

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY DEAN PRUITT,

Defendant-Appellant.

UNPUBLISHED
October 31, 2000

No. 210735
Macomb Circuit Court
LC No. 96-002239-FC

Before: Griffin, P.J., and Cavanagh and Gage, JJ.

MEMORANDUM.

Defendant appeals as of right his jury conviction for assault, MCL 750.81; MSA 28.276, and malicious destruction of police property, MCL 750.377b; MSA 28.609(2). We affirm.

Defendant argues that the trial court erred in declaring complainant unavailable and using her preliminary examination testimony at trial. We disagree.

Under MRE 804(a)(2), a witness is unavailable where she persists in refusing to testify concerning the subject matter of her statement despite an order of the court to do so. The record indicates that complainant asserted her Fifth Amendment rights, and refused to testify. Complainant was ordered to testify by the court, as indicated by a post-conviction finding of contempt. There is no showing that the trial court erred in finding the witness unavailable. See *People v Meredith*, 459 Mich 62; 586 NW2d 538 (1998).

The use of preliminary examination testimony does not violate defendant's right to confront the witness when the prior testimony is admitted because that testimony bears sufficient indicia of reliability. See *People v Adams*, 233 Mich App 652, 659-660; 592 NW2d 794 (1999). Defendant had an opportunity and similar motivation to develop complainant's testimony on cross-examination during the preliminary examination. See *id.* at 659; MRE 804(b)(1).

Affirmed.

/s/ Richard Allen Griffin

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage