

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

LEONARD LEPPLE JACKSON

Defendant-Appellant.

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

Supreme Court No. \_\_\_\_\_

Court of Appeals No. 281380

Lower Court No. 07-10097-01

*Opa 3-26-09  
Rec 573-09*

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State  
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NOTICE OF HEARING

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... i

STATEMENT OF QUESTIONS PRESENTED ..... ii

JUDGMENT APPEALED FROM, RELIEF SOUGHT, AND CONCISE ALLEGATIONS OF  
ERROR ..... 1

MATERIAL PROCEEDINGS AND FACTS ..... 3

ARGUMENT ..... 8

I. THE COURT OF APPEALS ERRED WHEN IT FAILED TO REMAND THIS CASE  
FOR RESENTENCING AFTER VACATING TWO OF MR. JACKSON’S THREE  
CONVICTIONS, WHICH REDUCED THE RECOMMENDED MINIMUM  
SENTENCING RANGE TO 81 TO 202 MONTHS FROM 108 TO 270 MONTHS..... 8

II. THE IDENTIFICATION EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT  
TO SUSTAIN MR. JACKSON’S CONVICTIONS. .... 12

JUDGMENT APPEALED FROM AND RELIEF SOUGHT ..... 16

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Leonard Leppel Jackson

## TABLE OF AUTHORITIES

### CASES

<i>Jackson v Virginia</i> , 443 US 307; 99 S Ct 2781, 61 L Ed 2d 560 (1979).....	1, 9, 12
<i>People v Buck</i> , 197 Mich App 404; 496 NW2d 321 (1992).....	2, 8, 9
<i>People v Francisco</i> , 474 Mich 82; 711 NW2d 44 (2006) .....	8, 10
<i>People v Francisco</i> , 474 Mich 82; 711 NW2d 44 (2006) .....	8
<i>People v Grier</i> , 152 Mich App 129; 393 NW2d 551 (1986).....	8
<i>People v Harris</i> , 261 Mich App 44; 680 NW2d 17 (2004).....	14
<i>People v Kern</i> , 6 Mich App 406; 149 NW2d 216 (1967).....	12
<i>People v Kimble</i> , 470 Mich 305; 684 NW2d 669 (2004).....	8
<i>People v Miles</i> , 454 Mich 90; 59 NW2d 299 (1997).....	8
<i>People v Patterson</i> , 428 Mich 502; 410 NW2d 733 (1987).....	10
<i>Townsend v Burke</i> , 334 US 736; 68 S Ct 1252; 92 L Ed 2d 1690 (1948).....	8
<i>United States v Rogers</i> , 126 F.3d 655 (5th Cir. 1997).....	14

### CONSTITUTIONS, STATUTES, COURT RULES

MCL 750.82 .....	3
MCL 750.224f .....	3
MCL 750.227b .....	3
MCL 750.529 .....	3
MCL 769.34(10) .....	8, 9
MCL 777.57(1) .....	9
US Const, amends V, XIV.....	8
Const 1963, art 1, § 17.....	8

## STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR WHEN IT FAILED TO REMAND THIS CASE FOR RESENTENCING AFTER VACATING TWO OF MR. JACKSON'S THREE CONVICTIONS, WHICH REDUCED THE RECOMMENDED MINIMUM SENTENCING RANGE TO 81 TO 202 MONTHS FROM 108 TO 270 MONTHS?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- II. WAS THE IDENTIFICATION EVIDENCE PRESENTED AT TRIAL INSUFFICIENT TO SUSTAIN MR. JACKSON'S CONVICTIONS?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

**JUDGMENT APPEALED FROM, RELIEF SOUGHT,  
AND CONCISE ALLEGATIONS OF ERROR**

Defendant-Appellant Leonard Leppel Jackson moves for leave to appeal from the March 26, 2009, Michigan Court of Appeals opinion in *People v Leonard Leppel Jackson*, unpublished per curiam opinion issued March 26, 2009 (Docket No. 281380) (Appendix A). Mr. Jackson timely filed a Motion for Reconsideration (Appendix B), which the Court of Appeals denied on May 13, 2009 (Appendix C). Mr. Jackson asks this Court to grant this application for leave to appeal or to take any other action this Court deems just, including remanding to the trial court for resentencing.

Mr. Jackson was found guilty of armed robbery and two counts of felonious assault after a bench trial in the Wayne County Circuit Court, Judge Daniel Ryan presiding.

On appeal, the Court of Appeals vacated the two felonious assault convictions because the prosecution failed to present sufficient evidence that a dangerous weapon was used (Appendix A). After the two convictions were set aside, which caused PRV 7 to decrease from 20 points to 0 points, an error in the sentencing guidelines scoring arose. Correction of this error changed Mr. Jackson's minimum guidelines range and entitled him to be resentenced based on accurate guidelines and accurate information regarding the number of convictions.

Nonetheless, although Mr. Jackson asked the Court to remand for resentencing on the remaining conviction, the Court of Appeals refused. The Court determined that it would not remand for resentencing: "[b]ecause defendant's armed robbery sentence is within the appropriate guidelines range and defendant did not raise this issue 'at sentencing, in a proper motion for resentencing, or in a proper motion to remand,' we must affirm defendant's sentence under MCL 769.34(10)." (*Jackson, supra* at \*5)

A sentencing error that arises because a conviction was set aside on sufficiency grounds does not exist until after the challenged conviction is vacated. However, in order to preserve

potential sentencing relief whenever a conviction *may* be set aside or reduced on appeal, appellate attorneys now have no choice but to routinely file anticipatory trial court motions for resentencing or remand motions. Failing to file these speculative motions will constitute ineffective assistance of appellate counsel. Thus, in every case where sufficiency is argued, the Court of Appeals motions panels and trial courts will have to consider anticipatory, speculative motions for not-yet-existing sentencing relief. Obviously, all of these motions will necessarily be denied as not ripe because the error will not exist until after the conviction is set aside on appeal.

In October of 2008, another Court of Appeals panel decided differently regarding remanding for resentencing after vacating a conviction. In *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2008 (Docket No. 278955) at \*11, and the consolidated case *People v Marquis Jackson*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2008 (Docket No. 279522) at \*11 (Appendix D), the Court of Appeals, citing *People v Buck*, 197 Mich App 404, 431; 496 NW2d 321 (1992), recognized that the cases must be remanded for resentencing on the remaining convictions after one conviction was reduced on sufficiency grounds. There is no indication that the defendants in those cases raised the issue of resentencing in anticipation that the Court would set aside a conviction based on sufficiency at sentencing, in a proper motion for resentencing, or in a proper motion to remand. *Id.*

The Court of Appeals also erred when it determined that there was sufficient evidence to convict Mr. Jackson for the armed robbery.

This case should be remanded for resentencing and/or any other action that this Court deems just.

## MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellant Leonard Jackson was charged with armed robbery, MCL 750.529, felonious assault (two counts), MCL 750.82, felon in possession of a firearm, MCL 750.224f, and using a firearm during the commission of a felony, MCL 750.227b (Information). He was convicted after a bench trial in of the armed robbery and the two felonious assault counts in Wayne County Circuit Court, Judge Daniel Ryan presiding (Tr, pp 120-121).

These charges arose out of an incident that occurred on January 12, 2007 (August 22, 2007, Trial Transcript, hereinafter Tr, p 20). On that date at about 9:00 p.m., Sherry Taylor went to the Cheers Party Store, 12344 E. Eight Mile, Detroit, Michigan, with her two children, Cherrise Harris, age nine, and Charlie Harris, age six (Tr, pp 20-21, 64). After Ms. Taylor left the store with her children and was putting the children back into her car, a man ran towards them (Tr, pp 22, 43, 64). She watched the man running towards her for about 30 seconds (Tr, p 42).

The man stopped beside her car. He held a silver handgun and told her, "Bitch, give me all your money or I'm a [sic] shoot your kids." (Tr, pp 23, 64-65.) He pointed the handgun at the children's heads (Tr, pp 23, 64-65). Taylor gave the man \$120, her I.D. card, her bridge card, and a paycheck stub (Tr, pp 23, 67). The perpetrator was just a few feet away when she gave him the items, which took about 30 seconds (Tr, pp 24, 43). He had a grey hoodie over his head, so Taylor could not see the perpetrator's hair. He did not have anything covering his face. (Tr, pp 22, 60, 67.) There was a floodlight on top of the store (Tr, p 24).

Nine year old Cherrise testified that she was already in the car when the perpetrator ran up to them. He opened the car door and pointed the gun at her and her brother. (Tr, p 64-65.) She looked at the man's face and stomach for less than a minute; he was about two feet from her.

The man had a “medium size” stomach and was a “big person.” (Tr, pp 66-68, 72.) The police asked her to describe what kind of pants the perpetrator had on, but did not ask for any other information (Tr, p 68).

After the perpetrator took the items from Taylor, he ran down Strasburg Street towards Seven Mile Road (Tr, pp 24, 26, 68, 76). She saw him running away for just a short period because he went around the corner of the market (Tr, pp 56-57). There was nothing strange about how the perpetrator ran (Tr, pp 42, 77). Taylor and the children then went into the market for about five minutes (Tr, pp 55, 68). When she came back outside, her car doors had been opened. She found her ID card, bridge card, and pay stub in the back seat. (Tr, pp 53-54, 78-79.)

A few days after the robbery, Taylor went to the police station. Detroit Police Officer Greg Hughes used a police photo database to search for suspects. Taylor looked through hundreds of photographs and narrowed the suspects down to six photographs. Taylor told Hughes that the men in those six photographs had the likeness of the perpetrator. None of the six lived in the area where the robbery occurred. (Tr, pp 26-27, 84-87.) Mr. Jackson was not depicted in any of the photographs. Taylor did not positively identify the perpetrator from the set of photographs (Tr, p 27).

After this incident, Ms. Taylor never went back to the Cheers Party Store. She started patronizing the Hoover Market, which was on Hoover Street, parallel to Strasburg. (Tr, pp 28-29, 44.) On May 24, 2007, in the afternoon, Taylor went to the Hoover Market with her sister (Tr, pp 28, 45). While she was walking into the market, she noticed Defendant-Appellant Jackson, whose hair was covered with a “doo rag”, sitting on a bicycle. Mr. Jackson and Taylor made eye contact. She ran into the store and told her sister, “That’s the guy outside that robbed me.” Taylor started shaking. When she left the store, Mr. Jackson was still outside. He did not run

away and looked at Taylor in a normal manner. She and her sister went to her mother's home, which was nearby, and called the police. (Tr, pp 29, 45-47, 60.)

Taylor soon returned to the Hoover Market to meet the police (Tr, p 30). Taylor's uncle drove separately to the market. She pointed out Mr. Jackson, who was still outside the store on his bicycle, to her uncle. Mr. Jackson rode away on his bicycle before the police arrived. Taylor's uncle followed Mr. Jackson. (Tr, pp 47-49, 94.) Taylor and her uncle contacted each other on their cell phones. Mr. Jackson did not try to get away. (Tr, pp 49-50.) From her car, Taylor saw Mr. Jackson sitting on a porch on Abbott Street (Tr, pp 31, 50, 94). She called Detroit Police Officer Lavar Green on his cell phone and told him Mr. Jackson's location (Tr, pp 32, 50, 94). Abbott Street is four or five blocks from Strasburg and a couple of blocks away from the Hoover Market (Tr, pp 32-33, 95).

The police were in a fully marked scout car when they pulled up in front of the house where Mr. Jackson was sitting on the porch (Tr, pp 50-51, 95). Mr. Jackson came down from the porch, and the police arrested him. Mr. Jackson did not resist in any way. (Tr, pp 51, 96-97.) Officer Green did not notice Mr. Jackson walking with a limp, and he was not using a cane or crutches (Tr, p 96).

Taylor testified that she recognized Mr. Jackson because she looked into his eyes (Tr, p 37). On the day of the robbery, she gave the police a description of the perpetrator as being 5'5", 160 pounds, medium to light complected, and medium build (Tr, pp 37, 61, 82). She testified that she had given the police a description of the perpetrator's eyes on the day of the robbery (Tr, p 37). However, after defense counsel questioned her about the contents of her statements to the police, she conceded that she had not described the perpetrator's eyes (Tr, pp 40, 52). Taylor

testified that she would describe Mr. Jackson as “light brown, medium brown.” (Tr, p 52.) She estimated that Mr. Jackson weighed 195 pounds at the time of trial (Tr, p 61).

On the day of trial, Taylor identified Mr. Jackson as the perpetrator of the robbery (Tr, p 22). Nine year old Cherrise was not sure whether Mr. Jackson was the person who robbed her mother (Tr, p 69). When Cherrise saw Mr. Jackson at 36<sup>th</sup> District Court, he had braids in his hair. On the date of trial, Mr. Jackson “did not have hair.” But she agreed that Mr. Jackson’s face was the same face that she saw pointing a gun at her. (Tr, pp 70-71.) No one told Cherrise what to say in court. She denied that she had identified Mr. Jackson to please her mother. (Tr, p 78.)

The trial court questioned Taylor regarding whether she had mistakenly identified Mr. Jackson as the perpetrator. The court asked whether she had identified Mr. Jackson as the perpetrator five months after the robbery because of the similar circumstances to the robbery. Taylor affirmed that she was certain that Mr. Jackson was the perpetrator. (Tr, pp 33-35.) She asserted that she had seen Mr. Jackson around the neighborhood between the time of the robbery and the day of his arrest. She had called the police to report him on a prior occasion, but the police never responded. (Tr, pp 35-36.)

Detroit Police Officer Charles Rogers testified that Mr. Jackson reported that he had lived at 19145 Strasburg for about 20 years. That address is three blocks from the Cheers Party Store. It is also near Hoover and State Fair. (Tr, pp 99-102.) Rogers described Mr. Jackson as having a heavy build (Tr, p 103). On the day of his arrest, Mr. Jackson reported that he weighed 230 pounds (Tr, p 102).

The prosecution and defense stipulated that Mr. Jackson was previously convicted of a felony and was not eligible to possess a firearm (Tr, pp 18-19, 103).

Jackson testified that he weighed 230 pounds (Tr, p 105). In 2003, his hip had been replaced. He had a scar from that major operation. (Tr, pp 105-106, 107.) On June 25, 2006, he was shot four times: twice in the leg and in the back. At the time of trial, he still had a bullet in his back. (Tr, pp 106-107.) The hip replacement and injuries from the bullets affected Mr. Jackson's ability to run and walk. Although he usually used a cane, he had not been using one at the Wayne County Jail because "they wouldn't give me one." (Tr, pp 107-108.) Mr. Jackson testified that he could run and walk, but not very fast. He ran with a wobble and walked with a limp. He could run "a little bit." (Tr, p 108.) He was riding a bicycle the day he was arrested because he was supposed to exercise his leg (Tr, p 109). He did not have a cane on that day (Tr, p 109).

The trial court found Mr. Jackson guilty of armed robbery and the two counts of felonious assault. The court determined that the prosecution had not proven beyond a reasonable doubt that the silver object used to commit the armed robbery was a firearm. Therefore, the court acquitted Mr. Jackson of the felony-firearm and the felon in possession of a firearm counts. (Tr, pp 120-121.) On September 5, 2007, the trial court sentenced Mr. Jackson as a third habitual offender to 9 years to 20 years in prison for the armed robbery conviction and 2 years to 8 years in prison on each of the felonious assault counts, which run concurrent with the armed robbery sentence (ST, pp 6-7, Judgment of Sentence, lower court file).

This is Mr. Jackson's appeal of right. Additional facts may be added *Infra*.

## ARGUMENT

### I. THE COURT OF APPEALS ERRED WHEN IT FAILED TO REMAND THIS CASE FOR RESENTENCING AFTER VACATING TWO OF MR. JACKSON'S THREE CONVICTIONS, WHICH REDUCED THE RECOMMENDED MINIMUM SENTENCING RANGE TO 81 TO 202 MONTHS FROM 108 TO 270 MONTHS.

#### **Discussion**

A defendant has the constitutional right to be sentenced on the basis of accurate information. US Const, Ams V, XIV; Const 1963, art 1, § 17; *Townsend v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 2d 1690 (1948); *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006); *People v Miles*, 454 Mich 90, 100; 59 NW2d 299 (1997). If a minimum sentence is within the appropriate sentencing guidelines range, the Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). An error in the scoring of the guidelines that results in a different recommended minimum term range requires resentencing. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

In *People v Buck*, 197 Mich App 404, 431; 496 NW2d 321 (1992) (rev'd in part on alternative grounds 444 Mich 853 (1993)), the Court of Appeals held that when a defendant is sentenced based on having been found guilty of multiple offenses and some of those convictions are later vacated on appeal, the defendant is entitled to a resentencing on any remaining counts. See also *People v Grier*, 152 Mich App 129; 393 NW2d 551 (1986).

Here, the Court of Appeals vacated Mr. Jackson's two felonious assault convictions because the evidence was insufficient. *People v Leonard Leppel Jackson*, unpublished per curiam opinion issued March 26, 2009 (Docket No. 281380) (Appendix A). Despite setting aside two of

three convictions, which resulted in a change in Mr. Jackson's recommended minimum guidelines range, the Court of Appeals refused to remand for resentencing on the remaining conviction. The Court determined that because Mr. Jackson's sentence did not fall outside the new guidelines range and he did not raise the issue "at sentencing, in a proper motion for resentencing, or in a proper motion to remand", it had to affirm the sentence. *Jackson, supra* at \*5, quoting MCL 769.34(10).

Another Court of Appeals panel<sup>1</sup> decided differently in *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2008 (Docket No. 278955) at \*11, and a consolidated case, *People v Marquis Jackson*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2008 (Docket No. 279522) at \*11 (Appendix D). In those cases the Court of Appeals, citing *Buck, supra*, recognized that the cases must be remanded for resentencing on the remaining convictions after one conviction was reduced on sufficiency grounds. There is no indication that the defendants in those cases raised the issue of resentencing in anticipation that the Court would set aside a conviction based on sufficiency at sentencing, in a proper motion for resentencing, or in a proper motion to remand. *Id.*

Here, after the two convictions were set aside, there was an error in the PRV 7<sup>2</sup> score. Because there was one remaining concurrent conviction and no subsequent convictions, PRV 7 was reduced from 20 points to 0 points. Mr. Jackson's total PRV score was reduced to 22 points, and the PRV level was reduced from D level to C level. With the correct PRV 7 score, Mr. Jackson's recommended minimum sentence range decreases to 81 months to 202 months from 108 months to 270 months. Thus, the error in the sentencing guidelines scoring changed the recommended range and requires resentencing. *Francisco, supra.*

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<sup>1</sup> Both panels included Judge Kathleen Jansen.

Additionally, Mr. Jackson preserved the issue of the PRV 7 score that was caused by those convictions because he objected to the validity of the felonious assault convictions when he pleaded not guilty. See *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987) (a challenge to the sufficiency of a conviction does not require preservation).

The trial court sentenced Mr. Jackson to 9 years to 20 years for the armed robbery conviction, which was the bottom of the recommended minimum sentence range of 9 years (108 months) to 22.5 years (270 months). The trial court also stated that it was sentencing Mr. Jackson to the bottom of the guidelines. Although the minimum sentence of 108 months falls within the corrected recommended minimum sentence range, Mr. Jackson is entitled to resentencing on the accurately scored recommended minimum guidelines range. *Francisco, supra*. The Court of Appeals erred when it denied Mr. Jackson's requested remand.

Requiring a defendant to raise sentencing guidelines errors at sentencing, in a motion for resentencing, or in a motion to remand when those errors will arise only *after* successful sufficiency challenges does not make sense. Nonetheless, after the result in this case, appellate attorneys must routinely file anticipatory trial court or remand motions to preserve potential sentencing relief whenever a conviction may be set aside on appeal. Failing to file these speculative motions will constitute ineffective assistance of appellate counsel. In every case where sufficiency is argued, the Court of Appeals motions panels and trial courts will have to consider anticipatory, speculative motions for not-yet-existing sentencing relief. Obviously, all of these motions will necessarily be denied as not ripe because the error will not exist until after the conviction is set aside on appeal.

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<sup>2</sup> Under PRV 7, 20 points are assessed for two or more subsequent or concurrent felony convictions. MCL 777.57(1)(a).

Mr. Jackson's case should be remanded so he can be sentenced based on the accurate recommended minimum guidelines range and accurate information regarding the number of convictions.

## II. THE IDENTIFICATION EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN MR. JACKSON'S CONVICTIONS.

### Discussion

The Due Process Clauses of both the state and federal Constitutions prohibit a criminal conviction absent proof beyond a reasonable doubt that the accused is guilty of all of the essential elements of the crime charged. *Winship, supra* at 361-62. This high standard of proof was developed to safeguard citizens from “dubious and unjust convictions” resulting in “improper forfeitures of life, liberty and property.” *Id.* at 362. As the United States Supreme Court reasoned in *In re Winship*, “[n]o man should be deprived of his life under the forms of the law unless the jurors who try him are able, upon their consciences, to say that the evidence before them...is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.” *Id.* at 363. Thus, a conviction based on insufficient evidence is unconstitutional, and must be reversed if the evidence produced at trial failed to satisfy this “beyond a reasonable doubt” burden of proof. *Jackson v Virginia*, 443 US 307; 99 SCt 2781, 61 LEd2d 560 (1979); *Hampton, supra*.

According to *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967), “[a]s an essential part of his case, the prosecutor must identify *the accused* as the person who committed the alleged offense.” As the *Kern* court stated, “[t]he duty of the prosecutor to identify the accused is an element of his general duty to prove defendant’s guilt beyond a reasonable doubt. Certainly proof of the defendant’s connection with the alleged offense is an indispensable element of that duty.” *Id.* at 409 (emphasis added). The prosecutor neglected to do so in this case.

Here, the defense did not dispute that a robbery occurred. The defense consistently maintained that Mr. Jackson was not the perpetrator. The *only* evidence against Mr. Jackson was identification testimony by Ms. Taylor and Cherrise. This identification evidence was insufficient to prove beyond a reasonable doubt that Mr. Jackson was the perpetrator of the armed robbery.

Over four months after the robbery, Taylor identified Mr. Jackson as the perpetrator as he sat on a bicycle outside a market. Taylor's identification was never tested by any sort of lineup. Further, on January 12, 2007, the date of the offense, Taylor's description of the perpetrator did not match Mr. Jackson. On that date, Taylor told the police that the perpetrator was 5'5", 160 pounds, medium to light complected, and medium build (Tr, pp 37, 61, 82). Detroit Police Officer Charles Rogers described Mr. Jackson as having a heavy build and weighing 230 pounds (Tr, pp 102-103). Taylor's description of the perpetrator on the date of the robbery is vastly different from Mr. Jackson with respect to actual weight and build. A 70 pound underestimation of a perpetrator's weight is too significant to be dismissed as a normal inability to estimate weight. The substantial difference in body type between Taylor's description of the perpetrator and Mr. Jackson rendered the identification so suspect that it is insufficient to prove that Mr. Jackson committed the crime.

In addition, Taylor asserted that she had recognized Mr. Jackson because she looked into his eyes (Tr, p 37). She claimed that she had given the police a description of the perpetrator's eyes on the day of the robbery (Tr, p 37). However, she subsequently conceded that she had never described the perpetrator's eyes to the police (Tr, pp 40, 52). Because of the inconsistent descriptions, the fact that Mr. Jackson was not identified through any sort line-up, and the length

of time between the robbery and Mr. Jackson's arrest, the identification lacked sufficient aspects of reliability to support a conviction.

Cherrise Harris' identification of Mr. Jackson as the perpetrator was very weak. See *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Her ability to identify Mr. Jackson outside a courtroom environment was never tested by any sort of lineup. On the day of trial, Cherrise did not know if she would be able to identify the perpetrator if she saw him again (Tr, p 69). She then identified Mr. Jackson in his "green prison outfit." She stated that she was not sure whether Mr. Jackson was the person who had robbed her mother because the person she had seen at the preliminary examination "had hair." (Tr, p 69.) Only after prompting by the prosecution did she finally agree that Mr. Jackson, who was sitting at defense table in jailhouse clothing, was the perpetrator (Tr, p 71). "[I]t is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant." *United States v Rogers*, 126 F.3d 655, 658 (5th Cir. 1997). Thus, Cherrise's identification testimony was too weak to add any evidentiary value to the proofs that Mr. Jackson was the perpetrator.

Finally, Mr. Jackson testified that he ran with a "wobble" because his hip was replaced in 2003 and he was shot four times in 2006, in the leg and in the back. He still had a bullet in his back. These injuries affected his ability to run and walk. (Tr, pp 106-108.) Neither Cherrise nor Taylor noticed anything strange about the perpetrator's gait (Tr pp 42, 77).

Because Taylor's initial description of the perpetrator did not resemble Mr. Jackson, because over four months had elapsed between the robbery and the identification, and because the identification testimony was inconsistent, Taylor's identification of Mr. Jackson at trial was not sufficiently reliable to prove that Mr. Jackson was the perpetrator. Cherrise's identification

testimony was even weaker. The prosecution did not present sufficient evidence to prove that Mr. Jackson was the perpetrator. The convictions must be reversed.

**JUDGMENT APPEALED FROM AND RELIEF SOUGHT**

Defendant-Appellant asks this Honorable Court to either grant this application for leave to appeal, or any appropriate peremptory relief.

Respectfully submitted,

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