

Reversed and Remanded and Opinion filed February 19, 2026.



In The
Fourteenth Court of Appeals

NO. 14-25-00214-CR

ERIK L. AGUIRRE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1815540**

OPINION

For more than twenty years, the Court of Criminal Appeals has counseled, again and again, that a trial judge should “give no definition of reasonable doubt at all to the jury.” *See Paulson v. State*, 28 S.W.3d 570, 373 (Tex. Crim. App. 2000); *Woods v. State*, 152 S.W.3d 105, 115 (Tex. Crim. App. 2004); *Mays v. State*, 318 S.W.3d 368, 389 n.81 (Tex. Crim. App. 2010); *Bluntson v. State*, — S.W.3d —, 2025 WL 1322702, at *38 (Tex. Crim. App. 2025). Despite that repeated admonition, the trial judge here made a brief but heedless comment during voir dire

and suggested to the entire venire panel that the prosecution's burden of proof, which is supposed to be the highest in the land, could be satisfied with a level of confidence amounting to a mere "60 percent."

That comment raises a host of questions: Must a complaint arising out of the comment have been preserved with a timely objection? If no objection is required, does the comment amount to error? And if there is error, what sort of harm analysis should follow?

We answer all of these questions below, and our ultimate conclusion is that appellant is entitled to a new trial.

BACKGROUND

This is a murder case.

A Good Samaritan found the complainant on his hands and knees in the street, spitting up blood, and in distress from having recently been shot. Emergency services were rushed to the scene, but the complainant was unable to be saved. He died from a single bullet that entered from the back and continued upwards through a lung and major artery.

Police canvassed the area and developed circumstantial evidence that appellant had caused the complainant's death. The evidence showed that the two men were total strangers, though they had briefly interacted in the moments before the shooting. The prosecution's theory of the case was that appellant had shot the complainant because the interaction was a scam.

The scam happened a short distance away in a parking lot, where appellant had met his girlfriend for a date night. They arrived in separate vehicles and planned to walk across the street to a nearby restaurant. Upon their arrival, they were approached by the complainant, who was wearing a reflective vest and presenting as

if he were an authentic parking attendant, but in truth, the complainant had no official affiliation with the parking lot or any of the nearby businesses. He told appellant that parking costs twenty dollars per vehicle. Appellant paid the complainant for both vehicles and then he and his girlfriend walked away.

Before appellant and his girlfriend entered their intended restaurant, they were approached by the DJ of a neighboring establishment. The DJ had watched the couple's interaction with the complainant, and he explained to them that the complainant was a scammer. He also pointed to signs that had been posted warning of fake parking attendants.

A surveillance camera captured what happened next. It showed appellant running to his car and retrieving an object that resembled a handgun. It then showed appellant running out of view of the camera, in a direction to intercept the complainant, who had just sped away on a bicycle. Less than a minute later, appellant calmly walked back into frame.

Appellant reunited with his girlfriend at the restaurant, where he told her that he had given the complainant a scare. The girlfriend suggested that they go someplace else because the vibe was not right. Appellant agreed, and they carried on with their date night at other locations. According to the girlfriend, appellant was normal for the rest of the evening.

The next day, the girlfriend was alerted that surveillance footage of her and appellant had been circulating on the news and that investigators were seeking information about them in connection with the complainant's death. When the girlfriend made contact with appellant to discuss the news story, he advised her to deny that she was the person in the surveillance footage.

The girlfriend did not follow that advice. She went to police, gave her story, and provided appellant's identifying information. Appellant was arrested less than a week later.

No one ever came forward claiming to have seen appellant shoot the complainant, but the employee of a smoke shop said that he saw appellant running with a gun. The smoke shop employee also said that he heard a gunshot. He later walked to the area where he believed that the gunshot originated, based on where appellant had been running, and he found a spent shell casing on the ground. He picked up the casing and turned it over to police. The casing was made by Hornady, which corresponded with the same brand of bullet recovered from the complainant's body, but no testing was ever performed on the casing, in part because the murder weapon had never been found.

Appellant did not testify in his own defense, but his attorneys offered multiple reasons for why the jury should acquit on the basis of reasonable doubt. One leading reason was that the investigation was incomplete. The defense criticized investigators for failing to speak to all available witnesses, including an acquaintance of the complainant who had also been seen on the surveillance footage. Relatedly, the defense criticized investigators for not obtaining footage from other surveillance cameras in the area.

Another reason was that the girlfriend left in her own vehicle shortly after the alleged shooting, and she drove away in a direction where she would have been able to see the complainant where he was ultimately found by the Good Samaritan. But the girlfriend testified that she did not see the complainant, his bicycle, or his reflective vest. Counsel argued that the girlfriend did not see the complainant because he was not there and because appellant had not shot him.

A separate reason offered by counsel was that most witnesses denied ever hearing a gunshot. Relatedly, the pedestrians on the surveillance footage did not jump or show any sort of reaction to the sound of gun. They walked around calmly, as if no gun had ever been fired.

The defense acknowledged that the smoke shop employee had heard a gunshot, but the defense argued that there were problems with his testimony. In addition to various inconsistencies, the smoke shop employee never saw the complainant on the ground, and he never called the police after finding the spent shell casing. The defense suggested that the smoke shop employee was not credible and that he might have had a reason to curry favor with the prosecution because he was seeking habeas relief in an unrelated case.

The defense also encouraged the jury to give no weight to the spent shell casing because it was recovered in a high crime area, implying that it could have originated from an unrelated shooting. The defense likewise argued that if the casing had come from appellant's gun, then appellant would have been in view of many people in the area at the time of the shooting, yet no such witnesses ever came forward.

The defense also pointed out that there was some distance between the blood at the scene and the location where the complainant's bicycle and vest were found. The defense proposed that, after appellant had already abandoned his pursuit, the complainant may have been approached by someone else. "Maybe it's his drug dealer, maybe it's another parking lot attendant who's pissed off at him because he's encroaching on his territory. This is a high crime area and people have arguments over piddly stuff like this." The defense suggested that the complainant could have been picked up by this third person, and that this third person could have then shot the complainant and dumped him on the street a short distance away. The defense

said that this theory would explain why there was no trail of blood between the body and the bicycle, or any scuff marks on the bicycle indicative of a fall.

As a variation on this theory, the defense suggested that the complainant may have been pushed to the ground by a drug dealer or other assailant, where he was then shot in the back while in a downward facing position. And because there was never any evidence that the complainant was found in possession of the forty dollars that had been taken from appellant in the parking lot scam, the defense suggested that this assailant may have stolen the money, as well as the bicycle and vest, but that the assailant abandoned the latter after realizing that there were people in the vicinity.

The jury rejected these defensive arguments and convicted appellant of murder. The trial court then assessed his punishment at fifty years' imprisonment.

SUFFICIENCY OF THE EVIDENCE

We begin with appellant's sufficiency challenge because we are obliged to address any arguments that, if meritorious, would result in rendition of judgment. *See Roberson v. State*, 810 S.W.2d 224, 225 (Tex. Crim. App. 1991) (per curiam).

Appellant's sufficiency challenge is limited to the element of identity—i.e., whether a rational trier of fact could have found beyond a reasonable doubt that he was the person who intentionally or knowingly caused the complainant's death, or who, with the intent to cause serious bodily injury, committed an act clearly dangerous to human life that caused the complainant's death. *See* Tex. Penal Code § 19.02(b)(1)–(2). We limit our analysis to this singular element. *See Murray v. State*, 457 S.W.3d 446, 448 n.1 (Tex. Crim. App. 2015) (solely addressing the element of the offense that was challenged on appeal). And in assessing whether the evidence was legally sufficient as to that element, we consider all of the evidence in

the light most favorable to the verdict. *See Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018).

The prosecution did not produce any direct evidence of identity, as there was no witness who testified to seeing appellant shoot the complainant, nor was there any surveillance footage of the shooting. But direct evidence is not necessary to support a conviction. *See Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). Circumstantial evidence is just as probative as direct evidence in establishing the guilt of an actor. *Id.* And the trier of fact may make a finding of guilt if that finding is warranted by the combined and cumulative force of all the incriminating circumstances. *Id.*

There were several incriminating circumstances in this case. Foremost among those circumstances was that the complainant scammed appellant out of forty dollars. The jury could have rationally inferred from that circumstance that appellant was upset and had a motive to shoot the complainant. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (“Motive is a significant circumstance indicating guilt.”).

There was also evidence of opportunity, insofar as the murder occurred in the vicinity of the parking lot where the scam occurred, and at a time when both appellant and the complainant were known to still be in the area. *See Ingerson v. State*, 559 S.W.3d 501, 510 (Tex. Crim. App. 2018) (concluding that the circumstantial evidence was sufficient to support a conviction for capital murder because the defendant had the opportunity and means of killing the two victims).

Lastly, after surveillance footage was released in a public plea for information regarding the murder, appellant told his girlfriend to deny that she was the person depicted in the surveillance footage. The jury could have rationally inferred from that evidence that appellant was conscious of his guilt. *See Gragg v. State*, 214

S.W.2d 292, 295 (Tex. Crim. App. 1948) (stating that a story contrary to the surrounding circumstances may be regarded as an expression of consciousness of guilt).

Considering the combined and cumulative force of all of these circumstances, we conclude that there was legally sufficient evidence to support the finding that appellant was the person who murdered the complainant.

Appellant counters that we should reach the opposite conclusion because the record only contains evidence of motive, which is insufficient by itself to prove identity. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). He discounts the evidence of opportunity because no one heard the gunshot other than the smoke shop employee, who was not in view of either appellant or the complainant at the time of the shooting. And because he further asserts that he and the complainant had left the scene in “different directions,” appellant argues that a jury would be required to speculate that he even had an opportunity to shoot the complainant.

Appellant seems to suggest that he and the complainant took paths in diametric opposition to one another, but the record plainly refutes that. The surveillance footage showed the complainant ride away on his bicycle in a northwesterly direction down the street. The same footage showed appellant running to his car to retrieve a handgun and then continuing in a direction that was also northwesterly, though not at the same degree as the complainant because appellant chose a more westerly path through the parking lot rather than down the street. But given the circumstances showing that appellant had just been scammed by the complainant, and by the girlfriend’s testimony after the fact that appellant said he had given the complainant a scare, a jury could have rationally found that appellant ran in a direction where he eventually obtained a line of sight that enabled him to

shoot the complainant. No speculation would be necessary to make that finding because the finding can be inferred from the surrounding facts and their logical inferences. *See Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

Appellant also contends that there is no evidence to support a finding that he was conscious of his guilt. He emphasizes the testimony that he did not flee the scene; rather, he left at the girlfriend's suggestion. And as for the girlfriend's testimony that he told her to deny being in the surveillance footage, appellant argues that this evidence was merely an attempt to protect the girlfriend from possible accusation, not an attempt to cover up his own involvement. Even if we accepted the argument that there was no evidence of flight, the jury was not required to credit appellant's innocuous explanation. The girlfriend's presence at the scene connected appellant to the offense, which is an incriminating circumstance. Based on his attempt to distance himself from that incriminating circumstance, the jury could have rationally determined that appellant was conscious of his guilt.

Appellant lastly argues that even if there were evidence of motive, opportunity, and consciousness of guilt, such evidence would only amount to a suspicion of culpability because there was no physical evidence connecting him to the shooting, like gunshot residue, DNA, or footprints. He even suggests that the spent shell casing was exculpatory at best, or irrelevant at worst, because there was evidence that it might not even match the caliber of the bullet recovered from the complainant's body.

The absence of such physical evidence is not dispositive, because in a sufficiency analysis "the question is not what evidence there isn't, it's what evidence there is." *See Acosta v. State*, 429 S.W.3d 621, 630 (Tex. Crim. App. 2014). The affirmative testimony of multiple eyewitnesses placed appellant near the scene of the crime and described him as being upset from having recently been scammed.

Surveillance footage likewise showed appellant running with a handgun in pursuit of the complainant, who was speeding away on a bicycle. The medical examiner also testified that the path of the bullet—which was back to front and upwards through the chest cavity—was consistent with the complainant being shot from behind while leaning forward on a bicycle and pedaling quickly. All of these circumstances support a logical finding that appellant was the person who shot the complainant.

For the foregoing reasons, we conclude that the evidence is legally sufficient to support the essential element of identity.

JUDICIAL COMMENT

Appellant's next issue focuses on a judicial comment that was made during voir dire. The comment addressed the prosecution's burden to prove every essential element of the offense beyond a reasonable doubt. The trial court explained that this burden has no formal legal definition, and that jurors will have to define it for themselves:

So one person's beyond a reasonable doubt is 99 percent and another person's beyond a reasonable doubt is 60 percent or a gut feeling or whatever else it is or I'm a reasonable person and I have a doubt or I have a doubt and the doubt seems reasonable to me and it goes to one of the elements of the offense. However you individually . . . interpret that that's your individual interpretation. But the State has to prove every element beyond a reasonable doubt, whatever that means to you.

Appellant did not object to this comment, but he claims that he may challenge it for the first time on appeal because it violated his rights to due process, insofar as the comment lessened the prosecution's burden of proof to a level of confidence of only "60 percent." The prosecution counters that a timely objection was required, and that by not objecting, appellant forfeited this complaint.

We begin our analysis with this threshold question of preservation.

I. Did appellant forfeit his complaint?

The prosecution relies on Rule 33.1 of the Texas Rules of Appellate Procedure, which provides that, as a prerequisite to presenting a complaint for appellate review, the complaining party must have presented the trial court with a timely request, objection, or motion that was then pursued to an adverse ruling. Appellant did not comply with this rule as he did not timely object to the trial court's comment. But the question that we must decide is whether such compliance was even necessary. The answer depends on the watershed case of *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997).

Marin describes three categories of requirements or rights. The first category encompasses systemic or absolute requirements that can never be waived. *Id.* at 279. The clearest example of this category concerns laws affecting the trial court's jurisdiction. *Id.* For instance, a defendant could not be tried for a felony in a county court at law even if he were to consent, nor could a child be tried as an adult in district court without a valid transfer order from the juvenile court. *Id.*

The second category describes rights that are "so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection." *Id.* at 278. These rights can be waived, but they cannot be forfeited through mere inaction. *Id.* Examples of these rights include a defendant's right to counsel and his right to a jury trial. *Id.* at 279. Thus, an indigent defendant may choose to represent himself in a bench trial, but explicit waivers would be required on his part, and absent such waivers, he must be appointed an attorney and his case must be tried to a jury. *Id.*

Most rights fall into the third category, which encompasses "an array of rules which are optional with the litigants." *Id.* at 278. One example involves hearsay, which a trial court has no duty to exclude on its own, but which a defendant might

object regarding its admission. *Id.* Rights under this category, whether constitutional, statutory, or otherwise, are forfeited by a failure to exercise them. *Id.*

Rule 33.1 applies only to complaints involving an alleged infringement of a category-three right. *See Burg v. State*, 592 S.W.3d 444, 449 (Tex. Crim. App. 2020). It does not apply to complaints involving the first or second categories. *Id.*

By arguing for an application of Rule 33.1, the prosecution has implicitly suggested that appellant's claim implicates a category-three right, rather than a right under categories one or two. The case law indicates otherwise.

The main case is *Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017), which involved a statutory complaint that the judge had commented on the weight of the evidence, in violation of Article 38.05 of the Code of Criminal Procedure. *Id.* at 791. In deciding whether that complaint had implicated a right under category three (which could be forfeited by inaction) or under a different category (which could not be forfeited by inaction), the Court of Criminal Appeals made an analytical distinction on the basis of duty. *Id.* at 797. If the judge, as an institutional representative, has no duty to enforce a right until requested to do so, then the right is subject to forfeiture by the parties and falls within the third category of rights described by *Marin*. *Id.* But if the law places a duty upon the judge to enforce a right *sua sponte*, then the right is waivable only and falls within the second category. *Id.* Because Article 38.05 is couched in mandatory terms and is directed specifically at the judge, the Court reasoned that the judge had a duty to refrain from commenting on the weight of the evidence, and that "the right to be tried in a proceeding devoid of improper judicial commentary is at least a category-two, waiver-only right." *Id.* at 801.

Appellant has not brought a claim under Article 38.05. He has not argued, for instance, that the trial court's "60 percent" comment operated as an improper

comment on the weight of the evidence. Instead, he has asserted a constitutional complaint that the trial court's comment violated his right to due process insofar as it lessened the prosecution's burden of proof.

The Court of Criminal Appeals recently remarked that it has “never authoritatively decided whether a litigant may raise a constitutional complaint about an improper judicial remark if he did not complain about the remark on this basis at trial.” *See Irsan v. State*, 708 S.W.3d 584, 607 (Tex. Crim. App. 2025). The Court acknowledged that this area of law remains “unsettled” because the leading case on such constitutional complaints is *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000), which was decided by a nonbinding plurality. *See Irsan*, 708 S.W.3d at 607.

But *Proenza* is binding authority because it was decided by a majority, and it came after the plurality opinion in *Blue*. Though *Proenza* dealt with a different type of complaint, its analytical framework with a focus on duty guides our decision here.

The Court of Criminal Appeals has unequivocally held that, in the context of preparing a jury charge that accurately sets out the law applicable to the case, the trial judge has a *sua sponte* duty to admonish the jury that the prosecution has the burden of proof beyond a reasonable doubt. *See Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007) (“Obviously, the trial judge is ultimately responsible for the accuracy of the jury charge and accompanying instructions. He must ensure that all of the law applicable to the criminal offense that is set out in the indictment or information is incorporated into the jury charge as well as the general admonishments, including reference to the presumption of innocence, proof beyond a reasonable doubt, unanimity of the verdict, and so forth. Here he has a *sua sponte* duty—a duty to act without any request or objections from the parties.”).

We think this same duty must apply during voir dire. Indeed, our system of justice would make little sense if a judge were required to give an accurate

admonishment about reasonable doubt in one stage of trial but was given free rein to discuss that standard inaccurately during another.

We likewise believe that the defendant must enjoy a waivable-only, category-two right to be free from commentary that lessens the prosecution's burden of proof. *See Tuazon v. State*, 661 S.W.3d 178, 192 (Tex. App.—Dallas 2023, no pet.) (concluding that the defendant had a “waivable-only, *Marin*-category-two due process right not to have the trial court define reasonable doubt in a manner that shifted the State's burden of proof”).

The prosecution suggests that appellant affirmatively waived his complaint because his counsel “endorsed” the trial judge's comment with the following remarks later during voir dire: “The Judge is right. You don't get a definition of what beyond a reasonable doubt is. [What] is reasonable is going to be different for you and for you and for you and for you and for each one of y'all. But it is the highest burden for this reason.”

Waiver requires “an intentional relinquishment or abandonment of a known right or privilege by actual renunciation or intentional conduct inconsistent with claiming that known right.” *See Wappler v. State*, 138 S.W.3d 331, 333 (Tex. Crim. App. 2004). Appellant's counsel did not actually renounce his complaint; he did not even mention the trial court's sixty-percent comment. Nor were counsel's remarks inconsistent with claiming a right to be free from improper judicial commentary.

Because the trial court's comment implicated a category-two right, and because there was no indication that appellant affirmatively waived his right to be

free from such commentary, we hold that appellant did not forfeit his complaint and that he may challenge the trial court’s comment for the first time on appeal.¹

II. Was the trial court’s comment improper?

“Trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires.” *Victor v. Nebraska*, 511 U.S. 1, 22 (1994). The question we now consider is whether the trial court’s comment had that impermissible effect.

The prosecution contends that the trial court’s comment was appropriate because it merely confirmed that the standard for reasonable doubt remains “an individual, unquantified judgment.” We agree with the first part of this assessment, insofar as our case law holds that “prospective jurors may form their own definitions of proof beyond a reasonable doubt.” *See Murphy v. State*, 112 S.W.3d 592, 598 (Tex. Crim. App. 2003). But the problem with the trial court’s comment is that it actually quantified the standard for reasonable doubt by assigning it a numerical percentage.

A percentage may be appropriate when discussing the civil standard for preponderance of the evidence, which is routinely likened to proof greater than fifty

¹ We previously held in two published opinions that a complaint to a judicial comment was “waived” or “not preserved” if the defendant did not object in the trial court. *See Muhammed v. State*, 331 S.W.3d 187, 194–95 (Tex. App.—Houston [14th Dist.] 2011, pet. ref’d); *Wilkerson v. State*, 347 S.W.3d 720, 725–26 (Tex. App.—Houston [14th Dist.] 2011, pet. ref’d). We employed similar language in at least one of our more recent unpublished opinions. *See Silva v. State*, Nos. 14-23-00324-CR & 14-23-00325-CR, 2024 WL 3507508, at *2 (Tex. App.—Houston [14th Dist.] July 23, 2024, no pet.) (mem. op., not designated for publication). To the extent that the earlier published opinions conflict with *Proenza*, which was decided later and by a higher court, we are not obligated to follow them. *See Mason v. State*, 416 S.W.3d 720, 728 n.10 (Tex. App.—Houston [14th Dist.] 2013, pet. ref’d) (“When the Court of Criminal Appeals has deliberately and unequivocally interpreted the law in a criminal matter, we must adhere to its interpretation under the dictates of vertical stare decisis.”). Nor are we obligated to follow the unpublished opinion because it has no precedential value. *See Tex. R. App. P. 47.7(a)*.

percent, *see Wheatfall v. State*, 882 S.W.2d 829, 834 (Tex. Crim. App. 1994), or proof that crosses the “50 yard line,” *see Brooks v. State*, 323 S.W.3d 893, 918 n.38 (Tex. Crim. App. 2010) (Cochran, J., concurring), or proof that “tips the scales,” *see Montanez v. State*, 195 S.W.3d 101, 110 (Tex. Crim. App. 2006) (Meyers, J., dissenting). However, the other evidentiary burdens in our legal system have no numerical analogs.

The clear and convincing standard, which is also civil, is more onerous than the preponderance standard, and it requires the evidence to produce “a firm belief.” *See In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005). And then there is the reasonable doubt standard, which is the most onerous in our system. *See Fuller v. State*, 363 S.W.3d 583, 587 (Tex. Crim. App. 2012) (“Proof beyond a reasonable doubt must *at least* constitute a more onerous standard of proof than preponderance of the evidence and clear and convincing evidence.”). This burden is not satisfied unless the evidence impresses upon the factfinder “a subjective state of near certitude of the guilt of the accused.” *See Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

Sixty percent is far short of a “near certitude.” It’s not even a high probability.

The trial court likened its sixty percent figure to “a gut feeling.” We are aware of two court decisions that examined similar comments made during voir dire, but both decisions predated *Proenza*, and neither meaningfully examined how such comments could lessen the prosecution’s burden of proof. *See Haro v. State*, 371 S.W.3d 262, 264–66 (Tex. App.—Houston [1st Dist.] 2011, pet. ref’d); *Harrell v. State*, No. 14-08-00028-CR, 2009 WL 5818564, at *7 (Tex. App.—Houston [14th Dist.] Sept. 1, 2009, pet. ref’d) (mem. op., not designated for publication). In our view, there is little difference between “a gut feeling” on the one hand and a “hunch” or “suspicion” on the other—and they all connote a lesser degree of certainty than “a firm belief.” By suggesting that a sixty percent level of confidence was

tantamount to a gut feeling, the trial court here effectively collapsed the reasonable doubt standard to something even less demanding than the clear and convincing standard. That was error. *See McCullough v. Nevada*, 657 P.2d 1157, 1159 (Nev. 1983) (per curiam) (holding that the trial court had made an improper comment during voir dire when, on a scale of zero to ten, it scored the standard for reasonable doubt at a “seven and a half”).

The prosecution counters that the trial court’s comment was not improper because it did not “impose” its sixty percent definition upon the venire panel. That may be true in a literal sense. The trial court did not declare, as an abstract statement of law, that reasonable doubt means “60 percent” and that the jury must abide by that definition.

But the absence of a more explicit command does not save the trial court’s comment. Jurors are “prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon . . . the merits of the issues involved.” *See Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003); *see also Starr v. United States*, 153 U.S. 614, 626 (1894) (“It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.”). And the problem with this particular comment is that there was no follow-up comment from the trial court that would have precluded the venire panel from construing its sixty percent figure as anything other than a proper measure for reasonable doubt. The comment, in essence, functioned as “a judicial endorsement or imprimatur” of an invalid standard. *See Beltran de la Torre v. State*, 583 S.W.3d 613, 617 (Tex. Crim. App. 2019).

Just as no definition should be given for reasonable doubt, the trial court here should have avoided any attempt to assign this standard a numerical value.

III. Was the error harmless?

Appellant asserts that the trial court's comment amounts to structural error, which requires an automatic reversal, without the need for conducting a harm analysis. *See Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014). But we treat error as structural only if the United States Supreme Court has already labeled it as such. *See Lake v. State*, 532 S.W.3d 408, 411 (Tex. Crim. App. 2017).

The Supreme Court has found structural error only in a “very limited class of cases.” *See Johnson v. United States*, 520 U.S. 461, 468 (1997). In *United States v. Davila*, 569 U.S. 597 (2013), the Supreme Court described this class as including cases where there was a denial of counsel of choice, a denial of self-representation, a denial of a public trial, and a “failure to convey to a jury that guilt must be proved beyond a reasonable doubt.” *Id.* at 611. That last part appeared to be a reference to *Sullivan v. Louisiana*, 508 U.S. 275 (1993), which, though not cited directly by *Davila*, was mentioned by a different case to which *Davila* had cited.

In *Tuazon v. State*, 661 S.W.3d 178 (Tex. App.—Dallas 2023, no pet.), which appellant has cited extensively, the court of appeals cited *Davila* and *Sullivan* in support of its holding that a trial court commits structural error when, during voir dire, it makes a “misstatement regarding reasonable doubt.” *Id.* at 194. But those cases were not quite on point.

For one thing, *Davila* had nothing to do with the standard for reasonable doubt. It dealt instead with a judge who had violated a federal rule by improperly participating in plea discussions. *See Davila*, 569 U.S. at 600. And while *Sullivan* did involve the standard for reasonable doubt, it focused on a defective jury charge, rather than on an improper judicial comment made during voir dire. *See Sullivan*, 508 U.S. at 277; *Henry v. State*, No. 14-24-00316-CR, 2025 WL 1833397, at *3 (Tex. App.—Houston [14th Dist.] July 3, 2025, pet. ref'd) (mem. op., not designated

for publication) (distinguishing *Sullivan* on that same basis). The charge error was also qualitatively different in that it used language like “grave uncertainty” and “actual substantial doubt,” which suggested a higher degree of doubt than is required for an acquittal. *See Sullivan*, 508 U.S. at 277 (indicating that the charge was “essentially identical” to the one held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam)). By contrast, the improper judicial comment here simply suggested that the prosecution’s burden of proof was less demanding than the burden required of the clear and convincing standard.

Absent clearer authority from the Supreme Court, we decline to treat the trial court’s error here as structural. *See Harris v. State*, No. 12-24-00165-CR, 2025 WL 211634, at *5 (Tex. App.—Tyler Jan. 15, 2025, no pet.) (mem. op., not designated for publication) (“Upon our review, violation of the right to be tried in a proceeding devoid of improper judicial commentary has not been labeled by the United States Supreme Court as structural error.”).

For constitutional error that is not structural, the standard for harm is governed by Rule 44.2(a) of the Texas Rules of Appellate Procedure. *See Do v. State*, 634 S.W.3d 883, 897 (Tex. Crim. App. 2021). Appellant argues in the alternative that he is entitled to relief under this rule.

Rule 44.2(a) provides as follows: “If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.”

An analysis under Rule 44.2(a) does not turn on whether the outcome of the trial was proper. *See Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). The focus instead is on whether the error was a contributing factor in the jury’s

deliberations—in other words, whether the error adversely affected “the integrity of the process leading to the conviction.” *Id.*

The prosecution, as the beneficiary of the error, has the burden of proving that the constitutional error was harmless beyond a reasonable doubt. *See Wells v. State*, 611 S.W.3d 396, 411 (Tex. Crim. App. 2020). We, as the reviewing court, must take into account any and every circumstance apparent in the record that logically informs that harmless-error determination. *Id.* at 410–11. This review may include any number of factors, including the nature of the error, whether the error was emphasized, the probable implications of the error, the weight the jury would likely have assigned to the error in the course of its deliberations, and whether the defendant’s guilt was established by overwhelming evidence. *Id.* at 410.

The prosecution contends that the trial court’s comment was an “isolated incident” and that, in the words of our sister court, we must consider that comment “in light of the entire transcript so as [to] guard against magnification on appeal of incidences which were of little importance in their setting.” *See Rodriguez v. State*, — S.W.3d —, 2025 WL 1335328, at *6 (Tex. App.—Houston [1st Dist.] 2025, pet. ref’d).

But the meaning of reasonable doubt is hardly a matter of “little importance.” Quite the opposite, it is a fundamental principle “developed to safeguard men from dubious and unjust convictions,” making it “essential for the protection of life and liberty.” *See In re Winship*, 397 U.S. 358, 362 (1970). The trial court’s comment whittled away that essential protection.

The comment was not repeated or emphasized elsewhere, at least concerning the quantification of “60 percent.” But during voir dire, the prosecution did repeat the trial court’s other comment that reasonable doubt was a gut feeling: “If it’s your gut feeling, I just know.” The defense explicitly disagreed with that measure: “I think

[the prosecution] had mentioned before gut and I take a little bit of issue with that because this isn't a gut decision." The defense continued with that theme in closing statements: "Don't just go back there and just do what your gut tells you or anything like that."

Despite these targeted rebukes of the "gut feeling" comment, there was no direct criticism of the trial court's "60 percent" comment. The jury charge, appropriately, did not attempt to define the standard for reasonable doubt. But that omission also meant that the trial court's inappropriate comment from voir dire, which effectively acted as a definition, stood uncorrected. Similar to the defective jury charge in *Sullivan*, that comment could only serve to compromise the jury's ultimate findings. *See Sullivan*, 508 U.S. at 281.

The prosecution argues that the trial court's error was harmless because "the most critical explanation of the burden of proof" was set forth correctly in the jury charge. But this explanation merely stated that the prosecution must prove "each and every element of the offense charged beyond a reasonable doubt" and that "it is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt." We agree that there was nothing improper about these instructions. Nevertheless, these instructions did nothing to repair the damage from the trial court's earlier comment that quantified reasonable doubt at a level of confidence of only sixty percent.

The prosecution also suggests that the trial court's error was harmless based on the strength of its evidence. We would agree that the prosecution presented a strong case, but all of its evidence was circumstantial. There was no video evidence of appellant shooting the complainant. There was no eyewitness who testified that appellant shot the complainant. There was no confession from appellant, or

discovery of a murder weapon that could be linked back to appellant. The prosecution's evidence, though strong, was not overwhelming.

The trial court's comment, by its very utterance, tended "to threaten the integrity of the criminal adjudicatory process itself." *See Proenza*, 541 S.W.3d at 798. We are not satisfied, to a level of confidence beyond a reasonable doubt, that the erroneous comment did not contribute to the conviction.

CONCLUSION

The trial court's judgment is reversed and the case is remanded for a new trial.

/s/ Tracy Christopher
 Chief Justice

Panel consists of Chief Justice Christopher and Justices Wilson and Bridges.

Publish — Tex. R. App. P. 47.2(b).