

## Fair play: soccer's answer to the harmless error doctrine

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The soccer ball landed on his foot so gently that even if it were a raw egg it would not have cracked. The attacker quickly made a cut to the left, but suddenly moved the ball to the right with a deft stepover move. The defender was beat, and the attacker was moving away, but still within reach. The only way the defender could stop this run on goal was to foul him. He reached out, grabbed the attacker's jersey, and as the attacker continued to pull away, the shirt stretched to twice its size before the defender lost his grip. The attacker, who was never slowed down, was on his way.

This situation, played out in match after match, presents a dilemma to the soccer referee. She is admonished to enforce the "laws of the game."<sup>1</sup> Holding an opponent is a foul, and the referee is directed to stop play and award the victimized player's team a free kick.<sup>2</sup> In our situation, however, this would be highly unfair. The attacker barely noticed

the foul and was already on his way to a great chance at scoring a goal. Stopping play would interrupt that chance at goal, and before the free kick is taken, the rest of the defending team would have a chance to rush back to defend.

Picture a new scene. A police officer is testifying in a battery case. He says when he came to the scene, the victim told him the accused struck her in the chest with a closed fist. The defense attorney jumps from his chair and shouts, "Objection." The judge overrules the objection without any further discussion. Later, the victim testifies that the accused pushed her in the chest very hard with an open hand. Later still, the accused takes the stand and tells a story of the "victim" rushing toward him, holding a vase ready to hit him over the head. He says he pushed her in the chest to keep her from smashing the vase on his head.

The statement made by the police officer is hearsay.<sup>3</sup> Assuming the accused is convicted, and he appeals, the appellate court must decide whether to reverse based on the illegal admission of hearsay evidence. The appellate court must first decide whether there was error. If error is found, the final decision is not yet made because of the application of the harmless error doctrine.

What do the two scenes have to do with each other? The author has been a soccer referee for more than 23 years, and has officiated more than 2,000 soccer matches, including more than 25 professional matches, and more than 200 college matches. Over the years, the scenes played out on the soccer field have proved to be markedly similar to those playing out in appellate courts.

This article will compare the way soccer referees handle minor rule violations with the way appellate courts use the harmless error doctrine to resolve asserted trial error. A soccer referee makes hundreds of quasi-judicial decisions in every match. A soccer match gives immediate feedback to the decision-maker. By exploring the effect of these decisions in the context of soccer, appellate court decision-makers may gain a better understanding of the long-term ramifications of their decisions.

### The harmless error concept in soccer and the law

Soccer has a doctrine similar to the judicial harmless error doctrine.<sup>4</sup> Soccer referees are admonished to call only meaningful fouls. They are told not to disrupt the flow of the game unless it is necessary to protect players from harm, promote fair play, or to ensure the game's enjoyment.

In appellate court decisions, the harmless error doctrine is used to promote finality in court decisions, reduce the number of meaningless retrials, and to prevent technical challenges to otherwise sound results.<sup>5</sup>

The basis for the soccer referee refusing to call insignificant fouls can no longer be found in the laws of the game.<sup>6</sup> The principle was part of the laws of the game until 1997:

The Laws of the Game are intended to provide that games should be played with as little interference as possible, and in this view it is the duty of referees to penalize only deliberate breaches of the Law. Constant whistling for trifling and doubtful breaches produces bad feeling and loss of temper on the part of the players and spoils the pleasure of spectators.<sup>7</sup>

After 1997, this admonishment was still given to referees and is consid-

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ered part of the “Spirit of the Game.”<sup>8</sup>

The legal harmless error doctrine can be found in many places. In Indiana, the doctrine can be found in Trial Rule 61:

IND. TRIAL RULE 61 provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The other rules make similar statements about protecting the “substantial rights of the parties,” and preventing “substantial injustice.”<sup>9</sup>

The development of soccer’s concept that only significant fouls should be called has its roots in the origin of soccer. Soccer was played by “gentlemen” who would not “commit a deliberate foul, but would offend either through inadvertence or ignorance of the laws.”<sup>10</sup> In soccer’s beginning days, there was no referee. As the game became more popular, and as a result, more competitive, violations of the law became more intentional. Soccer’s governing bodies slowly incorporated an official into the game. At first, disputes were to be settled by the teams’ captains, and only when they could not agree was the dispute “referred” to an umpire. This “referral” is the basis for the official’s title as “Referee.”<sup>11</sup>

The reference to the enjoyment of the players in soccer’s Trifling Rule shows a continued respect for the notion that the players are of paramount importance in soccer.

The Trifling Rule recognizes that players expect some minor contact, and see it as part of the game.

The development of the harmless error doctrine in the law has taken a long 180 degree turn. Its course began with *Bram v. United States*,<sup>12</sup> which was interpreted to mean any error was presumptively harmful, and reversal was the only proper remedy.<sup>13</sup> The rigid ritual of reversing even small errors led to a public outcry that sound results were being overturned on “technicalities.”<sup>14</sup>

A case that shows the ridiculousness of reversing all errors is *State v. Campbell*.<sup>15</sup> In that case the Missouri Supreme Court reversed a rape conviction because the indictment did not contain the word “the.” At the time, Missouri’s constitution required all indictments to contain the words “against the peace and dignity of the State.”<sup>16</sup> The court reversed because this indictment read “against the peace and dignity of State.”<sup>17</sup>

Eventually the American Bar Association and a group of leaders in the legal community, including Taft, Wigmore, Pound and Hadley, began lobbying for reform.<sup>18</sup> One commentator wrote that courts of review “tower above the trials of criminal cases as impregnable citadels of technicality.”<sup>19</sup> As a

result, the United States Congress enacted a law to prevent reversal in cases involving insignificant error. The law provided:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.<sup>20</sup>

Eventually, all 50 states enacted some form of rule that encouraged courts to ignore error unless it affects the “substantial rights of the parties.”<sup>21</sup>

After the enactment of these statutes and rules, the courts began to interpret their scope and application. In 1967, the United States Supreme Court decided, in *Chapman v. California*, that even some constitutional errors could be reviewed under the harmless error doctrine.<sup>22</sup> Since then more and more types of constitutional error have come under the scrutiny of the harmless error doctrine. In 1999, the United States Supreme Court decided that failing to instruct the jury as to a required element of the crime, although a constitutional error, could be viewed as harmless.<sup>23</sup> This expansion into almost

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all constitutional errors makes the application of the harmless error doctrine nearly universal.

### How are decisions about small infractions made?

The game of soccer does not have any elaborate appeal process. In fact the laws of the game make most decisions of the referee final.<sup>24</sup> Bob Evans and Ed Bellion, retired international-level referees, have written, “The *real* art of refereeing is rarely taught in basic training courses. For the *real* art of refereeing is as much about *not blowing* the whistle to stop the game, as it is about blowing it.”<sup>25</sup> Referees gain their ability to distinguish the trifling foul from the foul that warrants sanction only through experience and advice from other referees and evaluators. There is no *stare decisis* in soccer.

After years of experience and help from veteran referees, one major concept comes through clearly. When a referee is deciding whether to deem a foul trifling, or decide that it warrants sanction, she must look at how the infraction affects the player who is the victim of the foul. Evans and Bellion wrote:

When you see a foul, take a look at the player who was fouled. Is his balance disturbed? Does he lose control of the ball? Does his face grimace in pain? These are signs that the foul had some significance, and ... it should be called. But if the player just keeps on going, shrugging off the unfair challenge, then let him play.<sup>26</sup>

This focus on the foul’s effect on the victim is critical in maintaining the referee’s impartiality.

Each of the rules and statutes developed in the law purports to focus on the victim of the supposed error. Each says do not change a result unless the error “affects the substantial rights of the parties.”<sup>27</sup>

Court interpretation has quickly deviated from that focus. In a case closely examining the new federal statute on harmless error, the United States Supreme Court began by recognizing that the focus should be on how the error affects the party suffering the error. In *Kotteakos v. United States*, the Court said the statute gives the admonition, “Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.”<sup>28</sup> Within the same case, however, the Court shifts focus to the result:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.<sup>29</sup>

The focus has now shifted so far away from the effect on the person suffering the error that it is almost unrecognizable, considering the statute’s directive to consider the “substantial rights of the parties.” In *Neder v. United States*, the United States Supreme Court focuses on whether the evidence sustaining the verdict is “overwhelming.”<sup>30</sup> It held that “[i]f, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error ... it should not find the error harmless.”<sup>31</sup>

After the courts have shifted away from considering the effect of the error on the parties to asking what was the effect on the outcome, they have engaged in lengthy debate about the standard of review to apply. The Hon. Charles S. Chapel, presiding judge of the Oklahoma Court of Criminal Appeals, described four different measures:

- Error is harmless if the verdict is not clearly wrong;

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- Error is harmless if the verdict is the correct result;
- Error is not harmless if it is highly probable that it affected the verdict; and
- Error is not harmless if there is a reasonable possibility that it affected the verdict.<sup>32</sup>

After one reads the strain of logic in the *Campbell* case with the missing “the” in the indictment, a review of the cases laboring over which standard of review to use when considering harmless error makes the *Campbell* decision look well-reasoned. Even the United States Supreme Court recognized that application of the harmless error doctrine would be difficult:

Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.<sup>33</sup>

Each of the standards Justice Chapel identified offer little help to the appellate decision-maker. When asking whether a result is “clearly wrong” or the “correct result,” the appellate judge is forced to place his view of the evidence on higher authority than the jury’s. When asking whether there is a “high probability” or “reasonable possibility” that the verdict was affected, we get into the circular analysis of what is “reasonable,” “probable” or for that matter “harmless.”

The soccer referee develops an “I know it when I see it” approach. She has no real benchmark that she is encouraged to use. The biggest difference between the referee and the appellate judge ends up being the focus. The referee looks to how the infraction affected the victim. The appellate judge looks to how the error affected the outcome.

Justice Chapel argues that it is wrong for appellate courts to focus on the outcome.<sup>34</sup> The United States Supreme Court has stated that “the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence ... .”<sup>35</sup> While this may be true at the trial stage, a different approach is necessary for the appellate stage. Justice Chapel argues that the purpose of appeal is not to determine guilt, but to determine whether the trial was fair.<sup>36</sup> He describes the harm of appellate fact-finding:

A quasi trial on appeal denies the accused of the right to a public trial. A trial court and jury see and hear witnesses and observe their demeanor. Appellate judges only work from a cold record. “Worse still,” appellate court guilt determinations deprive an accused his right to confront witnesses. Although the accused confronted witnesses at trial, the appellate court cannot glean the impact of such live confrontation. “Worst of all” appellate court determinations of guilt deny the accused his constitutional right to trial by jury.<sup>37</sup>

The Supreme Court has said that the dual role of the law “is that guilt shall not escape or innocence suffer.”<sup>38</sup> If we are to honor the commitment to the innocent, we should adopt the soccer referee’s focus on the harm to the victim of the error. Appellate courts should recognize that there is a difference in the litigant’s guilt when discussing a particular trial tactic and the party’s actual guilt when considering the

whole outcome of the case. For the process to be fair, harmless error should only consider guilt relating to the trial tactic.

### **Big and little fouls**

There has been much discussion of whether the harmless error doctrine should be applied in cases involving “constitutional” error.<sup>39</sup> Fewer and fewer constitutional errors are safe from harmless error analysis.<sup>40</sup> The magnitude of the infraction, however, may not always show the harm to the victim of the infraction.

Pushing is a foul in soccer.<sup>41</sup> A push against one of the 11 opponents who is no where near the ball or a chance to receive the ball may be trifling as long as it does not knock the opponent to the ground. This could include a strong push. A slight push, however, that is done to an opponent who is jumping to head the ball can push the opponent just enough for her to miss. Taking a player’s fair chance at playing the ball cannot be considered fair, and the referee should not consider that foul trifling.

Pushing, by itself, is not categorized as major misconduct in soccer’s rules. It only becomes misconduct when other factors are present. Appellate courts miss the point when they lump all errors into categories such as “constitutional” or “structural.”<sup>42</sup> As with soccer, appellate courts should only make a severity consideration after determining the context of the infraction.

### **Deterrence and setting the tone**

The soccer referee who is timid about enforcing the laws of the game is in for a rough ride. Players are quick to gauge the referee’s temperament, and will adjust their aggressiveness accordingly.<sup>43</sup> The referee who fails to sanction rough play will see the players increase the

number and severity of fouls throughout the match. Many times the escalation is based on retaliation. The player who was just whacked without help from the referee will take the law into his own hands.

A strong and capable referee will set the tone early by calling the game tightly. Players respond to this by adjusting their attitude to accept that fair play will be expected and enforced. They then concentrate on tactics and skills.

In soccer it is useful to look at each supposed infraction in isolation. This keeps the referee focused on a clean application of the laws of the game. Without considering the context of the game, however, merely applying the laws in a cookie-cutter fashion can quickly lead to a bloody match gone out of control.

Once the referee understands that officiating is an art and relies on her experience to decide which fouls are trifling, she will soon see that there is no bright line to define the categories. With more experience, she will begin to see that she has wiggle room within the gray areas.

Sometimes players, in the emotional heat of the battle, begin to play more and more aggressively, leaving the referee looking for a good opportunity to reassert control over the match. A good referee finds that opportunity in the gray areas.

One opportunity is to sanction a smaller foul when the benefit to the victimized team is small. There is a big difference between a free kick 90 yards from the goal and one only 19 yards. A referee looking for an opportunity to calm the players can call smaller fouls when the free kick is further from the goal.

The act of sanctioning a foul that would not normally be called sends a message to the players that

the referee is still in charge and intends to ensure the fairness of the match. It is, in effect, a shot across the bow to warn players that they are beginning to behave worse, and will face harsher sanction if they do not back off.

A big problem with the application of the harmless error doctrine in law is its lack of attention to deterrence. Appellate decisions are made months after the infraction, in the isolation of the appellate court chambers. Appellate judges focus on one case at a time, and one issue at a time. The result may be fair in the context of that one issue or that one case, but it may promote future misconduct on the part of litigants and trial judges.

The resulting lack of deterrence in the law is becoming more and more evident. Once an appellate court determines that a particular error is harmless, lawyers are emboldened to continue creating the error.<sup>44</sup>

Trial judges are also influenced by overuse of the harmless error doctrine. Many trial judges confuse an appellate decision based on

harmlessness for a decision that states there was no error in the first place.<sup>45</sup>

Proponents of the harmless error doctrine have consistently argued that its use helps conserve scarce judicial resources by preventing needless retrials. Each time a lawyer or a trial judge puts an error at issue on appeal is another opportunity for the appellate court to rule that it was harmless. Each time an error is ruled harmless, it adds to the downward spiral of the free-for-all at trial.<sup>46</sup> By failing to focus on the effect harmless error decisions have on deterrence, appellate courts have actually increased their own work.<sup>47</sup>

### The Golden Yellow

In soccer the referee has two tools to control the unruly player who simply will not voluntarily comply with the laws of the game. The first is a warning for certain kinds of misconduct. The warning is formally made by showing the player a yellow card and admonish-

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ing him to correct his behavior.<sup>48</sup> One of the reasons a referee may give this warning is for “persistent infringement of the laws of the game.”<sup>49</sup>

Another sanction is ejection from the match, with the requirement that the team play short for the remainder of the match.<sup>50</sup> Although this ultimate sanction may be used without warning when the misconduct is serious enough, it is also a tool to sanction repeated violations. The player who has already been shown the yellow card must be ejected upon the second violation that warrants a yellow card.<sup>51</sup>

This progression of sanction has set many a trap for the timid referee. This timidity was actually taught to referees for a while. Referees were encouraged to avoid an ejection. They were told that the good referee starts with 22 players and ends with 22.<sup>52</sup> The prevalence of this attitude taught players not to be afraid of the red card. If a player had already been shown the yellow card, the Golden Yellow, he could feel safe that he would not be ejected, no matter what.

More recently, however, soccer administrators have learned that strict adherence to a fear of the ejection does not create safe, fair and enjoyable matches. The real reason behind the prior teachings was to encourage the referee to use

all of her tools short of the ejection. This would include calling fouls more frequently and avoiding overuse of the Trifling Rule.

Courts have been faced with this “Golden Yellow” problem. Goldberg described a Minnesota Supreme Court decision where an error was found harmless, but a warning was issued not to repeat the error lest the State face harsher sanction.<sup>53</sup> Several cases later, the same error was still being found harmless without the increased sanction.<sup>54</sup>

### Impartiality

In soccer, the referee does not care who wins. With this fundamental premise, she can feel comfortable focusing on the effect the infraction has on the victim. By avoiding any analysis of whether the victimized player might or might not have scored a goal without the foul, she protects her credibility and avoids any accusation of favoritism.

In law, the focus on the soundness of the verdict impairs impartiality. The appellate court improperly focuses on fact-finding and not on ensuring the fairness of the process.

This problem comes into sharp focus in criminal cases. Almost all criminal appeals are brought by the accused. It is the accused searching for error in the record to present on appeal. If the harmless error doctrine is overused, it will almost always favor the State. Repeated disallowance of claims that are actually error, but deemed harmless, can only create the suggestion that the appellate courts are no longer impartial.

This repeated favoritism of the State flies in the face of a basic premise in our criminal justice system. “That it is better 100 guilty

persons should escape than that one innocent person should suffer, is a maxim that has been long and generally approved.”<sup>55</sup>

### Recommendation

This author’s experience as a soccer referee has taught some hard-earned lessons. In matches earlier in the author’s career, game control disintegrated into chaos both with too much rigid application of the rules and with too much reliance on the Trifling Rule. The painful lesson is remembered long after the class. The results of a referee’s decisions are readily apparent before the match is ended.

The player who believes the referee is not respecting the laws of the game and who fails to enforce them fairly and evenly will have no incentive to comply voluntarily. If the player cannot see a consistent application of the laws irrespective of who will be penalized, he will not comply voluntarily. In fact, he may foul or cheat more often to satisfy his own notion of fairness.

When comparing the referee experience to the law’s use of the harmless error doctrine, two main points float to the top: impartiality and deterrence. Our courts should take these two concepts into account much more when deciding whether to deem an error harmless.

Our courts must strive, not just to provide actual justice, but to give the appearance that actual justice is being served.<sup>56</sup> By resorting to the harmless error doctrine less frequently, and by considering the important factors of impartiality and deterrence, both actual and apparent justice can be achieved. 🏆

1. FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATION, LAWS OF THE GAME, Law 5 (July 2004) [hereinafter LAWS OF THE GAME], found at [http://www.fifa.com/fifa/handbook/laws/2004/LOTG2004\\_e.pdf](http://www.fifa.com/fifa/handbook/laws/2004/LOTG2004_e.pdf), at 22.
2. LAWS OF THE GAME, Law 12, *supra* note 1, at 35.
3. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” IND. EVIDENCE RULE 801(c). The statement is hearsay unless an exception can be found. The United States Supreme Court recently restricted the use of “testimonial” out-of-court statements. *Crawford v. Washington*, 124 S. Ct. 1354, 2004 U.S. Lexis 1838 (2004). Even after that, the debate rages on about statements made to police. See *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004) (excited utterances are not testimonial even if made in response to police questioning). For purposes of this article, it is not necessary to debate whether a particular ruling is incorrect. An assumption will be made that a ruling asserted as error on appeal is in fact error.
4. See *infra* note 7, and accompanying text.
5. Another stated purpose is to prevent litigants from intentionally planting error to provide a hedge against an unfavorable trial result. The invited error rule, however, prevents a litigant from gaining relief on appeal for an error he created. See *Booher v. State*, 773 N.E.2d 814 (Ind. 2000). The rules of soccer also have a similar rule. According to Law 5, the referee is allowed to let “play to continue when the team against which an offence has been committed will benefit from such an advantage and penalises the original offence if the anticipated advantage does not ensue at that time.” LAWS OF THE GAME, Law 5, *supra* note 1. The referee in soccer treats decisions based on this “advantage clause” differently than she does decisions based on the minor nature of the offense. “Advantage” may be applied even where the foul is very serious.  
  
A comparison to basketball might help those unfamiliar with the advantage clause in soccer. At the end of a close basketball game, the team that is losing by just a few points will intentionally foul to stop the clock. If the victimized team misses either free throw, the team that fouled usually regains possession and another chance for two or three points. Soccer allows the referee to stop this kind of tactical foul by ignoring it during play. The offending player, however, is still subject to harsh penalty in the form of a red or yellow card when the ball next goes out of play.  
  
Because the author’s referee experience shows that minor infractions and “advantage” or “invited error” are two distinct concepts, the notion of invited error as a harm to be prevented does not seem to fit in this article’s analysis.
6. In 1997, the world governing body of soccer, FIFA (Federation Internationale de Football Association), imposed a major revision of the laws of the game. The revision was designed to simplify a set of laws and associated interpretations that had slowly become unwieldy and hard to understand.
7. FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATION, LAWS OF THE GAME, Law 5, Decision of the International F.A. Board 8

(July 1996). In order to make reference to this rule easier, it will be referred to as the “trifling rule.”

8. United States Soccer Federation, Inc., Advice to Referees on the Laws of the Game, 5.5 (2003), found at <http://www.usoccer.com/templates/includes/services/referees/pdfs/Advice2003.pdf>, at 17-18.
9. FED. R. CIV. P. 61 provides:  
No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.  
  
FED. R. CRIM. P. 52(a) provides, “Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”  
  
FED. R. EVID. 103(a) provides:  
Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and  
(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or  
(2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.  
  
28 U.S.C. §2111 provides, “On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”  
  
IND. TRIAL RULE 61 provides:  
No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.  
  
IND. EVIDENCE RULE 103(A) provides:  
Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and  
(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or  
(2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by

a proper offer of proof, or was apparent from the context within which questions were asked.

IND. APPELLATE RULE 66(A) provides:

No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.

10. Sir Stanley Rous & Donald Ford, *A History of the Laws of Association Football* 38 (Federation Internationale de Football Association) (1974).
11. *Id.*
12. 168 U.S. 532 (1897).
13. Charles S. Chapel, “The Irony of Harmless Error,” 51 *Okl. L. Rev.* 501, 521 (Fall 1998).
14. Kavanaugh, “Improvement of Administration of Criminal Justice by Exercise of Judicial Power,” 11 *ABA J.* 217, 222 (1925).
15. *State v. Campbell*, 210 Mo. 202, 109 S.W. 706 (1908).
16. *Id.* at 215, 109 S.W. at 709.
17. *Id.* at 208, 109 S.W. at 707.
18. *Kotteakos v. United States*, 328 U.S. 750, 758-59 (1946); Steven H. Goldberg, “Harmless Error: Constitutional Sneak Thief,” 71 *J. Crim. L. & Criminology* 421 (1980).
19. Kavanaugh, “Improvement of Administration of Criminal Justice by Exercise of Judicial Power,” 11 *ABA J.* 217, 222 (1925).
20. 28 U.S.C. §391 (1911). The law is now codified at 28 U.S.C. §2111, and states, “On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”
21. Chapel, *supra* note 13, at 502; Goldberg, *supra* note 18, at 422.
22. 386 U.S. 18 (1967).
23. *Neder v. United States*, 527 U.S. 1 (1999).
24. LAWS OF THE GAME, Law 5, Decisions of the International F.A. Board, Decision 1, *supra* note 1, at 23-24.
25. Robert Evans & Edward Bellion, *For the Good of the Game: Modern Techniques and Practical Wisdom for Today’s Soccer Referee* 58 (Youth Sports Publishing, Inc.) (2000) [hereinafter *For the Good of the Game*].
26. *For the Good of the Game*, *supra* note 25, at 69.
27. See *supra*, note 21, and accompanying text.
28. 328 U.S. at 760.
29. 328 U.S. at 764-65.
30. 527 U.S. 1, 16-18 (1999).
31. 527 U.S. at 19.
32. Chapel, *supra* note 13, at 530-31.
33. *Kotteakos v. United States*, 328 U.S. at 761 (citation omitted).
34. Chapel, *supra* note 13, at 530-31.
35. *Delaware v. Van Arsdale*, 475 U.S. 673, 681 (1986) (citing *United States v. Nobles*, 422 U.S. 225, 230 (1975)).

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36. Chapel, *supra* note 13, at 530-31.
37. *Id.* at 531 (citing Traynor, Roger, "The Riddle of Harmless Error," at 20-21 (1970, Ohio State Univ. Press (law forum))).
38. *Berger v. United States*, 295 U.S. 78, 88 (1935).
39. *See Neder v. United States*, 527 U.S. 1 (1999); *Arizona v. Fulminate*, 499 U.S. 279 (1991); and *Chapman v. California*, 386 U.S. 18 (1967).
40. *See Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting).
41. LAWS OF THE GAME, Law 12, *supra* note 1, at 35.
42. *Neder v. United States*, 527 U.S. 1 (1999).
43. Think for a moment like a player who sees a bad foul early in the game, and sees that the referee is not going to do anything about it except give a free kick. Players use this as a gauge to estimate the referee's level of tolerance and if they see a "softie" or a coward, they know that they too can get away with a higher level of physical play. More such infractions will be the result.  
*For the Good of the Game*, *supra* note 25, at 168.
44. Goldberg, *supra* note 18, at 440-41. Goldberg also saw the value of a sports analogy:  
Although demonstrating the effect of any decision-maker's benign neglect is difficult, the art form from which the phrase [no harm – no foul] is taken, professional basketball, presents an interesting analogy. Before the "no harm – no foul" type interpretations of the rules by modern referees, basketball was considered a kind of sporting dance inappropriate (in those days) for "men." Anyone watching the modern no harm – no foul game can attest that a portion of that contact sport resembles a war zone. It is difficult for one trained in the law to assume that prosecutors and judges would not be at least as quick as basketball centers and referees to adjust to this kind of development.  
*Id.*, at 437 n. 145.
45. Goldberg, *supra* note 18, at 437-38. Some courts have admonished trial courts about this problem:  
There are many points of law on which it is simply inappropriate for a trial court to instruct a jury. *See Hernandez v. State*, 761 N.E.2d 845, 848 (Ind. 2002) (citing examples). And we have regularly held that the mere fact that language has been used in an appellate opinion does not make it appropriate for a jury instruction. *See Dunlop v. State*, 724 N.E.2d 592, 595 (Ind. 2000) (citing cases). *Thomas v. State*, 774 N.E.2d 33, 36 (Ind. 2002).
46. The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided "overwhelming" support for the conviction puts aside the firm resolve of *Chapman* .... As a result, the deterrent effect of such cases as *Mapp v. Ohio*, *Griffin v. California*, *Miranda v. Arizona*, *United States v. Wade*, *Bruton v. United States*, on the actions of both police and prosecutors, not to speak of trial courts, will be significantly undermined.  
*Harrington v. United States*, 250, 255 (1969) (Brennan, J., dissenting) (citations omitted); *see also* Cameron & Duke, "When Harmless Error Isn't Harmless," 1971 *Law & Soc. Ord.* 23, 42 ("[I]f a particular error is declared to be harmless a sufficient number of times, then the cumulative effect of such holdings will be that both the prosecution and the trial judge will tend to ignore the error and commit it again.").
47. Chapel, *supra* note 13, at 516 ("One purpose of appellate courts is to correct errors and thereby to deter trial courts from intentionally committing error. Unless appellate courts hold trial courts to high standards, the deterrence factor is nil.").
48. LAWS OF THE GAME, Law 12, *supra* note 1, at 37.
49. *Id.*
50. *Id.*
51. *Id.*
52. *For the Good of the Game*, *supra* note 25, at 169.
53. Goldberg, *supra* note 18, at 439 n. 58.
54. *Id.* Indiana has shown the same timidity:  
We reiterate the importance of the State's timely disclosure of evidence to the defense. This Court noted in *Goodner* that a prophylactic rule requiring reversal may be required if recurring abuses occur. *See id.* In the months since *Goodner*, several other cases have presented issues of belated disclosure, *see Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000); *Dye*, 717 N.E.2d at 11-12; *Gardner v. State*, 724 N.E.2d 624, 628 (Ind. Ct. App. 2000). Disturbingly, each of these cases, like *Goodner* and *Williams*, arises in Marion County. Lowrimore's trial, like each of the others, occurred before our opinion in *Goodner*. Accordingly, we will not consider abandoning the requirement of a showing of prejudice from belated disclosure until the issue is presented in a trial occurring after *Goodner* was issued.  
*Lowrimore v. State*, 728 N.E.2d 860, 867 (Ind. 2000). *See also Lambert v. State*, 743 N.E.2d 719, 747-48 (Ind. 2001).
55. Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), in 9 *The Writings of Benjamin Franklin* 293 (Albert H. Smyth ed., 1906).
56. In addition it should be noted that in effecting any reform of the criminal system one of the most important considerations is the appearance of justice. If a given trial standard or review procedure seems arbitrary, regardless of its actual merit, use of that standard or procedure may help to undermine public confidence in the entire system of criminal justice.  
Saltzburg, "The Harm of Harmless Error," 59 *Va. L. Rev.* 988, 1027 n. 143 (1973).

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