

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW C. TROUT,

Defendant-Appellant.

UNPUBLISHED
October 22, 1996

No. 170719
LC No. 91-001977

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Following a jury trial, defendant, a juvenile at the time of trial, was convicted of second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced as an adult to seven to twenty years' imprisonment. Defendant now appeals as of right. We affirm.

On September 20, 1991, defendant was present at the scene of a schoolyard fistfight between the victim and Nicholas Delgreco. After the fight, defendant and others converged on the victim and kicked him to death. At trial, the prosecutor produced eyewitnesses who reported that defendant kicked the victim several times in the area of his head and upper body. However, some of the witnesses' accounts differed from their previous statements about the events leading to the victim's death, thus prompting the prosecutor to impeach his witnesses' testimony with their prior inconsistent statements.

On appeal, defendant argues that this Court should reverse his conviction because the prosecutor engaged in extensive impeachment of his witnesses with prior inconsistent statements. Defendant advances that this posed a grave risk that the jury would improperly consider the prior inconsistent statements as substantive evidence of his guilt. We disagree.

In order to preserve this issue for review, defendant was required to advance timely and specific objections to the prosecutor's attempts to impeach his witnesses. See *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995); *People v Lyles*, 148 Mich App 583, 589; 385 NW2d 676

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

(1986). Because defendant did not do so, this issue is unpreserved for appellate review. However, we may still address this issue if failure to do so would result in manifest injustice. *Turner, supra*.

After carefully reviewing the record, we find no manifest injustice. Impeachment of a witness with prior unsworn, inconsistent statements is permissible so long as the jury is instructed to consider the inconsistent statements solely in relation to the witness' credibility, and not as substantive evidence establishing the elements of an offense. *Lyles, supra* at 589-590. Here, the jury was instructed twice that the witnesses' prior unsworn, inconsistent statements were not substantive evidence, but were to be considered solely for the purpose of gauging the witnesses' credibility. Since the jury was properly instructed on the use of prior inconsistent statements for impeachment, there is no error. *Jones, supra* at 549; see also *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994) (jury presumed to have followed a court's instructions until the contrary is clearly shown).

Furthermore, the witnesses' prior inconsistent statements were not the only evidence which established that defendant kicked the victim in the head. Even if there was some risk that the witnesses' prior inconsistent statements could be used as substantive evidence of the elements of defendant's offense, it is clear that any error or combination of errors was not prejudicial to defendant, since it was not decisive of the outcome in light of the other evidence presented at trial. See *People v Lee*, 212 Mich App 228, 244-245; 537 NW2d 233 (1995).

Next, defendant argues that he is entitled to resentencing because the trial court failed to properly consider the requisite statutory factors in reaching its decision to sentence him as an adult. We disagree.

The standard of review of a trial court's decision to sentence a minor defendant as an adult is a bifurcated one. *People v Lyons (On Remand)*, 203 Mich App 465, 467-468; 513 NW2d 170 (1994). First, the trial court's factual findings supporting its determination regarding each factor enumerated in MCL 769.1(3); MSA 28.1072(3) are reviewed under the clearly erroneous standard. MCR 2.613(C); *Lyons, supra* at 468. The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* Second, the ultimate decision whether to sentence the juvenile as an adult is reviewed for an abuse of discretion. The abuse of discretion standard requires the reviewing court to determine whether the sentence is proportionate to the seriousness of the circumstances surrounding the offense and offender. *Id.*

Defendant first argues that the trial court gave "preemptive weight" to the seriousness of his offense and erred in failing to consider the circumstances surrounding his offense. While it is true that a sentencing court may not place "preemptive weight" on any one factor from MCL 769.1(3); MSA 28.1072(3) when reaching its sentencing decision, *People v Spearman*, 195 Mich App 434, 448; 491 NW2d 606 (1992), overruled on other grounds sub nom *People v Veling*, 443 Mich 23, 42; 504 NW2d 456 (1993), a trial court may place "weight as appropriate to the circumstances" on any of the factors, as long as all of the statutory factors are carefully considered. *Id.* at 448-449. In light of defendant's conviction for second-degree murder and its relative severity, we are not convinced that the

trial court made a mistake when it placed “great weight” on the seriousness of defendant’s offense. Moreover, it is clear from the record that the trial court considered the other relevant statutory sentencing criteria in reaching its sentencing decision.

Next, defendant argues that the trial court made unsupported findings of fact in relation to its determination that sentencing defendant as an adult was in the best interests of the public welfare and the protection of public security. As to the public welfare, the trial court found that the goals of deterrence and punishment would not be served if defendant were to spend only two and one-half years in juvenile detention for his crime. It is not contested that defendant was eighteen years of age when he was sentenced and that his recommended adult sentence called for a minimum of eight years’ incarceration. Nor is it contested that defendant would be released from juvenile detention upon his twenty-first birthday. In light of these uncontroverted facts, we are not convinced that the trial court was mistaken in finding that sentencing defendant to the longer term of incarceration in an adult facility would best serve the public welfare. See *People v Black*, 203 Mich App 428, 430-431; 513 NW2d 152 (1994).

Defendant also argues that the trial court failed to determine whether sentencing him as an adult would best serve the interest of public security. While the trial court did not explicitly consider this factor in relation to its finding concerning the public welfare, it had already determined elsewhere that defendant posed no threat to public security, a finding amply supported by the record. Moreover, the trial court’s concern that defendant’s sentence should have a proper deterrent effect can also be viewed as a public security consideration. In light of these considerations, we find that the trial court did not fail to consider the issue of public security in reaching its sentencing decision.

Next, defendant argues that the trial court improperly limited its discretion in reaching its decision to sentence him as an adult because it referred to the fact that it had sentenced one of his codefendants, Marek Sobotka, an adult, to a seven-year minimum sentence for his manslaughter conviction. Unlike *People v Shamblin*, 26 Mich App 57; 181 NW2d 791 (1990), in which the trial court improperly allowed sentences for completely unrelated crimes to influence its sentencing decision,¹ defendant’s potential sentence was compared to the sentence of his codefendant who was convicted of a lesser crime. It was entirely proper for the trial court to examine Sobotka’s sentence in its analysis, since they were engaged in what was essentially a joint criminal enterprise. In effect, Sobotka’s offense was a “circumstance” of defendant’s offense, and was thus properly considered by the trial court. Moreover, since the trial court engaged in the mandated statutory inquiry, it is readily apparent that it considered its sentencing decision to be a discretionary matter.

Lastly, defendant argues that the trial court’s ultimate decision to sentence him as an adult was improperly influenced by the many letters from the public it received regarding the sentencing decision. Contrary to defendant’s assertion, there is no indication that the trial court based its decision on the contents of these communications. The record reveals that the trial court merely acknowledged the receipt of these letters. The fact remains that the trial court carefully considered the relevant statutory criteria in reaching its sentencing decision. Furthermore, there is no indication that the trial court would have refused to disclose the contents of these communications had defendant requested that it do so.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski

¹ In *Shamblin*, the trial court sentenced the defendant to ten to twenty years' imprisonment because it refused to consider a minimum sentence less than that imposed in other cases by other courts for the lesser crime of manslaughter. *Id.* at 59-61. This Court determined that the trial court had improperly limited its discretion in reaching its sentencing decision, thus reaffirming the principle that a trial court should exercise its discretion in view of all the facts and circumstances appearing at trial. *Id.* at 61.