

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES SOLOMON,

Defendant-Appellant.

UNPUBLISHED

February 17, 1998

No. 198396

Recorder's Court

LC No. 95-012970

Before: Michael J. Kelly, P.J., and Fitzgerald and M.G. Harrison*, JJ.

MEMORANDUM.

In a jury trial, defendant was convicted of the assault with intent to murder Regina Tucker, MCL 750.83; MSA 28.278, assault with intent to commit great bodily harm upon Pearleree Jones, MCL 750.82; MSA 28.277, sixteen counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788, against the same two victims, and felony firearm, MCL 750.227b; MSA 28.424(2). At sentencing, twelve of the sixteen counts of CSC I were dismissed on multiple punishment grounds. On this appeal of right, defendant contends that the trial court erred in denying his motion to suppress the identification testimony of victim Jones. We affirm.

Jones first identified defendant at a corporeal lineup identification proceeding, which consisted of five men, of whom defendant, by approximately two inches, was the tallest. However, height disparities were greatly removed from the equation by having all the lineup participants seated in chairs. Jones' identification of defendant at this corporeal lineup was based on "the shape of his head and lips." She made no mention of his height, weight, or clothing in recounting her identification.

Shortly thereafter, Jones again identified defendant, this time in a photographic identification proceeding, at which defendant's counsel was not present. This was constitutionally improper, *People v Franklin Anderson*, 389 Mich 155, 188; 205 NW2d 461 (1973), and accordingly the people are required to show an independent basis for in-court identification by Jones by clear and convincing evidence.

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

The requisite clear and convincing evidence was Jones' earlier identification of defendant at the properly conducted corporeal lineup identification proceeding. There was nothing in either proceeding which was irreparably conducive to misidentification. *People v Kurylczuk*, 443 Mich 289, 303-305; 505 NW2d 528 (1993). Since identification of defendant based on the photographic lineup was merely cumulative of the proper identification based on the corporeal lineup, any error with respect to the photographic proceeding was harmless. *People v Williams*, 57 Mich App 612, 616; 226 NW2d 584 (1975).

Affirmed.

/s/ Michael J. Kelly

/s/ E. Thomas Fitzgerald

/s/ Michael G. Harrison