

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellant,

v

Nos. 177050; 185131
Recorder's Court
LC No. 93-012440

ERVIN WAYNE BOLEN,

Defendant-Appellee.

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

CORRIGAN, J. (concurring).

I concur in the majority's discussion of the disqualification and restitution issues. I also concur in the result that the trial court's grant of defendant's motion for a new trial was not against the great weight of the evidence.

In deciding the motion, the trial court essentially ruled on two grounds: one illicit, the other, proper. The court expressed its pique that the prosecutor decided to prosecute this case instead of a fraud case in which the monetary stakes were far higher. In this regard, the court invaded the separation of powers and usurped executive authority. Were the separation of powers the only issue presented, I would unhesitatingly reverse. I cannot do so, however, because the court exercised its "thirteenth juror" power to render its ruling impervious to judicial review. The court determined that the prosecution's key witness was incredible, despite the conclusion from twelve jurors that this witness was credible. The trial court had the authority to contradict the jury under *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993). Nonetheless, I believe that *People v Herbert, supra*, was wrongly decided, as was *People v Johnson*, 397 Mich 686; 246 NW2d 836 (1976).

In *People v Joseph Lemmon*, 1996 Mich LEXIS 2803 (Docket No. 105850, issued November 6, 1996), our Supreme Court recently granted leave to reconsider the *Herbert* principle. I restate my view outlined in our unpublished order in the *Lemmon* case. On this record, the prosecution convinced the jury of the credibility of witness Kenneth Mills. The trial court's judgment overturning the

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

jury involves a witness' demeanor, which is beyond my ability to review on a cold record. I cannot say that the trial court abused its discretion in granting a new trial where our Supreme Court has accorded trial courts such powers.

The problem in this case, as in *Lemmon*, is the thirteenth juror rule itself. On the record before me, I cannot find an abuse of discretion, given the authority invested in the trial court by *People v Herbert*. I question the validity of the *Herbert* rule, however, and urge our Supreme Court to hold this case in abeyance pending the outcome of *Lemmon*.

For the reasons stated, I concur in the result.

/s/ Maura D. Corrigan