STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v NINA JILLAINE SHEPHERD a/k/a NINA JILLAINE BUTTERS, Defendant-Appellant.	FOR PUBLICATION September 28, 2004 9:10 a.m. No. 247945 Midland Circuit Court LC No. 02-001097-FH Official Reported Version

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

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

I respectfully dissent from the decision of the majority reversing defendant's conviction in this case.

Although I agree with the majority that the trial court erred in admitting the transcript of accomplice Bobby Butters's guilty plea to subornation of perjury, I conclude, unlike the majority, that the error was harmless.

Relying on the language of *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994), for the test for preserved constitutional error, the majority concludes that "[w]hen quantitatively assessed in this case, there is clearly more than a reasonable probability that the transcript of Mr. Butters's guilty plea to subornation of perjury contributed to defendant's conviction of perjury. . . . In fact, this transcript established an element of the charged offense—the falsity of defendant's previous testimony." *Ante* at ___.

In *Anderson*, our Supreme Court quoted from the United States Supreme Court's decisions in *Arizona v Fulminante*, 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991), and *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967), concerning the federal test for harmless constitutional error. *Anderson, supra* at 404-407. However, after *Fulminante* and *Chapman* the United States Supreme Court has further explained the proper test for determining whether constitutional error is harmless. In *Neder v United States*, 527 US 1; 119 S Ct 1827; 144 L Ed 2d 35 (1999), after noting the *Chapman* test, the Supreme Court clarified what was required to establish harmless constitutional error:

> The erroneous admission of evidence in violation of the Fifth Amendment's guarantee against self-incrimination, see *Arizona* [*supra*], and the

> erroneous exclusion of evidence in violation of the right to confront witnesses guaranteed by the Sixth Amendment, see *Delaware v Van Arsdall* [475 US 673; 106 S Ct 1431; 89 L Ed 2d 674 (1986)], are both subject to harmless-error analysis under our cases. Such errors, no less than the failure to instruct on an element in violation of the right to a jury trial, infringe upon the jury's fact finding role and affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable. *We think, therefore, that the harmless-error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?* To set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." R. Traynor, The Riddle of Harmless Error 50 (1970). [*Neder, supra* at 18 (emphasis added.)]

In light of this statement, I conclude that the United States Supreme Court recognized that the test articulated in *Chapman*, which our Supreme Court applied in *Anderson* and which the majority relied on in the present case, is virtually unattainable, and restated the test to require a more realistic determination, i.e., whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder, supra.* Further, I note that our Supreme Court has acknowledged the *Neder* test for harmless constitutional error. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001).

Answering the question: "Is it clear, beyond a reasonable doubt, that a rational jury would have found defendant guilty of perjury absent the error of introducing into evidence the transcript of Butters's guilty plea to subornation of perjury?" I conclude that the error in this case was harmless. The testimony of the jail guards established that Butters admits that he was the driver of the pickup truck that fled from the police on the night in question. Like the plea transcript, this testimony established that defendant's trial testimony was false. In addition, other testimony corroborated that Butters was the driver of the fleeing pickup truck. Rose York, the owner of the bar from which defendant and Butters left just before the incident in question, testified that she knows both defendant and Butters and observed them leave alone in separate vehicles, Butters driving his pickup truck and defendant driving her station wagon. Further, the "script" that Butters gave to defendant before his trial essentially laid out the substance of what later proved to be defendant's testimony. Given this evidence, I believe that it is clear beyond a reasonable doubt that a rational jury would have found defendant guilty of perjury absent the error of introducing into evidence Butters's guilty plea transcript.

In all other respects, I concur with and join the majority. However, because I conclude that the only error in this case was harmless, I would affirm.

/s/ Joel P. Hoekstra