STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN J. SILVER,

Defendant-Appellant.

UNPUBLISHED
May 23, 2000

No. 212508
St. Clair Circuit Court
LC No. 98-000946-FH

Before: Cavanagh, P.J., and Holbrook, Jr., and Kelly, JJ.

HOLBROOK, JR., P.J. (dissenting)

I respectfully dissent. While I agree with the majority's conclusion that the trial court erred in refusing defendant's request for an instruction on the lesser included misdemeanor offense of entering without permission, MCL 750.115; MSA 28.310, I disagree with the conclusion that this error was harmless.

In reaching the conclusion that the instructional error was harmless, the majority makes the following observations: "The jury obviously rejected defendant's claim that he entered the complainant's house only to use the bathroom; otherwise it would have acquitted him rather than convicting him of first-degree home invasion." *Ante,* p ___. I do not hold a similar confidence that the jury's failure to acquit necessarily means that it rejected defendant's stated reason for being in the house. The majority's reasoning is, I believe, predicated upon the following false dilemma: (1) if the jury believes defendant's testimony regarding intent, then the jury will find defendant not guilty; (2) the jury did not find the defendant not guilty; therefore, (3) the jury must have rejected defendant's testimony about why he was in the home. I believe the unmentioned alternative is just as possible. That is, although the jury may have had some doubts about defendant's intent, given his admission that he was in the house without permission, the jury may have believed defendant was guilty of some offense, and thus "resolve[d] its doubts in favor of conviction." *Keebe v United States*, 412 US 205, 213; 93 S Ct 1993; 36 L Ed 2d 844 (1973). The probability that the jury would follow this path could only be enhanced by the appearance of defendant at trial in shackles.[1] Such a resolution need not be based on an impassioned or "vehement" animus toward defendant, but on an understandable desire to punish a man who was "plainly guilty of *some* offense." *Id.* (emphasis in original).

I am also not convinced that the majority's application of the harmless error rule for this particular preserved nonconstitutional error is correct. While I agree that under *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999), we should not reverse unless after an examination of the entire record we conclude that it is more probable than not that the error resulted in a miscarriage of justice, *id.* at 494, I do not agree that this calculation is made by "assessing [the instructional error] in the context of the untainted evidence." *Ante,* p ___. As support for its use of the tainted-untainted balancing test, the Court in *Lukity* cited to *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996). However, in both of those cases the recognized error was an evidentiary one, not the failure to properly instruct the jury. *Lukity*, *supra* at 491; *Mateo, supra* at 206 ("Where the error asserted is the erroneous admission of evidence, the court engages in a comparative analysis of the likely effect of the error in light of the other evidence.").

Moreover, in each of the Michigan cases cited by the *Mateo* Court as supporting the tainted-untainted test, *Mateo, supra* at 215, the asserted error was an evidentiary one. See *People v Peterson*, 450 Mich 349, 377-378; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995); *People v Straight*, 430 Mich 418, 424 NW2d 257 (1988) (observing that in order to determine whether the erroneous admission of statements made by a sexual assault victim approximately one month after the assault was harmless, the court "evaluate[s] the prejudicial effect of [the] testimony in the light of other competent evidence"); *People v Young (After Remand)*, 425 Mich 470, 501-505; 391 NW2d 270 (1986).

In this same passage, the *Mateo* Court also cited as persuasive authority the majority opinion in *Kotteakos v United States*, 328 US 750; 66 S Ct 1239; 90 L Ed 1557 (1946), and Justice Brennan's concurrence/dissent in *United States v Lane*, 474 US 438; 106 S Ct 725; 88 L Ed 2d 814 (1986). Neither of these cases directly indicates that the tainted-untainted test should be used when the error is an evidentiary one. Rather, it seems to me that the Court cited to the two opinions because they support the proposition that the nature of the error should be examined in light of the entire record to see if it had a substantial effect that casts doubt on the outcome of the trial. When the error is only an evidentiary one (which assumes, of course, that the jury was properly instructed), the gauging of the effect is accomplished by examining the entire evidence, and balancing the corrupting effect of the tainted evidence against the effect of the untainted evidence.

Accordingly, I do not believe that they support, even inferentially, the use of the tainted-untainted test for preserved instructional error. While the *Kotteakos* Court did discuss the trial court's instructions on conspiracy, the issue in that case was whether the joint conspiracy trial of individual defendants who had no connection with each other was prejudicial. *Id.* at 773-774. The *Kotteakos* Court found that the procedure was prejudicial, even though the Court concluded "that each [defendant] was clearly shown to have shared in the fraudulent phase of the conspiracy in which he participated." *Id.* at 771. Indeed, the *Kotteakos* Court made it clear that the harmless error analysis is distinct from a simple weighing of the evidence analysis. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error," the Court observed. *Id.* at 765. "It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." As for *Lane*, the Court's harmless error analysis was limited

to the issue of the misjoinder of charged offenses. *Lane, supra* at 439-440. The *Lane* majority acknowledged that in such a situation, harmless error analysis does not collapse into a perfunctory examination of the sufficiency of the evidence. *Lane, supra* at 450 n 13. The *Lane* Court did conclude, however, that the misjoinder error was harmless "[i]n the face of overwhelming evidence of guilt." *Id.* at 450.[2]

Therefore, I conclude that outside of the situation where the error was an evidentiary one, I do not believe harmless error analysis collapses simply into a weighing of the evidence presented at trial. In other words, I do not believe that it is wise to use this approach outside of the specific circumstances for which its has been provided (i.e., where the acknowledged error involved the admission or exclusion of evidence). This does not mean that a reviewing court need turn a blind eye to overwhelming evidence of guilt. *Lane, supra* at 450. But to always turn to a weighing of the evidence in every situation invites, in my opinion, the very type of appellate abuse that Justice Traynor warned against when extolling the virtues of the highly probable standard, i.e., that an appellate judge will focus "'his inquiry on the correctness of the result," and "hold[] an error harmless whenever he equated the result with his own predilections.'" *Mateo, supra* at 219-220, quoting Traynor, The Riddle of Harmless Error (Ohio State Univ Press, 1970), pp 34-35.

In an oft cited passage from *Keebe*, the United States Supreme Court commented on how an instruction on a lesser offense protects a defendant's right that the state prove beyond a reasonable doubt the existence of every element of the crime charged:

> [I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense remains in doubt, but defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit the serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option—convicting the defendant of simple assault—could not have resulted in a different verdict. [*Keebe, supra* at 212-213 (emphasis in original).]

In the case before us, the issue of defendant's intent was in dispute. Indeed, it was the central question to be resolved given that defendant admitted that he was in the complainant's house without her permission. After considering the record in its entirety, I conclude that had the trial court instructed on the lesser offense, the jury could have rationally convicted defendant of that misdemeanor. Therefore, I cannot say, as does the majority, that "it is unlikely that the jury would have chosen to

convict defendant of the lesser offense" if it had been presented to them in an appropriate jury instruction. *Ante*, p ___.

Furthermore, this is not a situation "where the jury had the choice of a lesser offense and rejected it in favor of conviction of a higher offense." See *People v Beach*, 429 Mich 450, 493; 418 NW2d 861 (1988). Nor is the situation analogous to those cases where the jury "acquits a defendant of an unwarranted charge . . . and a lesser included warranted charge . . . before convicting of a still lesser charge." *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).[3] The conclusion in each of these scenarios that the instructional error[4] was harmless, is predicated on the existence of an instruction on an offense that is interposed between at least one other instruction and the erroneous instruction (be it an error of inclusion or omission). For example, in the *Beach*-type scenario, it can be reasonably concluded that the failure to give instruction on the cognate lesser included offense "A3" was harmless where the jury was instructed on an additional lesser included offense, "A2," but nevertheless convicted the defendant of the greater offense, "A1." In the *Graves*-type scenario, the erroneous inclusion of an instruction on the greater offense, "A1," is harmless where the jury was also properly instructed on a lesser included offense, "A2," which it rejected in favor of a still lesser offense, "A3." In the case before us, where the only alternatives presented were conviction on the first-degree home invasion charge or acquittal, there is no interposed jury instruction upon which a conclusion of harmlessness may be hung.

The jury instruction on the misdemeanor offense of entering without permission should have been given in this case "precisely because [defendant] should not be exposed to the substantial risk that the jury's practice will diverge from theory," *Keebe, supra* at 212, with defendant being convicted even though the issue of intent remains in doubt. The importance the reasonable doubt standard plays in our system of justice cannot be overstated, nor too often acknowledged. Rooted firmly in the jurisprudential traditions of Western civilization, *Coffin v United States*, 156 US 432, 454-456; 15 S Ct 394; 39 L Ed 481 (1895), and essential to ensuring that a criminal defendant's constitutionally mandated due process rights are protected, *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994), the standard also "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 US 358, 363; 90 S Ct 1068; 25 L Ed 2d 368 (1970), quoting *Coffin, supra* at 453.[5] In the words of Justice Harlan, the reasonable doubt standard is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship, supra* at 372 (Harlan, J., concurring).[6]

For these reasons, I would reverse defendant's conviction of first-degree home invasion and remand for a new trial.

/s/ Donald E. Holbrook, Jr.

[1] I do not mean to imply by this observation that I disagree with the majority's analysis on defendant's claim that he was denied due process because he was forced to wear the shackles at trial. In fact, I

agree with the conclusion that under the circumstances, the trial court did not abuse its discretion in this matter. *Ante*, p ___.

[2] Although the *Mateo* Court cited to Justice Brennan's concurrence/dissent, there is nothing in the cited excerpt from that opinion that would contradict the above stated observations of the *Lane* majority. See *Lane, supra* at 455-460 (Brennan, J., concurring in part and dissenting in part).

[3] Both *Graves* and *Lukity* were authored by Justice Taylor. In *Lukity*, Justice Taylor specifically noted that the Court was overruling the "highly probably" test for preserved, nonconstitutional error established in *People v Gearns*, 457 Mich 170; 557 NW2d 422 (1998). *Lukity, supra* at 494. Accordingly, although he does not specifically so state, I read Justice Taylor's *Lukity* analysis as a rejection of his earlier analysis in *Graves*, to the extent that the *Graves* analysis was predicated upon the "highly probable" test. See *Graves, supra* at 487 (observing that "[o]n the basis of the record, we are satisfied that it is highly probable that the [instructional] error did not affect the verdict"). I do not assume that our Supreme Court would apply one standard where the error was instructional, and another where the error was evidentiary.

[4] In the first instance, the error was one of exclusion, whereas in the second it is one of inclusion.

[5] The close relationship between the presumption of innocence and the reasonable doubt standard is evidenced by the language of CJI2d 3.2(1):

> A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he / she] is guilty.

[6] The goals served by the reasonable doubt standard are both universal and particular, removed and immediate. For the society in general, the standard serves to build confidence in the fairness of the criminal judicial system, and by extension the legitimacy of the government that system serves. *Winship, supra* at 364. For a particular defendant facing a criminal trial, the standard assures that he will not be arbitrarily condemned.

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime where there is reasonable doubt about his guilt. [*Id.* at 363-364.]