STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE D. RODGERS,

Defendant-Appellant.

UNPUBLISHED
March 11, 1997

No. 197802
LC No. 92-011819
ON REMAND

Before: White, P.J., and Bandstra and Marilyn Kelly, JJ.

PER CURIAM.

In an opinion dated May 23, 1995, we[1] reversed defendant's convictions of murder in the second-degree, MCL 750.317; MSA 28.549, attempted murder MCL 750.91; MSA 28.286, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). In an order dated September 17, 1996, the Michigan Supreme Court remanded this case back to our Court for reconsideration in light of *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996). *People v Rodgers*, 453 Mich 882 (1996).

In *Mateo*, the Supreme Court considered the appropriate standard of review to be used on appeal in determining whether the nonconstitutional error of improperly admitting evidence can be considered harmless and thus not the basis for reversing a conviction. The Court instructed that "for the evidentiary error here alleged, reversal should be predicated by evaluating the error against the remaining evidence." 453 Mich at 214. The purpose of appellate review is "a determination of prejudice" because "reversal is only required if the error was prejudicial." *Id.* at 214, 215.

The Court went on to discuss "the level of assurance an appellate court on direct review must have that [an]**...**error was not prejudicial and thus harmless." *Id.* at 218. The Court suggested two standards:

> The first test assesses whether it is *highly probable* that the challenged evidence did not contribute to the verdict. The second test asks whether it is *more probable than not,*

> i.e., a preponderance of the evidence, that the error did not affect the verdict. [*Id.* at 219; emphasis in original]

However, the Court specifically refrained from "unilaterally adopt[ing] a definitive standard." *Id.* at 220.

In contrast to *Mateo*, the present case did not involve the erroneous introduction of evidence against defendant. Our reversal of defendant's convictions was based on our conclusion that the trial court improperly instructed the jury on attempted murder, a specific intent crime, by reading the jury instruction for second-degree murder, a general intent crime. Further, the trial court failed to provide a requested instruction on the lesser offense of accessory after the fact even though there was evidence to support that instruction, an error we considered not to be harmless in light of the jury finding defendant guilty of another intermediate charge. In addition, the requested accessory after the fact instruction would have addressed the obvious confusion expressed by the jury in questions addressed to the court.

We find these jury instruction errors to be much more egregious than the evidentiary error considered in *Mateo*. Assuming that *Mateo* has application to jury instruction errors as well as evidentiary errors,[2] we nevertheless find it unnecessary to decide which of the suggested "level of assurance" tests is applicable here. Under either test, we would reverse; we cannot conclude that it is "highly probable" or that it is "more probable than not" that the instructional errors did not[3] affect the verdict against defendant.[4]

For these reasons and for the reasons stated in our opinion dated May 23, 1995, we reverse and vacate defendant's convictions and remand this matter to the trial court. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Marilyn Kelly

[1] Pursuant to Court policy, former Court of Appeals Judge Walter P. Cynar has been replaced for purposes of this reconsideration with acting Court of Appeals Judge Marilyn Kelly.

[2] We assume this because the Supreme Court has remanded this matter for consideration in light of *Mateo*. Further, although most of the *Mateo* discussion relates specifically to the evidentiary question at issue there, the Court had before it the statute governing reversals because of "misdirection of the jury" or "error as to any matter of pleading or procedure." MCL 769.26; MSA 28.1096; *Mateo, supra* at 212.

[3] Further, even if the appropriate standard of review would place the burden of showing prejudice on defendant, see *id.* at 221-222 (Weaver, J., concurring), we conclude that it is highly probable (and thus more probable than not) that the jury instruction errors did affect the verdict against defendant.

[4] In a Supplemental Brief After Remand, defendant does not argue that the errors at issue here are of a constitutional nature. Accordingly, we assume the errors are not of a constitutional nature while recognizing that the line between constitutional and nonconstitutional errors "is rarely clear." *Mateo*, *supra* at 225 (Cavanagh, J., concurring in part and dissenting in part). Reversal of defendant's convictions clearly would be warranted if the jury instruction errors here were considered constitutional rather than nonconstitutional, under the more stringent "harmless beyond a reasonable doubt" standard. *Id.* at 206, 217.