

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT BROOKS,

Defendant-Appellant.

UNPUBLISHED

June 21, 1996

No. 182154

LC No. 94-007040

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE SINCLAIR,

Defendant-Appellant.

No. 182155

LC No. 94-007040

Before: Cavanagh, P.J., Hood and J.J. McDonald*, JJ.

PER CURIAM.

Defendants, Robert Brooks and Dwayne Sinclair, were charged with two counts of armed robbery, three counts of first-degree criminal sexual conduct, and one count of felony firearm. Following a jury trial, both defendants were convicted of two counts of armed robbery, MCL 750.529; MSA 28.797, and one count of felony firearm, MCL 750.227b; MSA 28.424(2). Defendants were acquitted of the three counts of first-degree criminal sexual conduct. Brooks was sentenced to two years' imprisonment for his felony firearm conviction to be followed by two concurrent five to fifteen year terms for his armed robbery convictions. Sinclair was sentenced to two years' imprisonment on his felony firearm conviction to be followed by two concurrent eight to twenty year terms for his armed robbery conviction. Defendants appeal as of right. We affirm.

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

Defendant Brooks first argues that the prosecutor failed to present sufficient evidence to prove beyond a reasonable doubt that he committed the offenses for which he was convicted. A challenge to sufficiency tests whether all the evidence, considered as a whole, justifies submitting the case to the trier of fact. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). On review, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Defendant's sole contested issue is whether complainant Laster's identification of him by voice alone was sufficient to support his convictions. A voice identification is a sufficient means of identification. *People v Bozzi*, 36 Mich App 15, 19; 193 NW2d 373 (1971). However, in order to be sufficient, the witness' voice identification testimony must be positive and unequivocal and there must be some reason for the witness' ability to identify the voice. *Id.*, p 22

In this case, there was evidence that three days following the incident, defendant Brooks was discovered driving the stolen vehicle. Complainant Laster subsequently identified Brooks from a line-up as one of her assailants by his voice alone. At trial, complainant testified that she heard her assailants speak several times on the evening in question, that she would never forget their voices, and that she was positive that the voices of the men she picked out to the line-up were among those she heard on the evening in question. We therefore conclude that there was sufficient evidence to satisfy the *Bozzi* requirements.

Defendant Brooks also argues that complainant Laster's voice identification was insufficient because it was unreliable. Defendant Brooks bases this argument on the fact that in addition to identifying himself and his codefendant, Laster also identified a person who had no connection with this matter. Claims of mistaken identification and the credibility of identification testimony are matters to be decided by the jury. *See People v Smalls*, 61 Mich App 53, 57; 232 NW2d 298 (1975); *People v Edwards*, 55 Mich App 256, 259-260; 222 NW2d 203 (1974); *People v Boynton*, 46 Mich App 748, 749; 208 NW2d 523 (1973). This Court will not weigh the evidence or assess the credibility of the witnesses. *People v Mehall*, 213 Mich App 353; 539 NW2d 593 (1995). By convicting defendant Brooks of armed robbery and felony firearm, the jury implicitly found Laster's identification testimony credible even in light of her prior misidentification of a third individual who was not involved in the crime.

Defendant Brooks further argues that because identity was the sole issue at trial, the jury's verdicts acquitting him of three counts of first-degree criminal sexual conduct but convicting him of armed robbery and felony firearm were inconsistent, and thus, support his claim that the identification testimony was insufficient. We disagree.

Criminal verdicts need not be consistent. *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984); *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980). "Because the jury is the sole judge of all the facts, it can choose, without any apparent logical basis, what to believe and what to disbelieve." *Vaughn, supra*. Therefore, the jury may release a defendant from some of the

consequences of his act without absolving him of all responsibility. *Id.* We therefore conclude that the jury's verdicts in this case do not demonstrate that the evidence presented as to identity was insufficient.

Both defendants argue that the jury's verdict was against the great weight of the evidence. This Court reviews a denial of a motion for a new trial based on a great weight of the evidence argument under an abuse of discretion standard. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). The question is whether the verdict was manifestly against the clear weight of the evidence. *Id.*

The evidence presented at trial did not clearly weigh in defendants' favor. Again, the sole contested issue is whether defendants were the individuals who committed the crimes. There was evidence that three days following the incident in question defendants were found in possession of the stolen vehicle. Complainant Laster picked both defendants out of a line-up based on their voices. At trial, defendants called into question the reliability of Laster's identification and defendant Sinclair presented alibi witnesses. However, claims of mistaken identity and alibi are matters dealing with credibility. *Smalls, supra* at 57. Further, evidence was presented which called into question the credibility of Sinclair's alibi. In reaching its verdicts, the jury apparently resolved these credibility issues. This Court will not resolve credibility issues anew on appeal. *Mehall, supra*. We therefore conclude that the jury's verdict was not manifestly against the great weight of the evidence.

Defendant Sinclair next argues that the trial court erred in refusing to respond to a question from the jury during their deliberations in a meaningful manner. During deliberations, the jury sent the following question to the court:

Transcript re: Run Harris. Question number one, does Run Harris or Rashan Harris exist?

Run Harris was the person from whom defendant Sinclair allegedly borrowed the stolen car.

In discussing the possible response with defense counsel, the trial court indicated that it was inclined to respond that the jury should rely on their collective memories. Defendant Brooks' counsel concurred, but indicated that "[w]e prefer an instruction that says yes, he exists and he's in prison in Indiana." Counsel for Sinclair concurred. The court then asked both counsel if they were "comfortable with the collective memories [response]." Each, including Sinclair's counsel, indicated that they were comfortable with the response. Because defendant Sinclair failed to object to the court's instructions, appellate review is precluded absent manifest injustice. *People v Cross*, 202 Mich App 138, 148; 508 NW2d 144 (1993). We find no manifest injustice in the court's response to the jury's question. On the contrary, we find that the court responded completely within its discretion to insure fairness. See MCR 6.414(H).

Defendant Sinclair further claims that the trial court gave inadequate jury instructions on alibi. Again, because defendant failed to object to the court's instructions, appellate review is precluded absent manifest injustice. *Cross, supra*. Having reviewed the instructions in their entirety, we find no manifest injustice. Defendant even concedes that the court gave the standard jury instructions on alibi.

CJI2d 7.4. We find defendant's argument that the standard jury instructions were inadequate unpersuasive in this case.

Defendant Sinclair finally argues that he was denied effective assistance of counsel when counsel failed to (1) seek an evidentiary hearing prior to trial to challenge complainant's voice identification of defendant on the basis of improper suggestions, and (2) to present evidence to the jury that Run Harris existed.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant first claims that defense counsel should have sought a pretrial evidentiary hearing to challenge complainant Laster's voice identification of defendant. The record reveals that defense counsel adequately cross-examined Laster concerning the identity of defendant as well as the police officer who conducted the lineup. Moreover, defendant failed to demonstrate, and we are not convinced, that, but for counsel's failure to request a pretrial evidentiary hearing, the outcome of the trial would have been different.

Defendant also claims that defendant should have presented evidence that Run Harris existed. Decisions concerning what evidence to present is a matter of trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). This Court will not second-guess defense counsel's trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Moreover, defendant has failed to demonstrate that, but for counsel's actions, the outcome of the trial would have been different.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ John J. McDonald