

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONRAD ALLEN FOSTER,

Defendant-Appellant.

UNPUBLISHED

March 24, 1998

No. 192819

Recorder's Court

LC No. 95-007564

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

MEMORANDUM.

Defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and felony-firearm, MCL 750.227b; MSA 28.424(2), and sentenced to two to ten years and two years imprisonment, respectively. Defendant appeals as of right. We affirm.

Defendant claims that the trial court erred in denying his motion for a new trial on grounds that audio tapes made of defendant to a 911 operator during the assault should have been made part of the trial record and that his trial counsel was ineffective for failing to seek admission of the tapes. We do not agree. The trial court did not abuse its discretion in denying defendant's motion for new trial. *People v Jehnsen*, 183 Mich App 305, 310-311; 454 NW2d 250 (1990).

Plaintiff asserts that the tapes were available at trial. However, even assuming arguendo that the 911 tapes in question have been lost or destroyed, defendant has failed to show that their loss requires the vacation of his convictions and sentences. Defendant's reliance on *People v Austin*, 76 Mich App 455; 257 NW2d 120 (1977), is misplaced. *Austin* is distinguishable from the instant case in several important regards. First, unlike the defendant in *Austin*, defendant has failed to show that any loss of the tapes constitutes an insurmountable impediment to appellate review. The missing evidence in *Austin* was essential to review and sustain defendant's conviction; the defendant in *Austin* was convicted of promoting pornography, but the allegedly pornographic materials were lost or destroyed. Here the tapes were cumulative to trial testimony by both defendant and complainant as to the content of the tapes. Second, the tapes in this case were never introduced into evidence or made part of an offer of proof concerning their admissibility. Accordingly, the tapes are not part of the lower court record,

unlike the exhibits lost in *Austin*. MCR 7.210(A)(1). Further, the loss of the tapes is at least partially attributable to defendant in light of defendant's failure to attempt to make them part of the record. Under these circumstances, *Austin* does not provide support for the vacation of defendant's convictions and sentences.

Additionally, defendant has failed to show that the trial court erred in resolving his ineffective assistance of counsel claim without first conducting an evidentiary hearing or that he is entitled to a remand for such an evidentiary hearing. Defendant is not entitled to an evidentiary hearing in light of his failure to explain the nature of the information contained on the tapes and how that information would be both admissible and helpful in presenting a valid defense to the crimes charged. *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995). For these same reasons, defendant has failed to show that trial counsel was ineffective. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Finally, the trial court noted in its opinion that defendant testified that he deliberately obtained an instrument of deadly force and that the knife previously obtained by the victim was in the bedroom at the time of the assault. The trial court stated that it had observed during the trial that defendant was much larger than the victim and that he was not injured in the confrontation. The trial court clearly indicated that it did not believe defendant could have reasonably thought himself in any danger from the victim so as to justify his using a gun to defend himself from her.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski