

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UNPUBLISHED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.

PER CURIAM.

After defendant's first trial ended with a hung jury, defendant was retried and convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and sentenced to a term of 8 to 15 years' imprisonment. He appeals as of right. Because we conclude that the trial court erroneously instructed the jury that it could find force or coercion as defined in MCL 750.520b(1)(f)(iv), we reverse and remand for a new trial.

I. Basic Facts and Procedural History

Defendant, an obstetrics and gynecology physician, was convicted of sexually assaulting the complainant after performing a gynecological examination. The complainant, who had been defendant's patient for approximately two years, testified that after she appeared for her annual pelvic examination at the clinic where defendant was employed, she undressed, put on a hospital gown, then waited for defendant to enter the examination room. According to the complainant, when defendant entered the room he greeted her by giving her a hug. Defendant then had her lie on the examination table, put her in stirrups, and started a breast examination. The complainant testified that while performing the examination defendant hovered over and squeezed her breasts and nipples, which was different from prior breast examinations he had performed on her.

At some point thereafter, defendant began a vaginal examination. Defendant inserted and removed a speculum, then performed an examination with his hands. The complainant testified that defendant made comments such as "everything looks good," and "everything feels good," which she felt was not normal and made her nervous. Defendant then grabbed her thighs, pressed up against her, inserted his penis into her vagina, and ejaculated. The complainant testified that she attempted to scoot back but that defendant put his arm around her waist and pulled her to him. Defendant then grabbed her hands and attempted to kiss her. The complainant testified that she never consented to having sex with defendant and that, after

defendant was done, he asked her to give him another chance and told her they could meet elsewhere. Defendant then left the room and returned with a card with his number on the back. After leaving the examination room, the complainant left the office area and went to the lobby, but then returned to the reception desk and asked to speak with a nurse about defendant.

The defense theory at trial was that defendant engaged in consensual sex with the complainant after the vaginal examination. During his testimony, defendant explained that he and the complainant had developed a flirtatious relationship over the course of her several visits during the previous two years, and that the sexual contact between them that day was initiated by her at the conclusion of the vaginal examination and was entirely consensual. Defendant further testified that, following the consensual sex act, the complainant jovially teased him because things happened too “quickly” and he thus asked her to meet him at a hotel to give him another chance, explaining that his wife and children were at his house so they could not go there. At that point, defendant testified, the complainant’s demeanor toward him changed and she said that she thought he was divorced.

A principal issue at trial was how the jury would be instructed with regard to the force and coercion element of defendant’s third-degree criminal sexual conduct charge. MCL 750.520d(1)(b) provides that force or coercion includes but is not limited to any of the circumstances listed in MCL 750.520b(1)(f). MCL 750.520b(1)(f) provides, in relevant part, that force or coercion includes:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

* * *

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

At defendant’s first trial before a different judge, the trial court merely instructed the jury that “[f]orce or coercion means that the Defendant either used physical force or did something to make the complainant reasonably afraid of present or future danger.” Near the conclusion of the prosecution’s case at defendant’s second trial, however, the trial court indicated that it intended to read directly from MCL 750.520b(1)(f). The court also indicated that it would read the corresponding sections of CJI2d 20.24.¹

¹ In relevant part, CJI2d 20.24 provides:

(1) It is enough force if the defendant overcame [*name complainant*] by physical force.

(continued...)

Defense counsel objected to the reading of both CJI2d 20.24 and the statute, arguing that it would be repetitive. Counsel also objected to instructing from the statute. Among other things, counsel argued that subsection (f)(iv) was inapplicable because there was no standard of care testimony regarding what is medically recognized as unethical or unacceptable. The trial court rejected this argument, ruling, “I don’t think any person on this jury would believe that undergoing a pelvic examination that results in sexual intercourse being performed on a patient is acceptable medical practice.” Rather, the court found, it was a matter of “common sense.” The trial court agreed, however, that it would be repetitive to instruct using both the statute and CJI2d 20.24, and ultimately did not read CJI2d 20.24.

Counsel then informed the trial court that she had planned not to have defendant testify, but that given the court’s ruling with respect to subsection (f)(iv), she wanted an adjournment not only to brief the issue concerning subsection (f)(iv) but also to prepare defendant to testify. The court refused to adjourn the matter, but gave counsel until after lunch that day to address the instructional issue. Shortly thereafter, the prosecution presented her final witness and rested its case.

After the jury was excused for lunch, defense counsel moved for a partial directed verdict, arguing that there was insufficient evidence that defendant engaged in medical treatment or examination of the complainant in a manner or for purposes that were medically recognized as unethical or unlawful, because there had been no expert testimony about what is medically recognized as unethical or unlawful, and the evidence established that the alleged assault took place after the examination, not during it. The trial court denied the motion, reiterating its belief that no expert testimony was required for the jury to find that the circumstances described in subsection (iv) had been established.

Ultimately, the trial court instructed the jury in accordance with subsections (f)(i), (iv), and (v), and also gave an instruction on the defense of consent. The jury was excused to deliberate at 2:40 p.m. At 3:32 p.m. the court was back on the record and indicated that the jury had sent out a note asking, “Please, clarify in more detail the definition of coercion re: (f)(iv). . . .” After discussing the note with counsel for both parties, the trial court indicated that it would instruct the jury that sexual intercourse is medically recognized as unethical or unacceptable.

(...continued)

(5) It is enough force if the defendant was giving [*name complainant*] a medical exam or treatment and did so in a way or for a reason that is not recognized as medically acceptable. A physical exam by a doctor that includes inserting fingers into the vagina or rectum is not in itself criminal sexual conduct. You must decide whether the defendant did the exam or treatment as an excuse for sexual purposes and in a way that is not recognized as medically acceptable.

(6) It is enough force if the defendant, through concealment or by the element of surprise, was able to overcome [achieve sexual contact with] [*name complainant*].

However, before it could do so the jury sent out another note asking, “Does criminal sexual conduct in the third degree mean rape in lawful terms, and what other violations does third degree cover?” After further discussion with the parties, the trial court brought the jury back in and gave the following instructions:

First off, the only act which is part of the charges that have been brought against the defendant in this case have to do with the entry of the penis into the vagina of the complaining witness. That is the sole act.

And sexual intercourse is a medically unethical or unacceptable practice. You are to disregard any other touchings or penetration that may have taken place in determining as to whether the defendant is guilty of the charge of criminal sexual misconduct, third-degree.

The only – the sole act is the entry of the defendant’s penis into the vagina of the complaining witness. . . .

After then explaining that a person commits the offense of third-degree criminal sexual conduct if “force or coercion is used to accomplish . . . sexual penetration,” the trial court reiterated that, included within the circumstances listed by MCL 750.520b(1)(f) as establishing “force or coercion” is “when the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.” The jury was then excused again at 3:46 p.m. Counsel for defendant subsequently expressed her dissatisfaction with the trial court’s reinstruction because the court reemphasized subsection (f)(iv), and argued that the court erred in informing the jury that sexual penetration is medically recognized as unethical or unacceptable. At 4:15 p.m., the jury reached a verdict finding defendant guilty as charged.

II. Analysis

A. Jury Instructions

In this case as previously noted, the trial court instructed the jury in accordance with MCL 750.520b(1)(f)(iv), which provides that force or coercion includes “[w]hen the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.” On appeal, defendant argues that the trial court erred in doing so because there was no medical testimony to support such an instruction. Because we find that the instruction was inapplicable to the circumstances charged in this case, we agree that the trial court erred in instructing the jury in accordance with subsection (f)(iv).

The determination of the circumstances to which the medical treatment or examination theory of force or coercion provided for under MCL 750.520b(1)(f)(iv) may be applied is one of law that we review de novo. See, e.g., *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

A review of the limited number of cases addressing the use of the force of coercion definition found in subsection (f)(iv) shows that it is limited to those circumstances in which the

evidence supports that the pretense of medical necessity was used by the defendant to obtain tacit or express consent for an otherwise offensive touching. In *People v Capriccioso*, 207 Mich App 100, 105; 523 NW2d 846 (1994), this Court explained:

[T]he conduct proscribed [by subsection (f)(iv)] is the intentional touching of a patient by a doctor for sexual gratification under the pretense that the contact is necessary in the diagnosis of the patient's ailment. The objective is to prevent a person in the medical profession from taking such an unconscionable advantage of the patient's vulnerability and abusing the patient's trust and unwitting permission of the touching under the belief that it is necessary. In turn, the Legislature has defined force or coercion as encompassing these situations.

This view of the statute's objective was similarly expressed in *People v Regts*, 219 Mich App 294; 555 NW2d 896 (1996), wherein this Court stated, "[t]he clear purpose of the statute is to protect patients from abuse by professionals who, under the guise of treatment, take advantage of the patient's vulnerabilities to achieve a sexual purpose."

The *Capriccioso* case illustrates the type of conduct proscribed by subsection (f)(iv). There, the evidence established that the defendant emergency room doctor fondled his female patients' breasts, under the guise of examining them for such ailments as back pain, congestion, and sinus allergies. *Id.* at 103-104. Similarly, in *Regts, supra* at 296, the defendant, the victim's psychotherapist, manipulated therapy sessions to establish a relationship that would permit his sexual advances to be accepted by the victim without protest. And in *People v Alter*, 255 Mich App 194, 197; 659 NW2d 667 (2003), this method of force or coercion was shown where the defendant, a therapist, had a sexual relationship with his patient under the pretense of helping her resolve her problems with her husband. See also, *People v Thangavelu*, 96 Mich App 442, 446; 292 NW2d 227 (1980) (wherein the defendant physician was tried on allegations that he performed cunnilingus on a female patient while she was being examined by him for lice).

This review of the factual bases for the charges in these cases makes clear that subsection (f)(iv) applies only where the pretense of medical necessity is used to gain consent to an otherwise offensive touching. Subsection (f)(iv) operates to negate the consent and criminalizes the sexual conduct when the artifice of medical necessity is used. *Capriccioso, supra* at 105. Here, however, the circumstances do not involve a situation where defendant engaged in sexual conduct under the guise of treating or examining the complainant. Although this case involved a gynecological examination, there was never any claim or suggestion that the charged sexual act occurred while defendant was purportedly engaging in medical treatment or examination. Rather, the complainant testified that it was after defendant completed his breast and vaginal examination that he grabbed her thighs, pressed up against her, and inserted his penis into her vagina. While we recognize that this occurred within the timeframe of the examination appointment, subsection (f)(iv) does not criminalize sexual conduct on the basis of its spatial relationship to medical treatment or examination. Rather, as already discussed, the statute criminalizes the abuse of a patient's unwitting accession to sexual conduct under the belief that it is necessary for medical examination or treatment. In this case, there is no evidence to support that the complainant acquiesced or otherwise acceded to the charged conduct under the mistaken belief that it was medically necessary.

Further, while the complainant testified that defendant's breast examination seemed more invasive than prior breast examinations, and that defendant made inappropriate comments when he performed his vaginal examination with his hands, defendant was not charged with any offense based on these acts. Indeed, the trial court specifically instructed the jury that defendant was charged with "engag[ing] in a sexual act that involved entry into [the complainant's] vagina by the defendant's penis" and, when later reinstructing the jury, once again clarified that "the only act which is part of the charges that have been brought against the defendant in this case have to do with the entry of the penis into the vagina of the complaining witness. That is the sole act." These instructions were consistent with the prosecution's theory of the case. Because the charge levied by the prosecution arose solely from defendant's penetration of the complainant with his penis, and because the evidence showed that this singly charged sexual act occurred after the examinations were concluded, we conclude that the trial court erred by instructing the jury on the medical treatment or examination theory of force or coercion.²

Additionally, we agree with defendant's related argument that the trial court erred in denying his motion for partial directed verdict because during its case-in-chief the prosecution failed to present any expert medical testimony to establish that the charged conduct was medically unacceptable or unethical. Previously, we noted that defendant sought a partial directed verdict of the medical treatment theory of force and coercion on this ground at the close of the prosecution's case. The trial court, however, denied the motion, ruling that no expert medical testimony was required for the jury to find that a physician's insertion of his penis into a patient's vagina was medically unacceptable and unethical. Rather, the court concluded, it was a matter of "common sense." However, in *Thangavelu, supra* at 450, this Court recognized that while there will be instances in which it cannot be reasonably argued that the charged conduct is medically recognized as acceptable or ethical treatment or examination, expert medical testimony is nonetheless required in prosecutions under MCL 750.520b(1)(f)(iv). See also *Capriccioso, supra* at 105 ("medical testimony is necessary to prove that a defendant's behavior during a medical examination was not acceptable or ethical"), citing *Thangavelu, supra*. It is well settled that where, as here, the evidence presented at the close of the prosecution's case-in-

² The response of the dissent regarding whether the jury was properly instructed regarding force or coercion pursuant to (f)(iv) fails to account for the legal requirement that the facts must show that the pretense of medical necessity was used to gain consent. Thus, whether a jury could reasonably conclude that defendant used the examination to put the victim in a position to be forcibly overcome or the whole examination was used for an unethical purpose is of no legal significance in determining whether an instruction regarding (f)(iv) is supported by the evidence because (f)(iv) is concerned with negating consent. Here, the victim testified unequivocally that she did not consent to sexual penetration. Rather, she maintained that she was overcome by the defendant's application of direct force and through surprise, both of which are deemed unlawful under (f)(i) and (v). If the victim's testimony were accepted as factually accurate by a trier of fact, defendant is guilty of criminal sexual conduct and is being justly held accountable. Unfortunately, neither of the two juries that have considered the defendant's and victim's competing and factually irreconcilable versions of what happened have resolved this factual dispute; the first because although properly instructed, it could not agree on a unanimous verdict, and the second at issue here because its attention was improperly diverted by the (f)(iv) instruction.

chief is insufficient to support conviction on a charged offense, the defendant is entitled to a directed verdict of acquittal on that charge. MCR 6.419(A); see also *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). Thus, although defendant acknowledged during cross-examination by the prosecution that sexual intercourse with a patient was neither medically acceptable nor ethical, a partial directed verdict on the medical treatment theory of force or coercion was required because the prosecution failed to present such evidence during its case-in-chief.³

However, because these are nonconstitutional preserved errors, reversal is not required unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In this case, we conclude that the error was not harmless because it is more probable than not that the error was outcome determinative.

Initially, we note that the prosecution did not request that the jury be instructed with force or coercion under a medical treatment theory, and that this theory was not pursued at defendant's first trial. Instead, it was the trial court that introduced this theory for the first time at defendant's second trial. More importantly, however, the circumstances indicate that the jury was confused about this theory of force or coercion. Indeed, shortly after the jury began deliberations it requested clarification of the force and coercion instructions, specifically indicating that it was confused about subsection (f)(iv). The jury then sent out another note indicating that it was confused about the circumstances covered by the offense of third-degree criminal sexual conduct. When reinstructing the jury, the trial court emphasized subsection (f)(iv) and, rather than merely instructing that force or coercion includes acts committed while engaging in medical treatment or examination that is medically recognized as unethical or unacceptable, it instructed that "sexual intercourse is a medically unethical or unacceptable practice." Because the trial court's instruction to the jury could reasonably be understood to mean that medically unethical or unacceptable treatment or examination is sufficient to satisfy the force or coercion element of the offense, and because there was no dispute that sexual intercourse took place, the trial court's instruction that "sexual intercourse is a medically unethical or unacceptable practice" essentially removed the force or coercion element from the

³ Nonetheless, we find unavailing defendant's claim that the trial court's various decisions concerning the force and coercion instruction violated separation of powers principles and demonstrated bias requiring reversal. Judicial rulings, in and of themselves, almost never constitute a valid basis for a claim of bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). Here, the trial judge's rulings do not reflect a deep-seated favoritism or bias, only that he viewed the law differently than defendant. Further, while defendant correctly asserts that the power to determine what charge should be brought is an executive power, which vests exclusively in the prosecutor, *People v Gillis*, 474 Mich 105, 141; 712 NW2d 419 (2006), the trial court did not decide the charge against defendant in this case. Rather, it was the prosecutor who decided to charge defendant with third-degree criminal sexual conduct involving force and coercion. The trial court merely made a ruling concerning which instructions applied to that charge. Accordingly, there was no separation of powers violation.

jury's consideration and assured defendant's conviction. Consequently, it is more probable than not that the trial court's erroneous instruction on the medical treatment theory of force or coercion affected the outcome. Thus, the error was not harmless.

In reaching this conclusion we recognize that the various theories listed in MCL 750.520b(1)(f) constitute alternative means of proving the offense of third-degree criminal sexual conduct, and that the complainant's testimony, if believed, would support a finding of force and coercion under subsection (f)(i) (application of physical force) and (v) (concealment or surprise). See, e.g., *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998). This Court has recognized, however, that "[w]here one of two alternative theories of guilt is legally insufficient to support a conviction, and it is impossible to tell upon which theory the jury relied, the defendant is entitled to a reversal of his conviction and a new trial." *People v Grainger*, 117 Mich App 740, 755; 324 NW2d 762 (1982); cf. *Gadomski*, *supra* at 32 ("because the trial court's instructions were legally correct, manifest injustice will not result from our failure to grant the relief requested"). Here, the basis for the jury's verdict is not so indiscernible as to render it "impossible" to determine upon which theory the jury relied. To the contrary, as we have already discussed, it appears from the jury's focus on subsection (f)(iv) and the trial court's responses, that the jury more likely than not relied on the improper instruction. Given these facts, and in light of the credibility driven nature of the evidence and the prior jury's inability to reach a verdict in the absence of the improper instruction, we reverse defendant's conviction and remand this matter for a new trial with instruction that the jury hearing this matter on retrial not be charged with the definition of force or coercion found at MCL 750.520b(1)(f)(iv).

B. Evidentiary Issues

In light of our decision to reverse defendant's conviction and remand this matter, it is unnecessary to consider many of defendant's remaining issues on appeal. However, because defendant's evidentiary issues may arise if there is a retrial, we will briefly address them.

Defendant argues that the trial court erred in permitting testimony concerning a policy change regarding the presence of medical assistants during gynecological examinations conducted at the clinic where this incident occurred. Defendant asserts that the trial court erred in permitting this testimony because it violated MRE 407, which prohibits evidence of subsequent remedial measures to prove culpable conduct. We find no plain error on this unpreserved issue. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003). The challenged testimony did not violate MRE 407 because the witness did not testify that the clinic took subsequent remedial measures. Rather, the witness testified that she did not know the clinic's present policy.

Defendant also argues that the trial court erred in refusing to admit testimony under MRE 801(d)(1). By failing to delineate which of the three subrules of MRE 801(d)(1) purports to permit the admission of the subject testimony, defendant has failed to properly present this issue for our review. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). However, to the extent his challenge can be viewed as arguing that the testimony was admissible as a prior inconsistent statement under MRE 801(d)(1)(A), we note that the statement at issue was not given under oath so the rule is inapplicable. See, e.g., *People v Malone*, 445 Mich 369, 376-377, 518 NW2d 418 (1994) ("[t]he rule clearly indicates the circumstances in which prior statements are defined as not hearsay: where the prior statement was made under oath *and* is

inconsistent with the witness' testimony) (emphasis added). Accordingly, we find no error in the trial court's refusal to admit the proffered testimony under MRE 801(d)(1).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Joel P. Hoekstra