

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 181075

Sanilac Circuit Court

TRUDY LEE O'CONNOR,

LC No. 94-004088-FH

Defendant-Appellant.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 181884

Sanilac Circuit Court

STEPHEN HERBERT ROGERS,

LC No. 94-004089-FH

Defendant-Appellant.

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

MICHAEL J. KELLY (dissenting in part).

I write separately because I disagree with the majority's conclusion that the trial court did not err in deciding defendant O'Connor's motion for new trial. I would reverse as to this issue and remand the matter for reconsideration of O'Connor's motion for new trial under the standard set forth in *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993).

As the majority correctly states, where a defendant moves for a new trial on the ground that the verdict was contrary to the great weight of the evidence, the trial judge must act "as the thirteenth juror," *i.e.*, he evaluates the credibility of the orally-testifying witnesses and therefore their demeanor." *Id.* at 476. On a motion for new trial, the trial judge may set aside a verdict on the grounds that the verdict is "perverse," or because the trial judge disbelieves the testimony of the prosecution's witnesses.

*Id.* Where a defendant moves for a directed verdict of acquittal, however, the trial judge employs a different test which asks whether, viewing the evidence in a light most favorable to the prosecution, the evidence is sufficient to permit a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt. *Id.* at 473; *People v Hampton*, 407 Mich 354, 368, 377; 285 NW2d 284 (1979). “Inherent in the task of considering the proofs in a light most favorable to the prosecution is the necessity to avoid a weighing of the proofs or a determination whether testimony favorable to the prosecution is to be believed.” *Herbert*, *supra* at 474.

Risking redundancy, I reproduce for the second time in this matter the whole of trial judge’s analysis regarding O’Connor’s motion for new trial:

[The jury] decided what they decided based upon what they heard from the witnesses, the evidence that they saw, and from the instructions I gave them. I believe the real standard is: Is there a lack of sufficient evidence such that reasonable minds could not have come to the conclusion that this rises to that level. I think that the jury heard all of the evidence. . . . They were able to judge all those things, to weigh all those things, and they came to their conclusion. Unless I find that there is [a] lack of any sufficient evidence for the jury to have come to the conclusion they did, it’s not my place to change what they have done. And I can’t find that it rises to that level. Therefore, I have to respectfully deny both motions for a New Trial and for a Judgment Notwithstanding the Verdict.

As his rationale clearly establishes, the trial judge neglected his duty to weigh the witnesses’ credibility in deciding whether to grant O’Connor’s new trial motion, and instead applied a test closely resembling a directed verdict analysis to the facts of the case. Unlike the majority, I cannot determine from the trial judge’s comments whether he was even aware of the new *Herbert* standard with which to analyze O’Connor’s new trial motion. The ultimate viability of the prosecution’s case against defendants essentially rested upon its ability to prove that the child victim suffered serious mental harm as a result of defendants’ conduct. See MCL 750.136b(2); MSA 28.331(2)(2). The prosecution’s experts testified that the victim suffered serious mental harm as defined by the statute; defendant’s experts testified that she did not. Without some indication of the expert’s credibility as viewed by the trial judge for a guide, I am unable to discern which of these critical witnesses he believed, and which he disbelieved. Because the same error resulted in reversal in *Herbert*, I believe this Court should remand, as did the *Herbert* Court, so that “the motion for new trial be reconsidered, with due consideration given to the question whether the prosecution witnesses were credible.” *Id.* at 477.

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

/s/ Michael J. Kelly