

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellant,

UNPUBLISHED  
October 24, 2017

v

NICHOLAS LOUIS STAPELS,  
  
Defendant-Appellee.

No. 337933  
Oakland Circuit Court  
LC No. 2017-261675-FH

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Before: SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. The majority presumes, with good reason, that Mich Admin Code, R 325.2655(1)(e) was violated in this case. However, the majority concludes that this error was harmless, relying on *People v Wujkowski*, 230 Mich App 181; 583 NW 2d 257 (1988). As described by Judge Warren in his well-written opinion, this case bears little relation to *Wujkowski*. In *Wujkowski*, the period of non-observation was 6 seconds out of the 15 minutes required by the rule. *Id.* at 184-186. In such a setting a finding of harmless error is readily justified. In this case, however, Judge Warren found that the period of non-observation was 12 minutes out of the required 15. To allow a finding of harmless error in such a setting essentially vitiates the rule and places the burden of proof on the defendant to demonstrate that the test is invalid. The purpose of the rule was to structure the test to assure reliability rather than to have the court conduct an after-the-fact analysis in which defendant is required to prove unreliability. Finding that the test results are admissible, where the lack of observation was 6 seconds out of 15 minutes (.75%), does not undermine that principle; but making such a finding where the lack of observation was 12 minutes or 80% of the required period surely does.

The majority seems to suggest that the availability of videotaping renders the rule unnecessary. In the absence of rules governing the manner and quality of videotaping, I question the wisdom of such a view. More to the point, this seems to create an exception that swallows the still-extant rule. As Judge Warren correctly noted, “the plain language of the Rule provides that a human being (in the terminology of the Rule - a “class operator”)—not a camera—ensure the accuracy of the foundation. Perhaps the Rule is antiquated—but it is the law until changed. . . [T]he Court [should] not graft onto it an exception that does not exist.”

/s/ Douglas B. Shapiro