

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE WILLIE NASH,

Defendant-Appellant.

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UNPUBLISHED

July 1, 1997

No. 190074

Ingham Circuit Court

LC No. 95-069010 FH

Before: Cavanagh, P.J., and Doctoroff and D.A. Teeple\*, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction for felonious assault. He contends that, in various particulars, he was deprived of the effective assistance of counsel at the trial level. Some of the facts relevant to this appellate challenge to his conviction were developed at a post-trial *Ginther* hearing.

Defendant first contends that counsel was ineffective in the manner in which he investigated and attacked the eyewitness identifications of defendant. Of the four prosecution res gestae witnesses, at least two were neighbors of defendant, and had seen him on multiple occasions. Defense counsel focused not on misidentification but on the fact that all the prosecution res gestae witnesses had had their backs turned at the moment the assault with the beer bottle occurred, and thus attempted to show reasonable doubt as to whether defendant was correctly identified by them as the perpetrator. Defendant has failed to show that in this respect counsel performed at a level below that of a minimally competent criminal defense practitioner. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant next contends that counsel was ineffective for failing to interview and call Jacqueline Smith as an alibi witness at trial. Smith testified at the *Ginther* hearing, and her testimony as there presented would have provided the basis for an alibi. However, this testimony completely contradicted a written statement she provided a few days after the incident to police. Defense counsel reasonably evaluated such contradictions, and the status of the witness as defendant's girlfriend, as so undermining her credibility that presentation of such evidence would not materially further defendant's cause. Again, such a tactical evaluation is well within the legitimate bounds of proper legal representation. *People v*

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

*LaVearn*, 448 Mich 207, 214; 528 NW2d 721 (1995). Given Smith's completely contradictory earlier written statement, defendant has also failed to show prejudice from the decision not to call Smith as a witness, assuming that this represented some dereliction in counsel's performance. *People v Pickens*, *supra*.

Finally, defendant contends that counsel was ineffective in failing to object to impeachment of two defense witnesses based on prior convictions for second degree retail fraud, MCL 750.356d; MSA 28.588(4), a misdemeanor. This argument is without merit. Second degree retail fraud, in some of its variations, includes elements of dishonesty. MCL 750.356d(1)(a) and (c); MSA 28.588(4)(a) and (c). Impeachment of all witnesses based on any crime, felony or misdemeanor, involving an element of dishonesty is permitted by the bright line rule of *People v Allen*, 429 Mich 558, 606-608; 420 NW2d 499 (1988) and MRE 609(a)(1).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Martin M. Doctoroff  
/s/ Donald A. Teeple