

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL HOPKSON,

Defendant-Appellant.

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UNPUBLISHED

December 6, 1996

No. 184911

LC No. 94-050740-FC

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082, and pleaded nolo contendere to possession of a firearm by a person convicted of a specified felony, MCL 750.224f; MSA 28.421(6). Defendant now appeals as of right. We affirm defendant's convictions, but remand to the trial court for reconsideration of defendant's motion for a new trial.

Defendant first argues that the trial court erred by applying an incorrect legal standard in deciding his motion for a new trial. Specifically, defendant argues that the trial court decided his motion based upon only the sufficiency of the evidence, and did not examine the whole body of proofs. We agree.

When deciding a motion for a directed verdict based upon the sufficiency of the evidence, the trial court, without considering witness credibility, must assess whether the evidence, viewed in a light most favorable to prosecution, was sufficient to permit a rational trier of fact to find the elements of the crime to have been proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473-474; 511 NW2d 654 (1993). In contrast, when deciding whether to grant or deny a new trial, the trial court must decide whether the verdict was against the great weight of the evidence. *Herbert, supra* at 475. In making its determination, the trial court must examine the whole body of proofs. *Id.* Further, the trial

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

court may grant a new trial after finding the testimony of the prevailing party's witnesses was not credible. *Herbert, supra* at 477.

From our reading of the transcript, we are persuaded that the trial court erroneously used the standard applicable to challenges to the sufficiency of the evidence.<sup>1</sup> As a consequence, the trial court made no findings regarding the credibility of the evidence supporting defendant's conviction. Rather, the trial court simply deferred to the jury's findings on the credibility issues. In our judgment, this case presents a very close question regarding whether the verdict was supported by sufficient credible evidence. Defendant is entitled to have his motion for new trial reviewed by the trial court according to the standard set forth in *Herbert, supra*.

Defendant next argues that he was denied a fair trial when the prosecutor improperly cross-examined his designated alibi witness by asking her why she had not come forward before trial with the exculpatory evidence within her knowledge. We disagree. The credibility of an alibi witness may be attacked by showing that the witness failed to speak or act when it would have been natural to do so if the facts were in accordance with the witness' testimony. *People v Martinez*, 190 Mich App 442, 445; 476 NW2d 641 (1991). Prior to pursuing that line of questioning, there must be some showing on the record as to why it would have been natural for the alibi witness to relate the exculpatory story to the police. *People v Fuqua*, 146 Mich App 250, 255-256; 379 NW2d 442 (1985).

Before the alibi witness in the instant action was cross-examined as to her reasons for failing to come forward, there was evidence on the record that established that the witness was defendant's mother, that she had personal knowledge of the events leading up to defendant's arrest, that she was present when the police came looking for her son and even gave them authorization to search her premises, that she made sure her son called the police when he arrived home, and that she had spoken to her son about the case prior to trial. We therefore hold that the prosecutor laid the proper foundation for the impeachment testimony and properly cross-examined the witness as to her failure to come forward prior to trial.

In a related argument, defendant claims that he was denied the effective assistance of counsel when his attorney failed to object to the prosecution's impeachment. Once again, we disagree. For a defendant to have been denied the effective assistance of counsel, not only must counsel's level of performance have fallen below an objective standard of reasonableness, but the defendant must have been so prejudiced by the inadequate performance as to have been denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). We find that defendant was not denied the effective assistance of counsel because the only error alleged was that defense counsel failed to object to a permissible line of questioning by the prosecutor.

Defendant's final argument is that the trial court abused its discretion when it imposed a sentence of eight to twenty-five years' imprisonment for defendant's armed robbery conviction as an habitual offender. We disagree. We review habitual offender sentences according to the principles of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996).

Here, defendant was convicted of armed robbery. He entered a restaurant during business hours while customers were present and assaulted an employee with a handgun. These actions were consistent with defendant's behavior on other occasions. He was convicted in 1990 of an offense involving an assault with a weapon and was also convicted in 1995 of a separate armed robbery offense. Prior leniency in sentencing was ineffective. Further, defendant admitted to having a drug problem. The judge indicated that the community needed to be protected from defendant and that defendant's conviction would serve as a deterrent to others. The judge adequately stated his reasons for imposing the sentence. We find that the trial judge did not abuse his discretion, and defendant's sentence was proportionate to the circumstances surrounding the offense and offender.

Defendant's convictions are affirmed, but the case is remanded for reconsideration of the defendant's motion for new trial. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ David H. Sawyer

/s/ Timothy P. Pickard

<sup>1</sup> We note that it appears that the trial court was misled by the prosecutor's argument regarding the applicable standards. The prosecutor cited the standard of review for challenges to the sufficiency of the evidence found in *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). Defendant did not cite the trial court to the *Herbert* standard.