STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ERVIN WAYNE BOLEN,

Defendant-Appellee.

UNPUBLISHED
February 14, 1997

Nos. 177050; 185131
LC No. 93-012440

Before: Doctoroff C.J., and Corrigan and Danhof,* JJ.

PER CURIAM.

In Docket No. 185131 of this consolidated case, plaintiff appeals by leave granted the trial court's March 30, 1995, order granting defendant's motion for new trial on the grounds that the jury's verdict was against the great weight of the evidence. In Docket No. 177050, plaintiff appeals as of right from the trial court's sentence imposed on defendant pursuant to his June 6, 1994, jury trial conviction on two counts of larceny in a building, MCL 750.360; MSA 28.592. We affirm.

Plaintiff first claims that the trial court abused its discretion in denying its motion to disqualify Wayne Circuit Judge Marvin R. Stempien from the post-judgment proceedings. We disagree. Factual findings underlying the ruling on a motion for disqualification will be reversed only for an abuse of discretion, while applications of the facts to the law is reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996); *Michigan Ass'n of Police v City of Pontiac*, 177 Mich App 752, 757; 442 NW2d 773 (1989). A motion to disqualify a judge is made pursuant to MCR 2.003. *People* v *Bettistea*, 173 Mich App 106, 123; 434 NW2d 138 (1988). The party moving for disqualification has the burden of proving that it is justified. *People* v *Houston*, 179 Mich App 753, 756; 446 NW2d 553 (1989). The pertinent portion of the court rule provides that a "judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which . . . [t]he judge is personally biased or prejudiced for or against a party or attorney." MCR 2.003(B)(1); *Cain*, *supra* at 494-495. Typically, the moving party must show actual, personal prejudice to disqualify a judge, and the party asserting partiality must overcome a strong presumption of impartiality. *Id*. at 497.

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

In the present case, Judge Stempien indicated that he believed the matter to be a case of a civil dispute, and not proper for prosecution. The judge implied that the case was only prosecuted because of pressure to do so by the city of Inkster. He stated, "Where in the devil is the prosecutor's brains? . . . I lay the blame for this on the prosecutor's office in the hands of the people who decided to prosecute." Furthermore, Judge Stempien compared this case to another case in which the stakes were higher, yet the prosecutor failed to bring criminal charges, despite the judge's request that he do so.

Although this presents a close case, and we do not condone the comments of Judge Stempien, we do not believe that the prosecution was able to show actual, personal prejudice which would overcome the strong presumption of impartiality. *Cain*, *supra* at 497. A trial judge's open disclosure of his views regarding the propriety of the bringing of a certain action does not require disqualification. *Ferrell* v *Vic Tanny*, 137 Mich App 238, 247-248; 357 NW2d 669 (1984). Further, the statements of Judge Stempien, at most, show only a prejudice or bias with respect to the specific circumstances of the case. Therefore, the alleged bias is not "personal" as required by the court rule. *Cain*, *supra*, at 494-495. Consequently, we find no abuse of discretion in the denial of plaintiff's motion for disqualification. Additionally, we note that Judge Stempien is no longer on the Wayne Circuit Court. Thus, upon retrial, this case will be before a new trial judge.

Next, plaintiff argues that the trial court abused its discretion in granting defendant's motion for new trial on a finding that the jury's verdict was against the great weight of the evidence. We disagree. A new trial may be granted where the verdict is against the great weight of the evidence or to prevent an injustice. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993) We review a trial court's determination on a motion for new trial for an abuse of discretion. *Id.* at 477. In addition, we defer to the trial court's opportunity to hear the witnesses and assess their credibility. *Kochoian* v *Allstate Insurance Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988). A judge may grant a new trial after finding the testimony of witnesses for the prevailing party not to be credible. *Herbert*, *supra* at 477. On a motion for a new trial, the judge acts "as the thirteenth juror," evaluating the credibility of the witnesses at trial, and therefore their demeanor. *Id.* at 476. When a trial court grants a new trial on the ground that the prosecution's witnesses lack credibility, it is essentially a finding that the verdict is against the great weight of the evidence. *Id.*

Defendant was found guilty of two counts of larceny in a building, MCL 750.360; MSA 28.592. The elements of that crime are:

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or the personal property of another, (5) the taking must be without the consent and against the will of the owner . . . [and] (6) the taking must be done within the confines of the building. [*People* v *Mumford*, 171 Mich App 514, 517-518; 430 NW2d 770 (1988) quoting *People* v *Wilbourne*, 44 Mich App 376, 378; 205 NW2d 250 (1973).]

The trial court's opinion indicates that it based its grant of a new trial primarily on a finding that the jury's verdict was against the great weight of the evidence with respect to the elements of taking and carrying away. Review of the record indicates that the minimal evidence presented on these elements was almost exclusively circumstantial, consisting of defendant's presence at the site near the time of the crime. Against this evidence was testimony denying defendant's involvement and indicating that defendant did not have access to the control room where the taking occurred. In addition, there was testimony, which was rebutted by two defense witnesses, that defendant made a statement which could be construed as an admission. However, the trial court found the prosecution's evidence in this regard not to be credible. Such a credibility determination is not improper with respect to a challenge to a verdict as against the great weight of the evidence. *Herbert*, *supra*, 444 Mich 477. Based on the extremely minimal evidence on the elements of taking and carrying away, and in light of the evidence rebutting those elements, we conclude that the trial court did not abuse its discretion in finding that the jury's verdict was against the great weight of the evidence. The trial court had the power to determine that the minimal evidence against defendant was not credible, and thus grant a new trial on that basis. *Herbert*, *supra*. Consequently, we need not review the trial court's additional bases for finding that a new trial was warranted.

Finally, plaintiff challenges defendant's sentence, arguing that defendant should have been ordered to pay restitution. Although our conclusion that the trial court did not abuse its discretion in granting a new trial renders this issue moot, we will briefly address it so as to guide the lower court in the new trial.

Plaintiff contends that restitution was proper under MCL 780.766; MSA 28.1287(766). Under the statute, a court "may order . . . that the defendant make restitution to any victim of the defendant's course of conduct which gives rise to the conviction, or to the victim's estate." MCL 780.766(2); MSA 28.1287(766)(2). This Court has held that the statutory definition of a "victim" provided in MCL 780.766(1); MSA 28.1287(1), does not include a governmental entity. *People v Chupp*, 200 Mich App 45, 48-49; 503 NW2d 698 (1993). In this case, the "victim" of defendant's alleged wrongdoing was the Inkster Public Housing Commission (IPHC), a governmental entity. Thus, the trial court's failure to order restitution was not error, and upon retrial, restitution should not be granted to the IPHC.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Robert J. Danhof