

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW TODD FERGUSON,

Defendant-Appellant.

UNPUBLISHED

July 1, 1997

No. 191467

Iosco Circuit Court

LC No. 95-003086 FH

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

MEMORANDUM.

Following a jury trial, defendant was acquitted of first degree criminal sexual conduct and a larceny charge, but convicted of the lesser included offense of third degree criminal sexual conduct. This appeal of right is being decided without oral argument pursuant to MCR 7.214(E).

Defendant claims he was deprived of the effective assistance of counsel at trial. He first contends that trial counsel failed to adduce evidence in support of the defense of consent that defendant and the victim had a prior sexual relationship. Following a post-conviction evidentiary hearing, the trial judge found that defendant's testimony supported such a claim, and assumed that the absent victim would also have corroborated that claim. The testimony of a third witness, Brad Schaaf, was correctly determined by the trial court to lend no support to this contention beyond a speculative inference. Because the claimed prior occasions on which this sexual relationship was consummated were totally different than the incident which was the subject of the prosecution here, both as to the type of sexual penetration and with respect to the presence of third persons, the trial judge correctly ruled that even had defense counsel sought to introduce such evidence at trial, it would have been barred by the rape shield statute. *People v Lucas*, 201 Mich App 717 (1993). Accordingly, defendant has failed to show that any dereliction of counsel in this respect was prejudicial, barring appellate relief on a claim of ineffective assistance of counsel. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant's remaining claims are completely devoid of record support. At the post-conviction evidentiary hearing, defendant adduced no witness who addressed the issue of whether the victim's

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

husband, a few days after the incident, displayed visible bruises, and likewise there is no record support for the claim that witnesses could have been adduced who would have testified that the prosecution's witnesses had a poor community reputation for truth and veracity. Lacking such factual support, it is unnecessary to determine whether defendant suffered any prejudice in these respects.

Affirmed.

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