

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEENAN BURTON,

Defendant-Appellant.

UNPUBLISHED

August 9, 2007

No. 270830

Wayne Circuit Court

LC No. 06-001382-01

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, carjacking, MCL 750.529a, and assault with intent to rob while armed, MCL 750.89. The trial court sentenced defendant to concurrent prison terms of five to fifteen years. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the evidence identifying him as the perpetrator of the crimes was insufficient to support the convictions.

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976); *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). A positive identification by a witness may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is a question for the trier of fact to decide. *People v Davis*, 241 Mich App 697, 699-700; 617 NW2d 381 (2000); *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to identify the accused as the perpetrator. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

The evidence linking defendant to the crime primarily consisted of the identification testimony of one witness, who identified him at a lineup and at trial, and the circumstantial evidence that defendant was driving the car approximately five hours after the carjacking.

Defendant's brief incorrectly states, "The sole direct evidence allegedly connecting Appellant to this offense [was] the testimony of [the witness] that she recognized Appellant's voice at a lineup." He then compares the case to *People v Bozzi*, 36 Mich App 15; 193 NW2d 373 (1971), in which this Court rejected a claim that a voice identification, along with circumstantial evidence, was insufficient to submit the case to a jury. The Court indicated that identification must be positive and certain and "it must also appear by the existence of some reason to which the witness can attribute his ability to make the voice identification, of which familiarity or peculiarity are the most common example." *Id.* at 22. Defendant contends that, unlike in *Bozzi*, the identifying witness was not familiar with the defendant. There was also no peculiarity about the perpetrator's voice.

The principal flaw in defendant's argument is that it ignores the witness's identification of defendant by his appearance as well as his voice. She "recognized" him at the lineup before she asked the participants to speak. She identified him by his appearance at trial. Her positive identification of defendant as the perpetrator and his presence in the vehicle are sufficient to support the conviction. *Bozzi, supra*, is inapposite.

Defendant also argues that the court erred in its instructions concerning the complainant for count III, assault with intent to rob while armed. However, defendant waived any claim of error. Defense counsel never requested re-instruction, as he claims on appeal. When the mistake was recognized, he agreed that "writing in" the correct complainant's name was the appropriate means of resolving the problem. Because defense counsel approved this procedure, defendant has waived the issue on appeal, and "there is no 'error' to review." *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly