the preliminary examination probable cause for the search and seizure of the defendant's person and automobile had not been established. Motions to quash the information, made by the defendant at the preliminary examination and again prior to trial, were denied. Subsequently, at a preliminary stage of the trial, testimony by a police officer clearly established that in fact there had been probable cause. Nevertheless, the *Walker* Court set aside the conviction, and stated:

> "From both the Michigan and Federal cases, it is clear that while police officers may proceed upon the basis of information received from an informer and need not disclose the identity of the informer, in order to establish probable cause there must be a showing that the information was something more than a mere suspicion, a tip, or anonymous telephone call, and that it came from a source upon which the officers had a right to rely. This is the showing which should have been made at the preliminary examination in this case, but was not. Unless we require such a showing, the preliminary examination becomes meaningless, and a defendant is forced to stand trial in violation of a proper determination *from legally admissible evidence* at the preliminary examination stage that a crime has been committed and that there is probable cause to believe he is guilty of it." *Id.,* at pp. 575-576, 189 N.W.2d 234. (Emphasis in original). See also *People v. White,* 276 Mich. 29, 31, 267 N.W. 777 (1936); *People v. Kennedy,* 384 Mich. 339, 183 N.W.2d 297 (1971).

In this appeal we are urged to reconsider *Walker* and to hold that error at the preliminary examination stage should be examined under a harmless error analysis. We agree and hold that the evidentiary error committed at the preliminary ***603** examination stage of this case does not require automatic reversal of the subsequent conviction absent a showing that defendant was prejudiced at trial.

II

[1] Initially, it should be recognized that the preliminary examination is not a procedure that is constitutionally based. While it has been determined that a judicial determination of probable cause is a prerequisite to extended restraint of liberty following arrest, the federal constitution does not require that an adversary hearing, such as a preliminary examination, be held prior to prosecution by information. *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). "In Michigan, the preliminary examination is solely a creation of the Legislature-it is a statutory right."[5] *People v. Johnson,* 427 Mich. 98, 103, 398 N.W.2d 219 (1986) (opinion of Boyle, J.). See also *People v. Dunigan,* 409 Mich. 765, 770, 298 N.W.2d 430 (1980); *People v. Duncan,* 388 Mich. 489, 495, 201 N.W.2d 629 (1972).

[2] [3] The Legislature, which created the preliminary examination procedure, has also mandated by statute that a conviction shall not be reversed where error is harmless:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, *or the improper admission or rejection of evidence,* or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively

> appear that the error complained of has resulted in a miscarriage ***604** of justice." M.C.L. § 769.26; M.S.A. § 28.1096. (Emphasis added.)

M.C.L. § 769.26; M.S.A. § 28.1096 parallels F.R.Crim.P. 52(a), which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Although the United States Supreme Court has held that certain constitutional violations do require automatic reversal, see, e.g., ****523** *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (denial of counsel at trial), "[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations...." *United States v. Hasting,* 461 U.S. 499, 509, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983). See also *People v. Johnson, supra,* 427 Mich. at p. 103, n. 1, 398 N.W.2d 219.

Under the federal system, it is well established that a defendant's conviction will not be set aside even though only hearsay evidence was presented to the grand jury which indicted him, *Costello v. United States,* 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956),[6] or for other evidentiary errors at the indictment stage, *Holt v. United States,* 218 U.S. 245, 247, 31 S.Ct. 2, 4, 54 L.Ed. 1021 (1910). See also *United States v. Blue,* 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966) (the fact that the grand jury was presented with self-incriminating evidence obtained from the defendant in violation of the Fifth Amendment does not bar prosecution).

In its review of Florida court proceedings against a criminal defendant charged under Florida law, the United States Supreme Court made clear that while a defendant presently detained ***605** may challenge the probable cause for his confinement, once he has been tried and convicted, there is no requirement under the federal constitution that the conviction be vacated because the defendant was detained pending trial without a determination of probable cause. The *Gerstein* Court explained:

> "In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington,* 369 US 541, 545 [82 S Ct 955, 957; 8 L Ed 2d 98] (1962); *Lem Woon v. Oregon,* 229 US 586 [33 S Ct 783; 57 L Ed 1340] (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins,* 342 US 519 [72 S Ct 509; 96 L Ed 541] (1952); *Ker v. Illinois,* 119 US 436 [7 S Ct 225; 30 L Ed 421] (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, *a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause.* [*Pugh v. Rainwater*] 483 F2d, [778] at 786-787." [5th Cir. (1973)] *Id.,* 420 U.S. at pp. 118-119, 95 S.Ct. at pp. 865-866. (Emphasis added.)

See also *Murphy v. Beto,* 416 F.2d 98 (CA 5, 1969); *McCoy v. Wainwright,* 396 F.2d 818 (CA 5, 1968); *Scarbrough v. Dutton,* 393 F.2d 6 (CA 5, 1968); cf. *Hamilton v. Alabama,* 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961).

The Supreme Court has recognized the viability of the harmless error principle even where fundamental constitutional rights of a defendant are involved at the preliminary examination. In *Coleman* ***606** *v. Alabama,* 399 U.S. 1, 9, 90 S.Ct. 1999, 2003, 26 L.Ed.2d 387 (1970), the Court held that because the preliminary hearing prior to indictment is a " 'critical stage' " in the course of prosecution under Alabama law, the Sixth Amendment right to counsel attaches. However, instead of reversing the defendant's conviction, after finding that the right to counsel had been unconstitutionally denied, the Court remanded the case to the state courts for a determination of whether denial of counsel at the preliminary hearing was harmless error.

More recently, the Supreme Court reaffirmed its commitment to the harmless error doctrine in a context that is close to this case. In *United States v. Mechanik,* 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), two government agents appeared together and testified in sequence before a federal grand jury in violation of ****524** F.R.Crim.P. 6(d), which states that only "the witness under examination" may be present. The United States Court of Appeals for the Fourth Circuit ruled that transgression of Rule 6(d) required automatic reversal of the defendant's subsequent conviction which came at the conclusion of a five-month jury trial. However, the Supreme Court reversed, and Chief Justice Rehnquist, writing for a majority, explained:

> "The Rule [6(d)] protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty ... [b]ut the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the

charging decision was harmless beyond a reasonable doubt.

" ***607** It might be argued in some literal sense that because the Rule was designed to protect against an erroneous charging decision by the grand jury, the indictment should not be compared to the evidence produced by the Government at trial, but to the evidence produced before the grand jury. But even if this argument were accepted, there is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial. He will already have suffered whatever inconvenience, expense, and opprobrium that a proper indictment may have spared him. In courtroom proceedings as elsewhere, 'the moving finger writes; and, having writ, moves on.' " 475 U.S. at pp. 70-71, 106 S.Ct. at pp. 941-942. (Emphasis deleted.)

The Court noted:

"No long line of precedent requires the setting aside of a conviction based on a rule violation in the antecedent grand jury proceedings.... See, e.g., *Gerstein v. Pugh,* 420 US 103, 119-123 [95 S.Ct. 854, 865-868, 43 L.Ed.2d 54] (1975); *Coleman v. Alabama,* 399 US 1, 10-11 [90 S.Ct. 1999, 2003-2004, 26 L.Ed.2d 387] (1970); *Chapman v. California,* 386 US 18 [87 S Ct 824; 17 L Ed 2d 705] (1967)." *Id.,* 475 U.S. at p. 71, n. 1, 106 S.Ct. at p. 942, n. 1.

Importantly, the Court found that the error in *Mechanik* was harmless when measured by a standard which requires a showing that the error prejudicially affected the outcome of the trial. *Id.,* at p. 72, 106 S.Ct. at p. 943.

Subsequently, in *Bank of Nova Scotia v. United States,* 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), the Supreme Court dealt with a trial court's authority to dismiss an indictment prior to trial on the basis of the cumulative effect of several acts of prosecutorial misconduct in the grand jury proceeding. By a vote of eight to one, the Court found the harmless error principle to be ***608** applicable. Pointing to *Mechanik, supra,* the Court said:

> "In *United States v. Mechanik,* 475 US 66 [106 S.Ct. 938, 89 L.Ed.2d 50] (1986), we held that there is 'no reason not to apply [Rule 52(a)] to "errors, defects, irregularities, or variances," occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself.' *Id.* at 71-72 [106 S.Ct. at 942-943]. In *United States v. Hasting,* 461 US [at p.] 506 [103 S.Ct. at p. 1979], we held that '[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error.' We stated that deterrence is an inappropriate basis for reversal where 'means more narrowly tailored to deter objectionable prosecutorial conduct are available.' *Ibid.* We also recognized that where the error is harmless, concerns about the 'integrity of the [judicial] process' will carry less weight, *ibid,* and that a court may not disregard the doctrine of harmless error simply 'in order to chastise what the court view[s] as prosecutorial overreaching.' *Id.* at 507 [103 S.Ct. at 1980]. Unlike the present ****525** cases, see *infra* [487 U.S.] at 258-259 [108 S.Ct. at 2376-2377] *Hasting* involved constitutional error. *It would be inappropriate to devise a rule permitting federal courts to deal more sternly with nonconstitutional harmless errors than with constitutional errors that are likewise harmless.*" 487 U.S. at pp. 255-256, 108 S.Ct. at pp. 2374-2375.[7] (Emphasis added).

As *Mechanik* made clear, if the federal standard were to be applied in this case, the nonconstitutional ***609** error assigned by defendant would not be ground for reversal in the absence of a showing that the error prejudiced the outcome of his subsequent trial. *Id.,* 475 U.S. at p. 72, 106 S.Ct. at p. 942.[8]

State courts have also addressed the question before us and have concluded that errors in the preliminary examination proceedings do not require reversal per se on an appeal from a subsequent trial. For example, the California Supreme Court has held that reversal of a conviction is not required unless the defendant shows that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. ***610** *People v. Pompa-Ortiz,* 27 Cal.3d 519,

165 Cal.Rptr. 851, 612 P.2d 941 (1980). In so holding, the *Pompa-Ortiz* court expressly overruled precedent (*People v. Elliot*, 54 Cal.2d 498, 6 Cal.Rptr. 753, 354 P.2d 225 [1960]) in which it had earlier ruled that preliminary examination errors required reversal per se.[9] See also *People v. Lofink*, 206 Cal.App.3d 161, 169-170, 253 Cal.Rptr. 384 (1988); *People v. Moore*, 185 Cal.App.3d 1005, 1017-1018, 230 Cal.Rptr. 237 (1986); *People v. Oyaas*, 173 Cal.App.3d 663, 670-671, 219 Cal.Rptr. 243 (1985). The California Supreme Court, sitting en banc, has explained its *Pompa-Ortiz* rule by pointing ****526** to art VI, § 13, of the California Constitution which mandates that "a judgment shall not be set aside for error not resulting in a miscarriage of justice." *People v. Crandell*, 46 Cal.3d 833, 856, 251 Cal.Rptr. 227, 760 P.2d 423 (1988). See also *People v. Alcala*, 36 Cal.3d 604, 205 Cal.Rptr. 775, 685 P.2d 1126 (1984).

The issue at hand has also been addressed by the Colorado Supreme Court. In *People v. Alexander*, 663 P.2d 1024, 1025-1026, n. 2 (Colo, 1983), it said:

> "The defendant ... argues that the trial court erred in finding probable cause at the preliminary hearing. Absent unusual circumstances not present here, however, any issue as to the presence of probable cause is rendered moot by the jury's guilty verdict.
>
> " 'Resolution of these questions must be made ***611** prior to trial in order to avoid the anomalous situation where a defendant may be found guilty at trial, and then attempt to have the conviction reversed for a preliminary hearing on probable cause. The illogic of this anomaly is further exemplified by the observation of Judge McGowan, writing for the District of Columbia Circuit Court of Appeals, when he states:
>
> > 'Where, as here, the accused has been found guilty of those charges in a full-scale trial that we have otherwise found to be free of error, the chances that he could persuade a magistrate that no probable cause exists for his continued detention are perhaps not ungenerously to be characterized as speculative. *Blue v. United States*, [119 US App DC 315] 342 F2d 894 (1964) [cert den 380 US 944; 85 S Ct 1029; 13 L Ed 2d 964 (1965)].' *Kuypers v. District Court*, 188 Colo 332, 335; 534 P2d 1204, 1206 (1975).
>
> "Accord *People v. Horrocks*, 190 Colo 501; 549 P2d 400 (1976). We consider the probable cause issue to be moot, and we accordingly do not discuss it further." See also *Commonwealth v. Troop*, 391 Pa Super 613; 571 A2d 1084 (1990); *State v. West*, 223 Neb 241; 388 NW2d 823 (1986); *State v. Navarrete*, 221 Neb 171; 376 NW2d 8 (1985); *State v. Tomrdle*, 214 Neb 580; 335 NW2d 279 (1983); *State v. Franklin*, 194 Neb 630; 234 NW2d 610 (1975); *State v. Mitchell*, 104 Idaho 493; 660 P2d 1336 (1983), cert den 461 US 934 [103 S.Ct. 2101, 77 L.Ed.2d 308] (1983); *Commonwealth v. McCullough*, 501 Pa 423; 461 A2d 1229 (1983).

We agree with the United States Supreme Court and with state courts which have held that automatic reversal is not warranted in the present circumstances. Like the California Constitution and F.R.Crim.P. 52(a), M.C.L. § 769.26; M.S.A. § 28.1096 clearly mandates that a conviction shall not be reversed for harmless error. Except for this Court's decision in *Walker*, we find no impediment ***612** to the application of that principle in this case.[10] It is significant that the question of possible application of the harmless error standard was not decided or even discussed in *Walker*. If, and to the extent that, the *Walker* decision by this Court can be read as rejecting the applicability of the harmless error doctrine in circumstances such as are presented by this case, it is overruled.

In this appeal it is contended that a harmless error analysis would be inconsistent with recently adopted revisions of the Michigan Court Rules which were based upon recommendations by a committee appointed by this Court. Among its recommendations, the committee proposed MCR 6.107(G), which would have incorporated the harmless error principle into postconviction ****527** review of preliminary examination errors. The proposed rule read:

> "Motions to Dismiss; Harmless Error on Appeal. If, on proper motion, the circuit court finds a violation of subrule (C), (D), (E), or (F), it shall either dismiss the information or remand the case to district court for further proceedings. *Absent a showing of prejudice, a court may not reverse an otherwise valid conviction because of either a violation of these subrules or an error in failing to dismiss an information for violation of the subrules.*" 422A Mich. 28 (1985). (Emphasis supplied.)

It is true that the rule as finally adopted and ***613** renumbered by this Court, MCR 6.110(H), does not contain the words emphasized above. However, deletion of this language need not be read as a rejection by this Court of a harmless error analysis in the present situation.

Rather, as staff comments which accompanied MCR 6.110(H) explain:

> "Subrule (H) is consistent with current practice. This subrule does not address, and leaves to case law, what effect a violation of these rules or an error in ruling on a motion filed in the trial court may have when raised following conviction." *Michigan Reports, Court Rules*, p R 6.1-9.

In other words, as adopted, MCR 6.110(H) was designed merely to reflect the then-existing state of the law. Of course, the new rule could not, and was not intended to, preclude this Court from reexamining the rule in *Walker*.

In our view, this Court can no longer ignore the applicability of M.C.L. § 769.26; M.S.A. § 28.1096 to facts such as those presented in this case. Since we consider ourselves bound by the legislation which established the preliminary examination procedure, it is reasonable and logical to also consider the Legislature's harmless error mandate which has direct application to the "admission or rejection of evidence." This case involves exactly such a situation.

Moreover, the instant case provides insight concerning the exacting toll of an automatic reversal rule. When the two coconspirators testified at defendant's trial, and thus were subject to cross-examination, the hearsay issue was mooted. The trial was rather lengthy for a bench trial,[11] and the error at the preliminary examination was unrelated ***614** to the issues which were the focus of the trial. To require automatic reversal of an otherwise valid conviction for an error which is harmless constitutes an inexcusable waste of judicial resources and contorts the preliminary examination screening process so as to protect the guilty rather than the innocent. As Chief Justice Rehnquist explained in *Mechanik, supra*, 475 U.S. at p. 72, 106 S.Ct. at p. 942:

> "The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. See *Morris v. Slappy*, 461 US 1, 14 [103 S Ct 1610, 1617; 75 L Ed 2d 610] (1983). The '[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible.' *Engle v. Isaac*, 456 US 107, 127-128 [102 S Ct 1558, 1571-1572; 71 L Ed 2d 783] (1982). Thus, while reversal 'may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution,' *id.* at 128 [102 S.Ct. at 1572], and thereby 'cost society the right to punish admitted offenders.' *Id.* at 127 [102 S.Ct. at 1571]. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's 'interest in the prompt administration of justice,' *United States v. Hasting, supra* [461 U.S.] at 509 [103 S.Ct. at 1980], and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable ****528** and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial."[12]

***615** Otherwise stated,

> "[Procedural rules] are not to be things to which individual litigants have claims in and of themselves. Nothing is so subversive of the real purposes of legal procedure as individual vested rights in procedural errors...." Pound, *The canons of procedural reform*, 12 ABA J 541, 543 (1926).

Although we do not overlook the concerns expressed in the dissenting opinion, we believe the availability of an interlocutory appeal affords protection in those cases where an innocent accused should have been screened out by the preliminary examination process.[13] Given the viability of that remedy and the enormous price of reversing valid convictions obtained pursuant to fair, error-free trials, we cannot support application of the automatic reversal rule under circumstances such as those presented in this case.[14]

Accordingly, we reverse and remand this case to the Court of Appeals for an analysis of whether ***616** the admission of hearsay evidence at the preliminary examination constituted harmless error and, if so, for resolution of the other issues raised by defendant in her appeal of right.

RILEY, C.J., and BRICKLEY and BOYLE, JJ., concur.

CAVANAGH, Justice (dissenting).

Today, four members of this Court have whimsically and waywardly rendered purportless a historic, fundamental and perhaps, in the vast majority of criminal cases, the most significant stage in the criminal process. The clear

message they today impart to police and prosecutors and the trial court judges of this state is this:

> "Don't worry if the evidence introduced at the preliminary examination is legally inadmissible or even if it is insufficient to warrant a bindover. As long as there is sufficient evidence to convict at the time of trial, this Court will ignore any pretrial error."

Why do we find it necessary to abandon this time-honored statute and court-rule sanctioned procedure? It simply cannot be because our appellate courts are deluged with claims of preliminary examination errors. ****529** There are probably two good reasons why they are not. First, until today, police, ***617** prosecutors, defense counsel and trial judges operated under the impression that the preliminary examination was a very important step in the criminal process at which sufficient legally admissible evidence was required. So, as a result, they got it right in the overwhelming number of cases. Secondly, inasmuch as some ninety-two percent[1] of our criminal cases result in a guilty plea, most pretrial claims of error are waived. Therefore, the occasion is rare indeed that we are confronted with a confessed error as in this case.

Once it becomes established that the evidence submitted at the trial cures any error or other deficiency at the preliminary examination, circuit and Recorder's Court judges considering a motion to quash an information, asserting as a basis that there was insufficiency in the evidence or other deficiency, will be asked to ignore the same on the representation and promise of the prosecutor that the error or deficiency will be cured at the trial. That is the next step in the slippery slope.

A motion to quash can then become almost a waste of time. In some counties they may not even pay the lawyers for filing them on the ground that the only motion that the court should be asked to consider is a motion for dismissal after the prosecutor completes the proofs at the trial. What then is the purpose; what is left of the preliminary examination?

It will be interesting to see if today's majority enthusiastically remands to our already overburdened Court of Appeals all those routine denials of interlocutory appeals from denials of motions to quash. It will certainly require a change in our usual treatment of such matters-a change necessitated by today's majority's fear that a conviction ***618** of one improperly required to stand trial in the first instance, will be, on very rare occasion, reversed. I must dissent.

I

In this case, the prosecution admitted on appeal in the Court of Appeals that the hearsay statements related by the undercover officer at defendant's preliminary examination were improperly admitted into evidence.[2]

> "Appellee must concede that the examining judge erroneously admitted into evidence at the preliminary examination the statements which Julia LeClair and Sandra Bell [codefendants] made [to the] officer.... [T]his is so because while there was evidence that Appellant had delivered the cocaine to Ms. LeClair, which Ms. LeClair subsequently delivered to [the] officer ... there was no evidence presented which established that Appellant knew or understood that the cocaine she delivered to LeClair was to be distributed to a third party rather than used by LeClair for her own personal use."

Nonetheless, the prosecution urged the Court of Appeals to sustain defendant's conviction for conspiracy to delivery a controlled substance because there was sufficient evidence at trial to convict. The prosecution argued that *People v. Johnson*, 427 Mich. 98, 398 N.W.2d 219 (1986), reh. den. 428 Mich. 1206 (1987), supported its contention; however, the Court disagreed:

> "To the extent *Johnson* can be read in the manner suggested by the prosecution, it is dicta and we cannot say that the concurring opinion by then Chief Justice Williams provides the crucial vote in ***619** support of that proposition. Hence, we will follow *People v Charles D Walker*, 385 Mich 565; 189 NW2d 234 (1971), and reverse defendant's conviction." Unpublished opinion per curiam of the Court of Appeals, decided December 8, 1988 (Docket No. 100610).

****530** The Court of Appeals reversed the defendant's conviction, and we granted the prosecution's application for leave.

In *People v. Walker, supra*, the defendant was convicted of unlawful possession or control of narcotics. Police officers, after receiving a "tip" from an informant, stopped the defendant's car and seized heroin from the car and incriminating drug paraphernalia from his person. At the preliminary examination, probable cause for the

search and seizure was not shown. The defendant's motion to quash the information for lack of probable cause was nonetheless denied. At trial, the prosecutor conducted an examination of one of the police officers outside the presence of the jury. The defendant's attorney objected on the ground that probable cause must be shown first at the preliminary examination, not later at trial. The officer's testimony at trial clearly established probable cause.

The *Walker* Court noted the longstanding rule in this state that at the preliminary examination, the people are required to show that a crime has been committed and that there is probable cause to believe that the accused is guilty of having committed that crime. In the absence of such a showing, the accused cannot properly be bound over by the examining magistrate. See *People v. Dellabonda*, 265 Mich. 486, 251 N.W. 594 (1933); *People v. Kennedy*, 384 Mich. 339, 183 N.W.2d 297 (1971).

We stated in *Walker:*

> " ***620** In light of what was presented to the examining magistrate, it was clearly error to allow the narcotics into evidence to determine probable cause. Since probable cause for the arrest and search was not properly established at the preliminary examination, it begs the question to say that probable cause existed to believe that a crime had been committed. There can be no judicial determination of probable cause unless it is made at the proper stage of the proceedings.... Unless we require such a showing [to establish probable cause], the preliminary examination becomes meaningless, and a defendant is forced to stand trial in violation of a proper determination *from legally admissible evidence* at the preliminary examination stage that a crime has been committed and that there is probable cause to believe he is guilty of it." *Id.* 385 Mich. at 574-576, 189 N.W.2d 234. (Emphasis in original.)

The Michigan Code of Criminal Procedure requires that a magistrate discharge a defendant if at the conclusion of the preliminary examination it appears that an offense has not been committed or there is not probable cause for charging the defendant with the crime. M.C.L. § 766.13; M.S.A. § 28.931. See also *People v. Asta*, 337 Mich. 590, 611, 60 N.W.2d 472 (1953):

> "[P]roofs on which to base the findings required by the statute must be introduced on a preliminary examination to justify binding over to circuit court for trial. In the case at bar the burden rested on the people to show by competent evidence, circumstantial or otherwise, that the crime of conspiracy as charged in the warrant had been committed, and that there was probable cause to believe defendants guilty thereof."

Thus, evidence sufficient to constitute probable cause must be shown at the preliminary examination. Evidence adduced at the subsequent trial ***621** cannot relieve the prosecution of the burden of producing sufficient admissible evidence to establish probable cause at the preliminary examination.

This principle has been an integral part of Michigan law. In *People v. White*, 276 Mich. 29, 267 N.W. 777 (1936), the defendants were arraigned for larceny and conspiracy to commit larceny. Over the defendants' objection, the people introduced admissions by the defendants and a transcript of unsigned statements that were made earlier to the police. The defendants were held for trial following a denial of their motion to quash the information, and were found guilty of receiving stolen property. This Court reversed the convictions, stating:

> "Aside from the confessions, there was not sufficient testimony in the examination to connect defendants with the offenses charged in the warrant.... The ****531** motion to quash should have been granted.... *The failure of the people to sustain their charge may be unfortunate, in view of the subsequent testimony at the trial, but it would be more unfortunate to upset established and well-understood rules of law.*" *Id.* at 31-32, 267 N.W. 777. (Emphasis supplied.)

See also *People v. Kennedy*, *supra.*

The requirement that sufficient evidence to bind a defendant over for trial must be presented at the preliminary examination has survived in Michigan for good reason. The preliminary examination has been held to be a *critical* step of the criminal process. *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S.Ct. 1999, 2003-2004, 26 L.Ed.2d 387 (1970); *People v. Bellanca*, 386 Mich. 708, 712, 194 N.W.2d 863 (1972); *People v. Duncan*, 388 Mich. 489, 501-502, 201 N.W.2d 629 (1972). By statute, a felony information cannot be filed against any person

until that person has ***622** undergone or waived a proper preliminary examination. M.C.L. § 767.42; M.S.A. § 28.982.

As this Court stated in *People v. Dochstader,* 274 Mich. 238, 244, 264 N.W. 356 (1936):

> "This binding conclusion and finding of the examining magistrate is a judicial determination, and constitutes the basis of the right of the prosecuting attorney to proceed in the circuit court by filing an information against defendant. Without such finding and determination by the examining magistrate, the prosecuting attorney is without jurisdiction to proceed in the circuit court by filing an information against defendant."

The prosecutor in this case maintains that, while there was insufficient admissible evidence at the preliminary examination to warrant the bindover of the defendant to the circuit court, there was sufficient evidence adduced at trial to sustain defendant's conviction. Therefore, we are urged to approach this case with hindsight and to subject the error to a harmless error analysis rather than reverse the conviction pursuant to MCR 6.110(H).

In 1989, this Court had an opportunity to adopt such a harmless error rule. The Criminal Rules Committee proposed MCR 6.107(G), which would have prohibited a court from reversing an otherwise valid conviction because of an evidentiary error, absent a showing of prejudice by the defendant.[3]

***623** This Court, however, rejected the proposed rule and instead adopted the present rule, MCR 6.110(H). This rule provides that upon a proper motion, a violation of various subrules at a preliminary examination requires the circuit court either to dismiss the information or remand the case to the district court.

Exemplifying the importance of adherence to proper preliminary examination procedures, this Court in *People v. Weston,* 413 Mich. 371, 319 N.W.2d 537 (1982), reversed the conviction of a defendant whose preliminary examination was held to be in violation of M.C.L. § 766.4; M.S.A. § 28.922.[4] There was no question that the ****532** date set for the defendant's preliminary examination was more than twelve days after the defendant appeared in district court. At the beginning of the preliminary examination, defense counsel challenged the holding of the examination on the basis of M.C.L. § 766.4; M.S.A. § 28.922. However, the defendant was bound ***624** over for trial and was subsequently found guilty of armed robbery. The Court of Appeals found that the error did not require reversal because the defendant did not suffer any prejudice because of the delay. This Court noted the strict limitation on any delay as provided by M.C.L. § 766.7; M.S.A. § 28.925. We rejected the Court of Appeals application of a "no prejudice/no reversible error" rule, despite its "repeated application." *Id.* at 375, 319 N.W.2d 537.

We stated in *Weston:*

> "A preliminary examination functions, in part, as a screening device to ensure that there is a basis for holding a defendant to face a criminal charge. A defendant against whom there is insufficient evidence to proceed should be cleared and released as soon as possible. The notion that a presumptively innocent defendant should remain in custody until a convenient time arrives for the magistrate to conduct the preliminary examination is exactly what the Legislature precluded in MCL 766.1; MSA 28.919." *Id.* at 376, 319 N.W.2d 537.

The rule in *Weston* was later modified and upheld in *People v. Crawford,* 429 Mich. 151, 414 N.W.2d 360 (1987), reh. den. 429 Mich. 1213 (1987).

Thus, it is clear to us that if a defendant is entitled to a prompt preliminary examination as mandated by statute, a fortiori, a defendant is entitled to a preliminary examination where the substantive evidence presented is legally admissible. See *People v. Kubasiak,* 98 Mich.App. 529, 536, 296 N.W.2d 298 (1980) ("It is well-settled that an examining magistrate may consider only legally admissible evidence in reaching a decision to bind a defendant over for trial"); *People v. Gwinn,* 47 Mich.App. 134, 139, 142, 209 N.W.2d 297 (1973).

At one point in its appeal, the people argued that this Court's decision in *People v. Johnson,* ***625** *supra,* supported the assertion that a conviction should only be reversed where there is error at the preliminary examination if the defendant shows prejudice as a result. The prosecution seized upon the language in a footnote in *Johnson* which addressed reversals for errors at preliminary examinations.[5] As stated by the Court of Appeals and as conceded by the prosecution at oral argument, that was a misreading of the *Johnson* decision since that language was dicta.

FN5. 427 Mich. 115, n. 14.

The prosecution cites a number of jurisdictions which have adopted a harmless error rule in preliminary examinations in cases involving matters of state law. Where there has been insufficient evidence at the preliminary hearing, some courts hold that a subsequent jury conviction either cures or renders moot those earlier deficiencies. *People v. Alexander*, 663 P.2d 1024 (Colo, 1983); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975); *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986). The prosecution relies heavily upon *People v. Pompa-Ortiz*, 27 Cal.3d 519, 612 P.2d 941, 165 Cal.Rptr. 851 (1980), in which the California Supreme Court determined that the defendant was denied a public preliminary hearing, yet nevertheless held that unless such denial prejudiced the defendant, his subsequent conviction at trial would not be reversed despite the error. I acknowledge that some other jurisdictions have developed different rules concerning the effect of error at preliminary examinations. However, I am not persuaded that these decisions mandate a change in our own state law. Some jurisdictions do have laws pertaining to preliminary examinations that are similar to Michigan's. For instance, in *Myers v. Commonwealth*, 363 Mass. 843, 849, n. 6, 298 N.E.2d 819 (1973), the Massachusetts Supreme Court stated ***626** that the rules of evidence should apply to preliminary examinations. ("Since the primary objective of the probable cause hearing is to screen out those cases where the ****533** legally admissible evidence of the defendant's guilt would be insufficient to warrant submission of the case to a jury if it had gone to trial, the rules of evidence at the preliminary hearing should in general be the same rules that are applicable at the criminal trial.") See also *State v. Jacobson*, 106 Ariz. 129, 130, 471 P.2d 1021 (1970) (" 'The proof which will authorize a magistrate in holding an accused person for trial must consist of legal, competent evidence. No other type of evidence may be considered by the magistrate. The rules of evidence require the 'production of legal evidence' and the exclusion of 'whatever is not legal.' " Citing *People v. Schuber*, 71 Cal.App.2d 773, 775, 163 P.2d 498 [1945]; see also *Rogers v. Superior Court of Alameda Co*, 46 Cal.2d 3, 8, 291 P.2d 929, (1955); *Goldsmith v. Sheriff of Lyon Co*, 85 Nev. 295, 303, 454 P.2d 86 (1969).

The people further contend that MCR 6.110(H) is contrary to M.C.L. § 769.26; M.S.A. § 28.1096, which provides:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of ... the improper admission or rejection of evidence ... unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

The prosecution argues that the automatic reversal rule conflicts with the statute because it does not require defendant to show prejudice or a "miscarriage of justice."

***627** In *People v. Weston, supra* 413 Mich. at 376, 319 N.W.2d 537, this Court rejected that argument, stating:

> "We are unable to apply this more general statute in the face of an unqualified statutory command that the examination be held within 12 days.
>
> "A preliminary examination functions, in part, as a screening device to insure that there is a basis for holding a defendant to face a criminal charge. A defendant against whom there is insufficient evidence to proceed *should be cleared and released as soon as possible.*"

In affirming this principle in *People v. Crawford, supra* 429 Mich. at 159, n. 12, 414 N.W.2d 360, we noted:

> "The burden imposed on the prosecution, when the charges are dismissed without prejudice before the preliminary examination is held, is substantial and sufficient to encourage the magistrate timely to schedule and hold the preliminary examination or to establish a record with the requisite showing of good cause for delay required by the statute. The burden on the prosecution of dismissal without prejudice if the requisite showing is not made, while substantial, is not overwhelming. The charges can be refiled, the defendant rearrested, and a timely preliminary examination held."

Here, the same considerations are present. Despite the language of M.C.L. § 769.26; M.S.A. § 28.1096, there are unqualified statutory commands that a defendant only be bound over after a preliminary examination if there is probable cause, and if not, the defendant *shall* be discharged, M.C.L. § 766.13; M.S.A. § 28.931, and that a

preliminary examination or a waiver thereof is a condition precedent to even the filing of a felony information, M.C.L. § 767.42; M.S.A. § 28.982.

***628** In addition, our own rule of evidence, MRE 801(d)(2)(E), requires independent proof of the conspiracy before a statement of a coconspirator is allowed. This requirement was disregarded in the instant preliminary examination, and defendant was bound over solely on the basis of this improperly admitted evidence, rendering meaningless the significance of this preliminary examination. Michigan courts have held several times over that the Michigan Rules of Evidence apply to preliminary examinations. *People v. Makela,* 147 Mich.App. 674, 383 N.W.2d 270 (1985); *People v. Washington,* 84 Mich.App. 750, 270 N.W.2d 511 (1978); see also *People v. Woodland Oil Co.,* 153 Mich.App. 799, 396 N.W.2d 541 (1986).

In adopting the prosecutor's view that an error at preliminary examination could be ****534** cured by sufficient evidence at trial, the majority leaves a defendant no remedy, short of seeking a motion to quash the information, or then an interlocutory appeal, which is granted very infrequently. See *People v. Johnson, supra* 427 Mich. at 127, n. 9, 398 N.W.2d 219 (Levin, J., dissenting). Additionally, I am persuaded that a harmless error requirement would undermine the accuracy of the screening process of the preliminary examination. The intended beneficiaries of this process are defendants who are innocent or against whom evidence is weak. These defendants will not appeal because at trial they generally are acquitted. Thus, as a practical matter, the only group of defendants who can be a "check" on the accuracy of the screening process are those against whom there is a strong case at trial. The harmless error rule would invariably apply to these defendants.

In affirming the principle of *Walker,* I do not propose that *any* error committed at a preliminary examination justifies automatic reversal after a ***629** defendant's subsequent trial conviction. If at the preliminary examination there is sufficient legally admissible evidence in addition to that which should have been excluded, the decision to bind over the defendant can stand. See *People v. Usher,* 121 Mich.App. 345, 349, 328 N.W.2d 628 (1982), and *People v. Johnson, supra* 427 Mich. at 116, 398 N.W.2d 219. However, wherethere is no other admissible evidence sufficient to bind over the defendant, I believe that such an improper bindover creates a travesty of justice and thwarts the purpose of the preliminary examination. We should not ignore the fact that:

> "[i]n modern criminal law pretrial procedure is for most defendants the only criminal procedure.... The core of pretrial procedure, in theoretical terms at the very least, is the preliminary hearing, at which police and prosecutorial discretion and the defendant's guilt are first subjected to judicial scrutiny." "For this reason, if no other, the criminal justice system must pay close attention to the functioning of pretrial procedure to ensure that it is providing the protections to which all accused persons are entitled."[6]

Thus, I would affirm the Court of Appeals reversal of defendant's conviction.

ARCHER and LEVIN, JJ., concur.

All Citations

435 Mich. 599, 460 N.W.2d 520

Footnotes

1 M.C.L. § 769.26; M.S.A. § 28.1096.

2 M.C.L. § 333.7401(1), (2)(a)(iii), 750.157a; M.S.A. § 14.15(7401)(1), (2)(a)(iii), 28.354(1).

3 MRE 801(d)(2) provides in pertinent part:

> "A statement is not hearsay if ... [t]he statement is offered against a party and is (A) his own statement ... or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy."

4 The Court of Appeals did not address the defendant's other allegations of error raised on appeal.

5 See M.C.L. § 766.1 *et seq.;* M.S.A. § 28.919 *et seq.*

6 In Michigan hearsay evidence may be presented to a grand jury. Our Rules of Evidence do not apply to grand jury proceedings. MRE 1101(b)(2).

7 In this preconviction setting, the standard for determining whether the error was harmless differed from that applied in *Mechanik:*

> "[D]ismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations. *United States v. Mechanik, supra* [475 U.S.] at p. 78 [106 S.Ct. at p. 945] [O'Connor, J., concurring]." 487 U.S. at p. 256, 108 S.Ct. at p. 2374.

8 The applicability of this standard in the present context has been recognized by this Court, albeit in dicta. In *People v. Johnson, supra,* the defendant argued that evidence of premeditation and deliberation at his preliminary examination was insufficient to justify binding the defendant over on an open charge of murder, thereby requiring reversal of his second-degree murder conviction. The *Johnson* Court (per Boyle, J.) disagreed, finding that there was evidence from which the magistrate could have inferred premeditation and deliberation. In a footnote, Justice Boyle discussed the issue of reversals for errors at preliminary examination:

> "While the opinion for reversal bases its result upon an admittedly nonconstitutional error, post, [427 Mich. at] pp. 137-138 [398 N.W.2d 219]; it errs in the standard it applies to determine whether the error is harmless. Certain constitutional violations require automatic reversal. See, e.g., *Gideon v. Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (denial of counsel at trial). Other constitutional violations are measured by the standard that requires a court to be convinced 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *Chapman v. California,* 386 U.S. 18, 24; 87 S.Ct. 824 [828]; 17 L Ed 2d 705 (1967) (commenting on defendant's failure to testify at trial could be harmless error); *Rose v. Clark,* 478 U.S. [570]; 106 S.Ct. 3101; 92 L.Ed.2d 460 (1986) (jury instruction shifting the burden of proof to the defendant can be harmless error). Nonconstitutional violations, such as that alleged in the instant case, are measured by a third standard in the federal system: The defendant must show a reasonable probability that the error affected the outcome of the trial. See *United States v. Mechanik,* 475 US 66; 106 S Ct 938; 89 L Ed 2d 50 (1986) (no reversal for grand jury error unless the error affected the outcome of the trial)." 427 Mich. at p. 115, n. 14, 398 N.W.2d 219.

9 The *Elliot* case had held that where an accused is illegally bound over due to a material error at the preliminary hearing, the binding over is voidable, and, upon proper objection, the court has no jurisdiction to proceed. In overruling *Elliot,* the *Pompa-Ortiz* court rejected the prior cases' "uncritical use of the term 'jurisdiction' " and held that a trial court is not deprived of "jurisdiction" in the fundamental sense ("legal power to hear and determine a cause") in matters correctable by pretrial motions. 27 Cal.3d at pp. 528-529, 165 Cal.Rptr. 851, 612 P.2d 941.

> This Court likewise has held that the circuit court does not lose jurisdiction where a void or improper information is filed. See *People v. Johnson, supra,* 427 Mich. at p. 106, n. 7, 398 N.W.2d 219.

10 This Court has previously applied M.C.L. § 769.26; M.S.A. § 28.1096 in a number of contexts. See, e.g., *People v. Straight,* 430 Mich. 418, 424 N.W.2d 257 (1988); *People v. Beach,* 429 Mich. 450, 418 N.W.2d 861 (1988); *People v. Crawford,* 429 Mich. 151, 414 N.W.2d 360 (1987); *People v. Blue,* 428 Mich. 684, 411 N.W.2d 451 (1987); *People v. Cash,* 419 Mich. 230, 351 N.W.2d 822 (1984); *People v. Woods,* 416 Mich. 581, 331 N.W.2d 707 (1982), cert. den. 462 U.S. 1134, 103 S.Ct. 3116, 77 L.Ed.2d 1370 (1983); *People v. Weston,* 413 Mich. 371, 319 N.W.2d 537 (1982); *People v. Eady,* 409 Mich. 356, 294 N.W.2d 202 (1980); *People v. Richardson,* 409 Mich. 126, 293 N.W.2d 332 (1980); *People v. Wilkens,* 408 Mich. 69, 288 N.W.2d 583 (1980).

11 The trial commenced January 7, 1987, and defendant was found guilty on January 29, 1987.

12 An automatic reversal rule would contradict MCR 6.002, which provides:

> "These rules are intended to promote a just determination of every criminal proceeding. They are to be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."

13 The underlying assumption of the dissent's dismay at the result of this opinion is that short of a reversal of an error-free trial, we cannot depend on the magistrate who is bound to follow the rules of evidence, the circuit or Recorder's Court judge who is bound to quash a bindover where the rules of evidence are not followed, and the Court of Appeals which is required to correct error of this nature to maintain the applicability of the rules of evidence in preliminary examinations.

> We obviously do not share that skepticism.

14 In his dissent in *People v. Johnson, supra,* 427 Mich. at p. 127, n. 9, 398 N.W.2d 219, Justice Levin wrote:

> "Any other rule would deprive the accused of any remedy for a defect in the conduct of a preliminary examination. Manifestly, the accused cannot be convicted unless sufficient evidence is adduced at the trial; if the sufficiency of the evidence at the trial cured an insufficiency at the preliminary examination, there would be no remedy unless the circuit judge quashed the information or the Court of Appeals or this Court granted an interlocutory appeal from an adverse decision by the circuit judge. Interlocutory appeals are infrequently granted defendants in criminal cases, and, thus, if there is to be any review of the circuit judge's decision, it can occur only, in the ordinary case, after trial and conviction."

If a problem does exist because appellate courts do not grant applications of criminal defendants for interlocutory appeal in sufficient numbers or in appropriate cases, it is suggested that this Court could deal with the problem directly through the exercise of its supervisory authority, rather than by adhering to an arbitrary rule that automatically reverses otherwise valid convictions. For example, the rules of appellate procedure could be amended.

1 *Criminal Justice in Crisis,* American Bar Association, Criminal Justice Section, November, 1988.

2 Prosecutor's Brief, p. ----. Before this Court in oral argument, the prosecution also conceded that without the testimony of the undercover officer about Julia LeClair's statements, there would not have been enough evidence to connect defendant to the crime, or to even establish that a conspiracy had occurred.

3 This rule became effective October 1, 1989. The highlighted portions were contained in the proposed rule version, but were *not* adopted by this Court:

> "Motions to Dismiss; Harmless Error on Appeal. If on proper motion, the circuit court finds a violation of subrule (C), (D), (E), or (F), it shall must either dismiss the information or remand the case to the district court for further proceedings. Absent a showing of prejudice, a court may not reverse an otherwise valid conviction because of either a violation of these subrules or an error in failing to dismiss an information for violation of these subrules."

In the case at bar, there was a violation of Rule 6.110(C), which provides:

> "Conduct of Examination. Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. Except as otherwise provided by law, the court must conduct the examination in accordance with the rules of evidence. A verbatim record must be made of the preliminary examination."

4 "[T]he magistrate before whom any person is brought on a charge of having committed a felony shall set a day for a preliminary examination not exceeding 12 days thereafter, at which time a magistrate shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the accused, in regard to the offense charged and in regard to any other matters connected with the charge which the magistrate considers pertinent."

6 Note, *The function of the preliminary hearing in federal pretrial procedure,* 83 Yale L J 771, 805 (1974).