

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DAVID LOUIS,

Defendant-Appellant.

UNPUBLISHED

February 21, 1997

No. 185193

Saginaw Circuit Court

LC No. 94-009180-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE LAMONT JONES,

Defendant-Appellant.

No. 185194

Saginaw Circuit Court

LC No. 94-009181-FC

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,* JJ.

PER CURIAM.

In these consolidated cases, defendants were convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284. Defendant Louis was sentenced to time served and five years' probation. Defendant Jones was sentenced to a term of eighteen months to ten years' imprisonment. Defendants now appeal as of right, and we affirm defendants' convictions, but remand for correction of defendant Louis' presentence investigation report (PSIR).

On January 4, 1994, the victim was assaulted by three young males who demanded that he give them his White Sox baseball jacket and hat. The victim ran, was shot three times, and was seriously wounded. He could not identify his assailants. Defendants, however, were identified by Marilyn

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

Atkins, who was near the scene and knew all parties involved. Following a joint jury trial, defendants were convicted of assault with intent to rob while armed, and they now appeal, raising some issues in common and some individually.

Defendants first argue that the probative value of a photograph of the injured victim that was admitted at trial was outweighed by its unfair prejudicial impact and should not have been admitted. We disagree. The photograph depicts the victim lying on a stretcher with protective devices surrounding his neck and waist, and a pool of blood approximately two to three feet long and one foot wide appears near his head. The admission of photographs as evidence is a matter within the discretion of the trial court. *People v Mooney*, 216 Mich App 367, 377; 549 NW2d 65 (1996). The fact that a photograph may be more effective than an oral description and, to that extent, likely to excite passion and prejudice, does not render the photograph inadmissible. *Id.* at 378. Here, we find no abuse of discretion in the trial court's decision to admit the photograph at issue, where the photograph was instructive to depict the nature of the assault upon the victim.

Both defendants also argue that the trial court abused its discretion in denying them new trials.¹ We disagree. While defendants are correct in recognizing that in denying defendants' motions for directed verdicts, the trial court noted that it did not "personally" feel that anyone should be convicted by the type of testimony given by Marilyn Atkins, they fail to appreciate that in denying their motions for new trials the trial court determined that Atkins had been credible. In denying their motions for new trials, the trial court stated:

Defendants claim that the Court's [earlier] statement [regarding Atkins] amounted to finding that [she] was not a credible witness, thereby entitling defendants to a new trial. The Court disagrees with defendants' characterization of the Court's statement. While Marilyn Atkins' testimony was contradicted, the Court's statement was not a finding, as in the *Herbert*² case, that the prosecutor's witness was absolutely incredible and unbelievable.

The Court's comments related to the amount of testimony contradicting Marilyn Atkins' testimony rather than to a finding as to her credibility. The Court finds that, even though Marilyn Atkins' testimony was contradicted, it was not absolutely incredible or unbelievable.

Based upon the above comments, we conclude that the trial court, after recognizing the need to assess the credibility of witnesses in deciding the motions for new trials, did not abuse its discretion in denying defendants new trials.

Both defendants also claim that they were denied fair trials due to numerous instances of prosecutorial misconduct, many of which were not objected to below. Consideration of unpreserved challenges to alleged instances of misconduct is limited to whether our failure to review would result in a miscarriage of justice. *People v Graham*, 219 Mich App 707; ___ NW2d ___. Here, with respect to defendants' unpreserved claims of error, our failure to provide further review will not result in a

miscarriage of justice because we conclude that either the complained of actions did not amount to misconduct, or that any possible prejudice could have been cured by a timely instruction. *Id.*

Turning now to defendant Jones' preserved claim of error, defendant Jones claims that misconduct by the prosecutor involving the withholding of information about a witness denied him access to potentially exculpatory evidence. Here, we find no abuse of discretion in the trial court's refusal to dismiss the charges against defendant Jones due to the prosecutor's failure to turn over information concerning the alias of a recanting witness who claimed to have fabricated a tip to the police and whose testimony was suppressed. Defendant Jones was not deprived of a fair and impartial trial, and reversal on this basis is not required. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995).

Defendant Jones next argues that his conviction is supported by insufficient evidence and that the trial court should have granted his motion for a directed verdict of acquittal. Here, viewing the evidence in a light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 516; 489 NW2d 748 (1992), the evidence was sufficient to permit a rational jury to conclude that one of the defendants was armed and that defendants were guilty of the crimes for which they were convicted.

Defendant Jones further argues that the trial court abused its discretion in denying his motion for a mistrial after the victim stated that he believed defendant Jones was one of his assailants. The victim had previously testified that he could not recognize his assailants' faces, but only their general physical descriptions, one of which matched defendant Jones. Upon the facts of this case, we find no abuse of discretion. The trial court properly instructed the jurors to disregard the victim's statement that he "believed" that defendants had been involved in his assault, and reminded them that the victim had no basis upon which to have made that identification.

We further reject defendant Jones' argument that the cumulative effect of errors committed at his trial denied him a fair and impartial trial, as we do not find this claim to be supported by the record.

Defendant Louis claims that the prosecutor's misconduct in his case was so prejudicial that his counsel's failure to object deprived him of the effective assistance of counsel. We disagree. Because we have previously concluded that the complained of remarks were either not improper or were not prejudicial, we find defendant Louis' claim of ineffective assistance on these facts to be without merit.

Defendant Louis next argues that his in-court identification by Atkins was directly tainted by a prejudicial photographic line-up and that the identification should have been suppressed. We find no clear error in the admission of Atkins' identification testimony. We agree with the trial court that defendant Louis has failed to show that the pretrial identification was tainted by improper procedure or was unduly suggestive. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Defendant Louis also argues that the trial court abused its discretion in sentencing him as an adult. We disagree. A trial judge's findings of fact regarding the factors enumerated in MCL 769.13; MSA 28.1072(3), which governs sentencing of juveniles, are reviewed for clear error. *People v Lyons (On Remand)*, 203 Mich App 465, 468; 513 NW2d 170 (1994). The ultimate decision to sentence a

minor as an adult is reviewed for an abuse of discretion, which requires this Court to determine whether the sentence is proportionate to the seriousness of the offense and the offender. *Id.* Here, we find defendant Louis' sentence to be proportionate and conclude that the trial court did not commit clear error or abuse its discretion in determining that defendant Louis should be sentenced as an adult.

Finally, defendant Louis argues that his PSIR requires amendment due to the inclusion of irrelevant information. We agree. During sentencing, the trial court noted, in response to defense counsel's request to have certain information stricken, that he was not considering in any way a previous, unrelated assault charge against defendant Louis that had been dismissed. In *People v Taylor*, 146 Mich App 203; 380 NW2d 47 (1985), the trial court also "did not make a finding of inaccuracy but chose to proceed with sentencing without taking into consideration the challenged information." In deciding *Taylor*, this Court held:

When a court, for purposes of expediency, efficiency or otherwise, disregards information challenged as inaccurate, the court in effect determines that the information is irrelevant to sentencing. The defendant is therefore entitled to have that information stricken. Accordingly, we remand for the challenged parts of defendant's presentence investigation report to be stricken. [*Taylor, supra*, 146 Mich App 205.]

Because the information was challenged as inaccurate and the trial court disregarded it in sentencing defendant, it should have been stricken before the PSIR was sent to the Department of Corrections, *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995). Accordingly, we remand the case for preparation of a corrected PSIR.

Defendants' convictions are affirmed, but defendant Louis' case is remanded for correction of his PSIR.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Timothy P. Pickard

¹ Defendant Jones actually argues that his counsel was ineffective for failing to move for a new trial. However, counsel for both defendants did move for a new trial, and thus we have reviewed the merits of the trial court's denial of a new trial as to both defendants.

² *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).