STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LOREN DIEHL,

Defendant-Appellant.

UNPUBLISHED
May 15, 1998

No. 194908
Gratiot Circuit Court
LC No. 95-003179 FH

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals by right from his convictions of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to eighteen months to four years for the felonious assault charge, and to a consecutive term of two years for the felony-firearm violation. We affirm.

Defendant first argues that he was improperly bound over for trial because probable cause that he committed the crimes was lacking at his preliminary examination. Specifically, defendant argues that the prosecution did not establish that he possessed the specific intent to commit felonious assault.[1] To prove the specific intent element of felonious assault, a prosecutor must show that a defendant possessed the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). In the present matter, the district court heard testimony that defendant pointed a loaded, cocked shotgun at a tactical officer who was attempting to apprehend him. It also heard testimony that defendant's aiming of the gun at the officer made the officer "move to the right" for fear of being shot. Based on these actions, we conclude that the district court had evidence before it which allowed the inference that defendant possessed the specific intent to put the victim in apprehension of receiving an immediate battery. Accordingly, we find that the bindover was proper. As to defendant's suggestion that he was merely defending himself, any claim of self-defense was properly left for the jury. See *People v Medley*, 339 Mich 486, 492; 64 NW2d 708 (1954).

Next, defendant argues that he was denied the effective assistance of counsel at trial. Because defendant failed to move for a new trial or an evidentiary hearing, our review is limited to the record below. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), our Supreme Court ruled that to prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that the representation so prejudiced the defendant as to deprive him of a fair trial. *Id*. at 302-303. It is against this backdrop that we evaluate defendant's arguments.

Defendant argues that counsel was ineffective for failing to call a ballistics or forensics expert to testify concerning the entry wound of the bullet that hit defendant. He argues that such testimony would have shown that he turned away from arresting officers, allowing for a deduction that he was shot while attempting to retreat. Although not mentioned by defendant in his appellate briefs, there was evidence presented at trial on at least two occasions regarding the location of the entry wound. After reviewing the record below, we conclude that defendant has not shown a reasonable probability that, but for defense counsel's failure to call a ballistics expert, the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). In addition, calling the paramedics as witnesses would not have, under the reasonable probability standard, changed the result of the proceeding. *Id.* The paramedics were not actual witnesses to the shooting and could not have testified that defendant was retreating or running away when he was shot. In fact, defendant testified at trial that he did not run until after he was shot. As to defendant's argument that counsel was ineffective for failing to raise a claim of self-defense at trial, we have reviewed the record and conclude that this argument is without merit. At trial, defendant testified that he never pointed the gun at the officers and that he was carrying the gun, at that point in the evening, for the purpose of shooting varmints. Thus, based on defendant's own testimony, there was no basis for raising a self-defense claim. In sum, defendant has not met his burden of establishing that he was denied the effective assistance of counsel at trial.

Next, defendant argues that the trial court should have sua sponte changed venue in this case or sequestered the jury because one of the jurors admitted that he or she had read a newspaper that contained an article about defendant's involvement in an unrelated criminal sexual conduct (CSC) matter and because one of the jurors was employed in the dentist's office where the CSC victim went for dental services. We disagree. Defendant fails to cite any authority for the proposition that the court should have sua sponte changed venue. This Court will not search for authority to support a party's position. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997). In any event, defendant presents nothing more than speculation about why a change of venue should have been granted. Further, it was not established that the juror read the CSC article relating to defendant. The lower court record reveals that when asked by the court if any of the jurors had read the paper, one of the jurors responded that he or she had opened the paper backwards and had looked at an ad that was placed in the newspaper by the juror. There was no indication on the record that the juror had even seen the CSC article about defendant. With regard to the juror who was employed by the dental office where the CSC victim was treated, it has not been demonstrated that this attenuated association impaired the juror's ability to judge defendant fairly. Moreover, defendant has not supplied us with any

citations to the lower court record so that we can verify this allegation, and defendant has not provided a transcript of the voir dire on appeal. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

Finally, defendant filed a supplemental brief challenging the credibility of several of the witnesses at the preliminary examination and at his trial. We are persuaded that any inconsistencies in the testimony of the prosecution's witnesses -- and the relative weight given to such testimony -- was best left to the trier of fact. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

We affirm.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] Although defendant suggests that the district court mischaracterized the crime of felonious assault as a general intent crime, we do not find this to be true. The prosecutor stated that felonious assault was a general intent crime; however, there is nothing in the record to suggest that the district court relied on the prosecutor's incorrect statement in finding that probable cause existed to bind over defendant.