

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYIEE SAM BROWN,

Defendant-Appellant.

UNPUBLISHED

April 10, 2008

No. 276518

St. Clair Circuit Court

LC No. 06-002119-FC

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

MURRAY, P.J. (*concurring*).

As an intermediate appellate court, we are constitutionally bound to follow the precedent established by our Supreme Court. *Paige v City of Sterling Heights*, 476 Mich 495, 524; 720 NW2d 219 (2006). Thus, I concur in the decision to vacate defendant's conviction because *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007), requires this decision. However, my reading of the many opinions issued in *Nyx* leads me to conclude that the only precedential holding of the Court (i.e., a ruling that a majority of the Court agreed upon) was that the Due Process Clause of the United States Constitution precluded convicting the defendant in that case because he had no notice that he would be charged, at the conclusion of trial, with criminal sexual conduct II. See *Nyx, supra* at 123-124 (Opinion of Taylor, CJ., and Markman, J) and at 142-143 (Opinion of Cavanagh and Kelly JJ.). There did not appear to be a majority conclusion on any other point within these opinions, so I would vacate defendant's conviction on this constitutional ground because defendant's procedural predicament was the same as it was for the defendant in *Nyx*.¹

/s/ Christopher M. Murray

¹ This error was not harmless. For one, this was a preserved issue. Second, defendant did not have an absolute "all or nothing" trial position as was the case in *Nyx*. See *Nyx, supra* at 150-154 (Opinion of Young, J.). Third and finally, even if defendant's defense was as defendant's was in *Nyx*, the majority did not find harmless error.