

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNA MURRY,

Defendant-Appellant.

UNPUBLISHED

July 3, 2001

No. 221713

Wayne Circuit Court

Criminal Division

LC No. 99-003161

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felonious assault. MCL 750.82. She was sentenced to a term of one to four years' imprisonment. She appeals by right. We remand for an evidentiary hearing on defendant's claim that she was denied the effective assistance of counsel.

Defendant argues that the trial court erred in denying her motion for a new trial based on ineffective assistance of counsel. The trial court denied the motion without conducting an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). We agree that remand for a *Ginther* hearing is appropriate.

Defendant alleges that the complainant was previously arrested for pointing a gun at her, but was released after three days because defendant chose not to press charges. Had this information been elicited at trial, it may have undermined the complainant's credibility by showing that she was biased against defendant and possibly motivated to seek revenge.¹

At trial, the complainant denied ever having pointed a gun at defendant. Counsel attempted to ask the complainant about her arrest, but the trial court apparently believed that counsel was trying to impeach her with her prior record, and limited the inquiry to crimes of theft

¹ It would also explain testimony that the complainant was heard to say to defendant, "bitch, you got me locked up. I'm going to kill you"

or dishonesty. See MRE 609(a). The record does not indicate that defense counsel attempted to explain to the court what he was trying to do. Later, counsel asked the complainant whether she was aware that defendant had filed a complaint against her. The trial court overruled the prosecutor's objection, subject to defendant showing relevance, but defense counsel failed to pursue the matter. Counsel's reasons for not pursuing this issue are not clear from the record and, in light of the conflicting testimony that was presented at trial, failure to properly follow-up on this issue may have been a serious error that affected the outcome of defendant's trial. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant's motion for a new trial also alleges that two of the prosecution's witnesses were the complainant's children, something counsel failed to bring out at trial but which, if true, could have seriously undermined the credibility of the witnesses' testimony.

Defendant also claims that the doctor who saw her after the charged assault saw a cut on her cheek, which would have lent strong support to defendant's claim that the complainant attacked her with a box cutter and at the same time undermined the credibility of the prosecution witnesses. Although the doctor appeared at trial, the trial court ruled that his testimony was irrelevant because the beating was irrelevant. There is no indication that defense counsel sought to explain the relevance of the testimony.

In light of the facts and circumstances of this case, the foregoing issues should be further explored at an evidentiary hearing to address whether defendant was denied the effective assistance of counsel.

We remand for an evidentiary hearing on defendant's motion for a new trial based on ineffective assistance of counsel. The *Ginther* hearing is to be conducted within eighty-four days from the release date of this opinion. At this time, we need not address defendant's other issues regarding sufficiency of the evidence and the verdict being contrary to the law and the evidence. We retain jurisdiction.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey