

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY JAMES SCHWARZ,

Defendant-Appellant.

UNPUBLISHED

June 26, 2014

No. 315372

Lapeer Circuit Court

LC No. 11-010634-FC

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

JANSEN, P.J. (*concurring in the result*).

I concur in the result reached by the majority in this case. I write separately to emphasize (1) the erroneous nature of the circuit court’s decision to allow the victim’s preliminary examination testimony to be read into evidence at trial, and (2) defense counsel’s defective performance in failing to properly object to this plain error.

“As a general rule, neither party in a criminal trial is permitted to bolster a witness’ testimony by seeking the admission of a prior consistent statement made by that witness.” *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987). This rule applies to bar the admission of a witness’ prior consistent testimony given at a preliminary examination. *People v Rosales*, 160 Mich App 304, 307-308; 408 NW2d 140 (1987). In the present case, as the majority explains, the victim’s prior consistent testimony constituted inadmissible hearsay and was not subject to any exception. *Id.*; see also *People v Smith*, 158 Mich App 220, 227; 405 NW2d 156 (1987). For instance, the prior consistent testimony was not introduced to rehabilitate the witness or to rebut a charge of recent fabrication. *Id.*; see also MRE 801(d)(1)(B). Nor was the victim “unavailable” within the meaning of MRE 804(a). Indeed, the victim actually testified at trial. Unlike the child witness in *People v Duncan*, 494 Mich 713, 727-730; 835 NW2d 399 (2013), the victim in this case was not unable to testify because of a mental infirmity. See MRE 804(a)(4). In addition, the victim was not exempted from testifying on the ground of privilege, did not testify that she lacked memory of the incident, and did not refuse to comply with a court order directing her to testify. See MRE 804(a)(1), (2) and (3); see also *State v Bishop*, 63 Wash App 15, 22; 816 P2d 738 (1991). I conclude that admission of the victim’s prior consistent testimony from the preliminary examination “constitute[d] a serious impropriety” that, under different circumstances, might well have warranted reversal. *Rosales*, 160 Mich App at 309.

Defense counsel objected to the admission of the victim's preliminary examination testimony only on the grounds that it was unnecessarily cumulative and would constitute "piling on." But even in the absence of a proper objection, it is the duty of the circuit judge "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters" MCL 768.29. The prosecution's wholesale admission of the victim's prior consistent testimony was so egregious and improper as a matter of law that the circuit judge was obligated to step in and prevent the error from infecting defendant's trial. See *People v Spencer*, 130 Mich App 527, 539-540, 542; 343 NW2d 607 (1983). I believe that "this was a trial which got out of hand," *id.* at 543, and that the circuit judge abdicated his responsibility to ensure that defendant received a fair trial by permitting the prosecutor to utterly disregard the rules of evidence.

I also find error in defense counsel's actions, or lack thereof, in objecting to the admission of the victim's preliminary examination testimony. Defense counsel should have known that the prosecutor was not permitted to bolster the victim's trial testimony by seeking to admit her prior consistent testimony from the preliminary examination. He also should have known that the victim's prior consistent testimony constituted inadmissible hearsay. See, e.g., *Lewis*, 160 Mich App at 29; *Rosales*, 160 Mich App at 308. Yet counsel did not object on hearsay grounds, resulting in forfeiture of this issue on appeal. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001) (observing that "[t]o preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal"). Had defense counsel raised the correct objection at trial, rather than merely complaining about "piling on," this claim of error would have been preserved for appellate review and defendant may well have received a new trial. As things stand, however, the issue is unpreserved. Given the other, properly admitted evidence of defendant's guilt in this case, I simply cannot conclude that the plain error, despite its egregiousness, affected the outcome of the lower court proceedings. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Therefore, I reluctantly concur in the result reached by the majority.

/s/ Kathleen Jansen