

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ROBERT DAWSON,

Defendant-Appellant.

UNPUBLISHED

August 17, 1999

No. 207474

Berrien Circuit Court

LC No. 97-400786-FC

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2); two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2); and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as follows: first-degree home invasion, 12 to 20 months; first-degree criminal sexual conduct - two counts (merged into one conviction/sentence), 30 to 50 years; felony-firearm, one count, 2 years, and two counts (merged into one conviction/sentence), 2 years. The sentences for felony-firearm were to be served concurrently with each other; the sentences for first-degree home invasion and first-degree criminal sexual conduct were to be served concurrently with each other, but following the felony-firearm sentences. We affirm.

The victim, who was eleven years old at the time of the incident, was home alone in the evening, taking a bath when three males broke into her home through a back window. The three males stole items from the house and two of them sexually assaulted the victim several times. Even though all defendants had their faces covered, the victim did identify two of the males by voice. She identified one of the perpetrators as being Demetrius Guidry, one of her friend's older brothers, whom she knew before the incident, whose voice she had heard almost every day over the past year, whom she had previously spoken to on the telephone, and whom one of the other perpetrators called by name during the incident. Guidry then substantiated the victim's identification of him by admitting to police that he was at the scene and participated in the home invasion with defendant and defendant's brother. The

victim identified defendant by his voice during a police lineup but could not identify him by physical appearance.

Defendant contends that there was insufficient evidence to prove his identity because Guidry's testimony was suspect, having been given in return for a plea bargain; the victim was unable to identify defendant by physical appearance; and the victim's identification of defendant by his voice was tainted because just before the lineup at which the victim identified defendant, the victim had been in the same courtroom as defendant when defendant was attending a juvenile waiver hearing.

Defendant's contention regarding Guidry's testimony is essentially a challenge to Guidry's credibility. However, the credibility of a witness is a matter of weight, not sufficiency, that is to be determined by the jury. *People v Sharbnaw*, 174 Mich App 94, 105; 435 NW2d 772 (1989). The victim's inability to identify defendant by physical appearance is of small matter because the victim was able to identify defendant by his voice. Although defendant contends that the voice identification was tainted, the jury was made aware of the circumstances under which the victim and defendant ended up in the same courtroom before the lineup. The jury also was presented with the victim's testimony that, while in the courtroom before the lineup, she saw only the back of defendant's head and did not hear him speak. Therefore, the challenges regarding the victim's testimony are also challenges to her credibility and are, thus, matters for the jury to determine. Reviewing the record as a whole and in a light most favorable to the prosecution, it is clear that there was sufficient evidence presented at trial to support the identification of defendant and his guilt beyond a reasonable doubt. *People v Lyles*, 148 Mich App 583, 594; 385 NW2d 676 (1986).

Next, defendant argues that his convictions should be reversed because there was an insufficient independent basis for the in-court identification. However, defendant has waived this issue for appellate review. The trial court is not obliged to determine whether an independent basis exists unless the defendant asserts that the pretrial identification was tainted. *People v Laidlaw*, 169 Mich App 84, 92-93; 425 NW2d 738 (1988). Issues regarding the propriety of an in-court identification are waived absent objection. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995); *People v Whitfield (After Remand)*, 228 Mich App 659; 579 NW2d 465 (1998). In this case, defendant did not object and did not assert at trial that the pretrial identification was tainted.

Affirmed.

/s/ Gary R. McDonald

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh