

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN L. FULBRIGHT,

Defendant-Appellant.

UNPUBLISHED

November 17, 1998

No. 200291

Oakland Circuit Court

LC No. 96-145817 FC

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284, assault with intent to murder, MCL 750.83; MSA 28.278, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to twenty-five to fifty years' imprisonment for each assault conviction, to be served consecutively to his mandatory two-year sentence for the felony-firearm convictions. He appeals as of right. We affirm.

Complainants Charles and Jeffery Fitch were walking toward Charles Fitch's house on the evening of April 4, 1996, when a man approached them with a gun, pointed it at Charles Fitch, and fired twice. The man then pointed the gun at Jeffery Fitch's head and took his car keys. Charles Fitch got into the house and called 911. He described the assailant as wearing a rolled up black stocking cap and a white and red shirt with the word "Fila" on the front. The police apprehended defendant a short time later behind a restaurant approximately two-tenths of a mile from Charles Fitch's house. Defendant was wearing a Fila shirt. Police found a black stocking cap, Jeffery Fitch's keys, and a gun nearby. Testing revealed that a bullet and spent shell casing found at Charles Fitch's house were fired from that gun.

On appeal, defendant first contends that the trial court erred in allowing Charles Fitch to make an in-court identification of defendant as his assailant. Even if the trial court erred in allowing the in-court identification, the error would warrant reversal only if it was not harmless

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

beyond a reasonable doubt. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 531; 560 NW2d 651 (1996); *People v Winans*, 187 Mich App 294, 299; 466 NW2d 731 (1991). Here, the evidence aside from the identification was sufficient to support defendant's conviction. Defendant was apprehended shortly after the shooting within two-tenths of a mile from the shooting. He was wearing a Fila shirt as described by Charles Fitch. When he saw the police, he tried to hide. When questioned, he gave a false name. The gun used in the assault, Jeffery Fitch's keys, and a cap matching the description given by Charles Fitch were found where defendant was apprehended. Defendant claimed that Germaine Watkins was the shooter. However, Watkins, who is 6' 11" tall and weighs over four hundred pounds, clearly did not fit the description of the assailant given by either brother. Given the overwhelming evidence that defendant was the person who assaulted the Fitch brothers, aside from the in-court identification by Charles Fitch, any error in allowing the identification was harmless beyond a reasonable doubt.

Defendant next argues that he was denied due process when the trial court denied his motion for a *Walker* hearing [*People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965)]. The motion was made on the first day of trial, after defendant's motion to adjourn was denied and just before jury selection, and was requested on the ground that counsel wanted to cross-examine the officers who interviewed defendant to see if there was some possibility that his statement was involuntary. Given the circumstances, defendant's motion was not the type of pretrial motion contemplated by *Walker*, *supra*, and the decision to entertain the motion was in the discretion of the trial court. See *People v Mitchell*, 44 Mich App 679, 683; 205 NW2d 876 (1973), *rev'd* on other grounds 402 Mich 506; 265 NW2d 163 (1978); *People v Soltis*, 104 Mich App 53, 55; 304 NW2d 811 (1981). In light of the generality and timing of the request, we find no abuse of discretion. Furthermore, even if the trial court abused its discretion in refusing to accord defendant a full *Walker* hearing, the error would not require reversal because the record shows that defendant's statements -- which did not constitute a confession or acknowledge culpability in any way and were voluntarily given after defendant was read his *Miranda* rights [*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] -- were voluntarily made and the police did not engage in misconduct. *People v Littlejohn*, 197 Mich App 220, 223-224; 495 NW2d 171 (1992).

Defendant's final argument is that there was insufficient evidence to prove that he acted with intent to kill. When reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992), *amended* 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from that evidence may constitute satisfactory proof of the elements of the offense, including the intent to kill. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). In this case, defendant's gun was loaded, he fired it while aiming it at Charles Fitch, and one of the bullets hit, at chest height, the door Fitch was attempting to open. From this evidence, a rational jury could infer that defendant intended to kill Charles Fitch.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Robert P. Griffin