

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS SMITH,

Defendant-Appellant.

UNPUBLISHED

April 29, 1997

No. 186236

Recorder's Court

LC No. 94-009308

Before: Holbrook, Jr., P.J., and White and A. T. Davis*, JJ.

MEMORANDUM.

Defendant appeals by right from his jury trial conviction 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). We affirm.

Defendant first argues that the prosecutor failed to present sufficient evidence to establish that defendant was complainant's assailant. In making this argument, defendant argues that the only direct evidence linking defendant to the crime was Carolyn Johnson's voice identification of defendant, which was unreliable. We disagree.

The testimony presented at trial established that Johnson had been defendant's girlfriend and had lived with him for approximately 1 ½ years. Based on her familiarity with defendant's voice, Johnson testified that she was sure that the voice she heard ask "is Carolyn in there" was defendant's. Because her testimony established that she was familiar with defendant's voice and had unequivocally identified defendant as the person who asked the question, her voice identification testimony was a sufficient means of identifying defendant as the assailant. See *People v Bozzi*, 36 Mich App 15, 19; 193 NW2d 373 (1971).

Although, as defendant correctly points out, Johnson was inside the house when the assailant called out to inquire whether she was inside the house, this merely calls into question Johnson's ability to have heard accurately the assailant's voice. Thus, this goes to the weight and credibility of Johnson's

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

testimony. The credibility of identification testimony is a matter 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). In light of the jury's verdict in this case, it is clear that it found Johnson's identification to be credible, and this Court will not address issues of weight and credibility anew on appeal.

Moreover, contrary to defendant's assertion, the other evidence presented at trial, both direct and circumstantial, and the inferences reasonably drawn, also established that defendant was Dobbs' assailant. Both Dobbs and Carr testified that a yellow Ryder truck pulled up in front of Dobbs' home at approximately 2:30 a.m. on July 23, 1994. The person inside the vehicle yelled out asking for Carolyn Johnson. A single shot was fired from the driver's side of the truck, striking Dobbs. Approximately two hours after the shooting, defendant was apprehended by police near Dobbs' second home on Hague. At that time, defendant was the sole occupant of a yellow Ryder truck, and he was in possession of SKS, which is the Chinese version of a AK 47. Moreover, Johnson testified that following the shooting she spoke to defendant on the phone, and he apologized for shooting Dobbs. Viewing this evidence in a light most favorable to the prosecutor, there was sufficient evidence to establish beyond a reasonable doubt that defendant was Dobbs' assailant.

In a supplemental brief, defendant argues that the trial court erred in denying his motion for new trial on the grounds that the verdict was against the great weight of the evidence, and that defendant's constitutional right to remain silent was violated. We disagree. Given the evidence presented at trial, the trial court did not abuse its discretion in denying the motion based on the great weight of the evidence. Further, the questioning of the prosecution witness did not violate defendant's Fifth Amendment rights.

We affirm.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Alton T. Davis