

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES L. GALEN,

Defendant-Appellee.

UNPUBLISHED

December 30, 1996

No. 189490

LC No. 94-131765-FH

Before: Fitzgerald, P.J., and Holbrook, Jr. and E.R. Post,* JJ.

PER CURIAM.

The prosecutor appeals as of right the circuit court order dismissing a felonious assault charge against defendant on the ground that the complaining witness did not appear for trial. We reverse.

Defendant was bound over for trial following a preliminary examination. Before the commencement of trial on August 14, 1995, the defense made a motion to dismiss on the ground that the complaining witness was not present for trial. Defense counsel indicated to the court that he had taken a sworn statement from the witness that differed substantially from the witness' preliminary examination testimony. The prosecutor objected to the dismissal, arguing that the witness' preliminary examination testimony could be used because defendant had an opportunity and similar motive to develop the testimony during a vigorous cross-examination.

The trial court determined that the witness was unavailable and that the prosecution had made diligent attempts to secure the production of the witness. The trial court dismissed the charges, however, apparently on the ground that the witness had made contradictory statements and because the witness "is not going to be located whatsoever." The prosecution asserts that this latter finding was in error. We agree.

Former testimony of a witness is admissible in a later proceeding where that witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity to

* Circuit judge, sitting on the Court of Appeals by assignment.

cross-examine the witness at that time. MRE 804b(1). There is no dispute in this case that the witness was unavailable. MRE 804(a)(a). Defendant argued, however, that the witness' preliminary exam testimony had been contradicted by the witness and was therefore not sufficiently reliable. *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980). However, the substance of the alleged contradictory statement is not contained within the record and, therefore, we are unable to determine whether the statement was sufficient to challenge the reliability of the preliminary exam testimony. Hence, on the record presented, we are convinced that the trial court abused its discretion in dismissing the charge. See *People v Morrow*, 214 Mich App 158; 542 NW2d 324 (1995)(the decision whether to dismiss the charges or proceed with the prosecution after the complainant recanted her preliminary exam testimony is part of the prosecutor's executive and discretionary powers).

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Edward R. Post