

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 172541

ANDREW JAMES TROMBLEY,

Macomb Circuit Court

LC No. 92-002226-FC

Defendant-Appellant.

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Before: Doctoroff, P. J., and Michael J. Kelly and Young, JJ.

MICHAEL J. KELLY (dissenting in part).

I dissent in part and would remand the matter for reconsideration of defendant's motion for new trial under the standard set forth in *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993).

The trial court's ruling on defendant's motion for new trial, which is quoted in the majority opinion, does not, I believe, comport with the standards set forth in *Herbert*. The innovation *Herbert* introduced is its clarification of the duty of the trial judge on motion for new trial to assess the credibility of the witnesses testifying for the People. *Herbert* involved two judges. The first, Judge Thorburn, erred in assessing the credibility of witnesses on a motion for directed verdict of acquittal. The second, Judge Sosnick, erred in failing to assess the credibility of the witnesses on motion for new trial. The Supreme Court majority stated:

"On a motion for new trial, the judge acts 'as the thirteenth juror,' i.e., he evaluates the credibility of the orally-testifying witnesses and therefore their demeanor. But on a motion for a directed verdict he does not."

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We thus reaffirm our statement . . . that a judge may grant a new trial after finding the testimony of witnesses for the prevailing party not to be credible. We caution, however, that this exercise of judicial power is to be undertaken with great caution, mindful of the special role accorded jurors under our constitutional system of justice. [*Herbert, supra* at 476-477 (quoting *Dyer v MacDougall*, 201 F2d 265, 271-272 (CA 2, 1952))].

The majority here has aptly demonstrated some of the sharp conflicts between certain witnesses' prior statements and their trial testimony, not the least of which involved one witness stating he had seen the defendant in public regularly over a period of time when the defendant was incarcerated in a penal institution. Another witness originally could not identify defendant as the driver of the mystery van, yet did so after seeing defendant's picture in the papers and on television. He admitted that he later came to believe that the defendant was the driver.

Unlike a motion for directed verdict, which is resolved by examining the sufficiency of the evidence in the light most favorable to the prosecution, "a new trial may be granted where the verdict is against the great weight of the evidence." *Id.* at 474-475. Likewise, a new trial may be granted to prevent an injustice. *Id.* "To determine whether a verdict is against the great weight of the evidence, or has worked an injustice, a judge necessarily reviews the whole body of proofs," not just the evidence which supports the prosecution's case. *Id.* at 475. A trial court may grant a new trial because it "disbelieves the testimony of witnesses for the prevailing party." *Id.* at 476; *People v Johnson*, 397 Mich 686, 687; 246 NW2d 836 (1976). I cannot determine, except by surmise, whether the trial judge believed or disbelieved the witnesses who put defendant in his mother's apartment at the time of the kidnapping, or the witnesses who saw defendant driving a vehicle that passed a taxi cab sometime after the kidnapping; the experts who compared microscopic stains to match the victim's blood type, or the experts who were unable to make such comparison. In sum, there was a great deal of contradictory testimony introduced at this trial, and I believe this Court is entitled to some expression of the presiding judge's assessment as to the believability of critical witnesses.

Only by implication is the majority able to determine how or if the trial court assessed the credibility of the witnesses. It appears to me that the trial court applied the great weight of the evidence standard without looking at the whole body of proofs, thus disregarding its duty to evaluate and assess the witnesses' credibility. Since the same error resulted in reversal in *Herbert*, I believe this Court should remand, as in *Herbert*, so that "the motion for new trial be reconsidered, with due consideration given to the question whether the prosecution witnesses were credible." *Herbert, supra* at 477.

As to all other matters, I concur with the majority.

/s/ Michael J. Kelly