

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER A. DOWDY,

Defendant-Appellant.

UNPUBLISHED

February 6, 2001

No. 212119

Wayne Circuit Court

Criminal Division

LC No. 97-007435

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1), felonious assault, MCL 750.82; MSA 28.277, and assault and battery, MCL 750.81; MSA 28.276. The trial court sentenced defendant to ten to twenty years' imprisonment for the home invasion conviction, six to ten years for the assault with intent to commit CSC conviction, two to four years for the felonious assault conviction, and ninety days for the assault and battery conviction. The trial court then vacated these sentences and sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to twelve to twenty-five years' imprisonment. We affirm.

Defendant argues that the trial court erred in denying his motion for a *Ginther*¹ hearing to develop his ineffective assistance of counsel claim and that this Court should have granted his motion for remand². Defendant contends that he was denied effective assistance of counsel by trial counsel's (1) refusal to object to two jurors who were sleeping during trial, (2) failure to object to a juror's presence in the courtroom while defendant's prior criminal record was being discussed, (3) failure to impeach the complainant and her daughter on their description of defendant, (4) failure to call witnesses to testify that defendant never etched his name on his tools, and (5) failure to pursue a theory that a serial burglar committed the crime. Defendant requests that this Court remand to the trial court for a full evidentiary hearing to allow him to

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² In an unpublished order dated April 19, 1999, another panel of this Court denied defendant's motion to remand for an evidentiary hearing on this same issue "for failure to persuade this Court of the necessity of a remand at this time."

further develop his claims. The trial court considered defendant's motion for a *Ginther* hearing and concluded that the claims had for facial merit in light of the court's recollection of the trial. We find no error in this determination and conclude that both the trial court and this Court properly denied the motion for a *Ginther* hearing.

Defendant next contends that the trial court erred in denying his motion for new trial on the ground that the verdict was against the great weight of the evidence. Defendant challenges the verdict on the basis that the witnesses' testimony was not credible and the evidence presented by the prosecution was weak. We disagree.

We review a trial court's denial of a motion for new trial for an abuse of discretion. *People v Gadomski*, 232 Mich 24, 28; 592 NW2d 75 (1998). A new trial on grounds that the verdict was against the great weight of the evidence should be granted only in exceptional cases where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would result if the motion were denied. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). In deciding whether a verdict is against the great weight of the evidence, the trial court is not permitted to "substitute its view of the credibility [of witnesses] 'for the constitutionally guaranteed jury determination thereof.'" *Id.*, quoting *Sloan v Karmer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). Conflicting testimony or questions of credibility do not constitute grounds for a new trial. *Lemmon, supra*. The trial court may not act as a thirteenth juror in considering a motion for new trial. *Id.* at 645.

At trial, defendant presented a defense of misidentification. However, Both Carrillo and Bernez positively identified defendant as the perpetrator. Further, evidence was presented that the intruder jumped the fence between defendant and Ferguson-Dowdy's homes after the assault, and nobody was seen leaving Ferguson-Dowdy's yard after the incident. Indeed, defendant was ultimately apprehended in that yard shortly after the incident. In addition, several witnesses testified that, at about the time the intruder was jumping out Bernez' bedroom window, Ferguson-Dowdy's dog was barking, but it stopped barking right after the intruder jumped the fence. Although defendant challenges the witnesses' credibility, the jury was in the best position to observe the demeanor of the witnesses and determine the credibility of their testimony. *Lemon, supra* at 625. Defendant had a full opportunity to cross-examine witnesses and bring out any inconsistencies in the witnesses testimony. On this record, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial on grounds that the verdict was against the great weight of the evidence.

Finally, defendant challenges his sentence as disproportionate. This Court reviews an habitual offender's sentence for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). An abuse of discretion in sentencing occurs if the sentence violates the principles of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

A review of defendant's criminal history reveals that he had prior convictions for a number of crimes, including sex offenses, and that he served terms of incarceration and parole totaling almost twenty years. Further, the evidence in this case was that defendant entered a

neighbor's home, wielding a pry bar, proceeded into the victim's bedroom and indicated that he was going to rape her. The victim's fourteen-year-old daughter entered the room, and defendant fought with both of them. Defendant did not leave the home until a young, male neighbor burst into the house to come to the victim's aid. Considering the serious and violent nature of the offenses of which defendant was convicted, in conjunction with defendant's criminal background, we are unable to conclude that defendant's sentence was disproportionate. Defendant has clearly demonstrated that he has not been rehabilitated by his other periods of incarceration and probation. Accordingly, the trial court did not abuse its discretion in sentencing defendant.³

Affirmed.

/s/ Michael J. Kelly
/s/ Helene N. White
/s/ Kurtis T. Wilder

³ Defendant additionally argues that the trial court sentenced him under the mistaken belief that he was on probation at the time these offenses were committed. Because defendant did not object to his sentence on the basis of inaccurate sentencing information and did not present this issue in his statement of questions presented, it is not preserved for appellate review. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990); *People v Kennie*, 147 Mich App 222, 226; 383 NW2d 169 (1985).