

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LEE BAISDEN,

Defendant-Appellant.

UNPUBLISHED

March 4, 2008

No. 269999

Wayne Circuit Court

LC No. 05-003753

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

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

I concur in the result reached by my distinguished colleague, Judge Hoekstra, that this case must be reversed and remanded for a new trial, but I do so reluctantly and only because binding precedent requires it.

I would like to join with Judge Meter in his dissent, which discusses the reasons for NOT requiring medical testimony to substantiate that sexual intercourse is a medically unethical or unacceptable practice when a woman visits a doctor's office for a gynecological examination. Certainly, it makes no sense whatsoever, in the circumstances present in this case (or a similar case for that matter), that an independent medical expert must testify that penile penetration (or any form of sexual intercourse) is not a medically acceptable, ethical approach to a medical examination.

Indeed, a doctor's office should be a safe harbor for any patient, a secure place for a woman undergoing an intimate examination. In this instance, the doctor's office was anything but a safe harbor; rather, it was occupied by a loathsome doctor, who violated a vulnerable woman.

However, the challenge here is that Michigan case law requires "medical testimony" for prosecutions under MCL 750.520b(1)(f)(iv), *People v Capriccioso*, 207 Mich App 100, 103-106; 523 NW2d 846 (1994); *People v Thangavelu*, 96 Mich App 442, 450; 292 NW2d 227 (1980), and this Court is required by the first-out rule to adhere to published decisions issued after November 1, 1990, which have not been "reversed or modified" by our Supreme Court or by a special panel of this Court, MCR 7.215(J)(1). As recently as 1994, in *Capriccioso*, this Court affirmed the requirement of medical testimony when the prosecution pursues a criminal sexual conduct conviction under MCL 750.520b(1)(f)(iv). Therefore, under MCR 7.215(J)(1), I am bound to follow *Capriccioso*.

Applying *Capriccioso* to this case, the trial court erred in instructing the jury on MCL 750.520b(1)(f)(iv) because the prosecution failed to present medical testimony to support the instruction. Likewise, the trial court erred in denying defendant's motion for partial directed verdict because it erroneously concluded that medical testimony was not required. And for the reasons set forth in Judge Hoekstra's opinion, I agree that these errors were not harmless. I further agree that the trial court was not biased and it did not err in its evidentiary rulings.

But for the ruling in *Capriccioso*, with which I vigorously disagree and about which I would declare a conflict, I would affirm defendant's convictions. Few people, if any, would disagree that his despicable actions in violating a female patient do not constitute an ethical, acceptable medical treatment. However, because I am bound by this Court's decision in *Capriccioso*, I must concur in the result reached by Judge Hoekstra.

/s/ Bill Schuette