

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THERESA KEMP,

Defendant-Appellant.

UNPUBLISHED

May 3, 2002

No. 229609

Wayne Circuit Court

LC No. 99-012607

Before: White, P.J., and Murphy and Fitzgerald, JJ.

WHITE, P.J. (*concurring in part and dissenting in part*).

I concur in the majority's disposition of the newly discovered evidence issue. I also agree with the conclusion that there was sufficient evidence to support the felony-firearm conviction. I would, however, remand for a *Ginther*¹ hearing on the ineffective assistance of counsel issue.

It appears that counsel knew of the existence of Karen, the bar owner, but failed to interview her. Counsel made an offer of proof at the conclusion of trial asserting that Karen would have testified that she was in the bar on the night of the incident and that she observed a bulge in the waistband of the victim that she believed to be a gun. Codefendant Cash, who was alleged to be the shooter, denied having a gun, and no one except the victim saw Cash or defendant with a gun. Cash testified that the victim produced the gun.

I conclude that defendant has made a sufficient showing that counsel's performance fell below an objective standard of reasonableness and that but for counsel's error, there existed a reasonable probability that the result would have been different, *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), to warrant remand for a *Ginther* hearing.

/s/ Helene N. White

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).