STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM DALE SNYDER,

Defendant-Appellant.

UNPUBLISHED

No. 195666
Montcalm Circuit Court
LC No. 95-000116-FC

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

WAHLS, J. (dissenting).

I respectfully dissent. I agree with the majority regarding all but one issue. I would conclude that the trial court's error in excluding evidence relevant to the complainant's credibility requires reversal.

Defendant argues that the trial court improperly limited impeachment of the complainant by excluding evidence of a prior inconsistent statement. I would agree. A witness' prior inconsistent statements are not hearsay when they are used for impeachment purposes. Hearsay is an out of court statement offered to prove the truth of the matter asserted. MRE 801(c). As noted by former Justice T.E. Brennan:

> Of course, prior inconsistent statements of a witness can be shown for impeachment purposes. . . . Prior inconsistent statements are not admissible to prove the truth of the thing said. They are offered, rather, to prove that the inconsistent statement was in fact made, irrespective of its truth, for the purpose of impeaching contrary testimony from the witness stand. [*People v Hallaway*, 389 Mich 265, 276; 205 NW2d 451 (1973) (Brennan, J.).]

In this case, the complainant testified that defendant shot her "execution style," and she denied every suggestion that the shooting could have been an accident. On cross-examination, defense counsel attempted to ask her whether she had told anyone that the shooting was an accident. To the extent that defense counsel's questions were allowed, complainant denied ever making any such statements. Defendant later called a witness, Daniel Rambadt, who apparently was ready to testify that the

complainant had told him that the shooting was an accident. The following exchange took place on direct examination:

Q. What did [the complainant] tell you?

[Prosecutor]: Objection; hearsay.

The Court: Objection sustained.

A. She told me it was –

[Prosecutor]: Objection.

Q. Hold on.

The Court: Do not answer the question.

A. OK.

The Court: The objection's been sustained.

A. OK.

[Defense counsel, continuing]

Q. Did she indicate to you that this had been an accident?

[Prosecutor]: Objection; hearsay.

The Court: Objection sustained.

[Defense counsel]: I'm offering it to impeach the testimony of the previous witness where she indicated that she told Mr. Rambadt –

The Court: You cannot ask a hearsay question. The jury will disregard the remarks of counsel with regard to that.

The trial court's refusal to allow this question was error. *People v Weems*, 15 Mich App 22, 23; 165 NW2d 893 (1968). The answer would have gone directly to the credibility of the complainant on a key issue in the case.

The majority never reaches the merits of defendant's argument on this issue, concluding instead that (1) this issue was not properly preserved, and (2) even if this issue had been preserved, any error was harmless. I disagree on both points.

An offer of proof is not necessary to preserve an evidentiary issue for review if "the substance of the evidence . . . was apparent from the context within which questions were asked." MRE

103(a)(2). Here, defense counsel asked defense witness Daniel Rambadt "Did [the complainant] indicate to you that this had been an accident?" The prosecutor then objected on hearsay grounds, and the trial court sustained the objection. In my opinion, the substance of Rambadt's testimony on this point is readily apparent from the context of defense counsel's yes-or-no question. After all, Rambadt was a defense witness who was called solely for the purpose of impeaching the complainant's credibility. I cannot imagine a question that would make the substance of any evidence more apparent than a simple yes-or-no question. Thus, I would conclude that this issue was preserved. See *People v Morton*, 213 Mich App 331, 335; 539 NW2d 771 (1995).[1]

Even if this issue were not properly preserved, I would conclude that the trial court's error in excluding this testimony was plain error requiring reversal. The prosecution's case rested almost entirely on the testimony of the complainant. The complainant's prior inconsistent statement on an essential issue would have called into question the veracity of all of her testimony. Under these circumstances, I cannot conclude that the trial court's error was harmless. See *People v Adamski*, 198 Mich App 133, 140-141; 497 NW2d 546 (1993). Therefore, I would reverse defendant's convictions and remand for a new trial.

/s/ Myron H. Wahls

[1] I believe the majority's reliance on *People v Wakeford*, 418 Mich 95; 341 NW2d 68 (1983), is misplaced. In *Wakeford*, the defendant alleged prejudice based on an evidentiary ruling that caused him to elect not to testify in his own defense. Under those circumstances, there were no questions from which to infer the substance of the defendant's testimony. Thus, I find the discussion in *Wakeford* irrelevant to the question whether the substance of Rambadt's testimony is apparent from defense counsel's questions.