

the Jasuta / Schulman report

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TIBA's Case of the Week Fourteenth Court of Appeals

Case Name: [Erik L. Aguirre v. The State of Texas](#)

- **OFFENSE:** Murder
- **COUNTY:** Harris
- **C/A CASE No.** 14-25-00214-CR
- **DATE OF OPINION:** February 19, 2026 **OPINION:** [Chief Justice Tracy Christopher](#)
- **DISPOSITION:** Conviction Reversed
- **TRIAL COURT:** 232nd D/C; Hon. Josh Hill
- **LAWYERS:** [Douglas Gladden](#) (Defense); [Nathan Farmer](#) (State)

(Background Facts): A Good Samaritan found the deceased 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 deceased 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 deceased'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 deceased 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 deceased, who was wearing a reflective vest and presenting as if he were an authentic parking attendant, but in truth, the deceased 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 deceased 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 deceased, and he explained to them that the deceased 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 deceased, 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 deceased 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 deceased'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.

[68] 536 Sufficiency of the Evidence / Murder: No one ever came forward claiming to have seen Appellant shoot the deceased, 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 deceased'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 deceased 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 deceased where he was ultimately found by the Good Samaritan. The girlfriend, however, testified that she did not see the deceased, his bicycle, or his reflective vest. Counsel argued that the girlfriend did not see the deceased 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 deceased 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 jury rejected all of defense's arguments and convicted Appellant of murder. The trial court then assessed his punishment at fifty years' imprisonment.

Holding: 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 deceased's death, or who, with the intent to cause serious bodily injury, committed an act clearly dangerous to human life that caused the deceased's death. *** We limit our analysis to this singular element. See *Murray v. State*, 457 S.W.3d 446 (Tex.Cr.App. 2015)(see ¶¶, [Vol. 23, No. 16](#); 04/20/2015). *** The prosecution did not produce any direct evidence of identity, as there was no witness who testified to seeing Appellant shoot the deceased, nor was there any surveillance footage of the shooting. But direct evidence is not necessary to support a conviction. *Merritt v. State*, 368 S.W.3d 516 (Tex.Cr.App. 2012)(see ¶¶, [Vol. 20, No. 16](#); 04/23/2012). *** There were several incriminating circumstances in this case. Foremost among those circumstances was that the [deceased] 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 deceased. See *Guevara v. State*, 152 S.W.3d 45 (Tex.Cr.App. 2012)(see ¶¶, [Vol. 12, No. 42](#); 10/25/2004). *** 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 deceased were known to still be in the area. See *Ingerson v. State*, 559 S.W.3d 501 (Tex.Cr.App. 2018)(see ¶¶, [Vol. 26, No. 38](#); 09/24/2018). *** 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 (Tex.Cr.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 deceased.

Ed Note: The next set of issues 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.

[§§ 205.01 Trial Courts / Trial Court's Actions / Improper Comments by Trial Judge / Preservation of Error]: Appellant did not object to the trial judge's 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.

Holding: 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. Cr. App. 1997) (see §§, [Vol. 5, No. 24](#); 06/23/1997). *** The main case is *Proenza v. State*, 541 S.W.3d 786 (Tex. Cr. App. 2017) (see §§, [Vol. 25, No. 44](#); 11/20/2017), 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. *** 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." *** 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 (Tex. Cr. App. 2025) (see §§, [Vol. 33, No. 8](#); 03/03/2025). 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. Cr. App. 2000) (see §§, [Vol. 8, No. 49](#); 12/18/2000), which was decided by a nonbinding plurality. 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 (Tex. Cr. App. 2007) (see §§, [Vol. 15, No. 38](#); 10/01/2007). *** 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 waiveable-only, category two right to be free from commentary that lessens the prosecution's burden of proof. 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.

Sidebars

([David A. Schulman](#)) Obviously, if our hero had done the right thing and simply called the police once he got to the restaurant and learned that he had been scammed, he would have been a lot better off, even if the scammer got on his bicycle and rode away before the police showed up. But he was, of course, our hero, and had to run out the macho thing.

[§§] 205.01 Trial Courts / Trial Court's Actions / Improper Comments by Trial Judge (Merits):

"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 (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 (Tex.Cr.App. 2003)(see §§, [Vol. 11, No. 25](#); 06/30/2003). 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 percent, see *Wheatfall v. State*, 882 S.W.2d 829 (Tex.Cr.App. 1994)(see §§, [Vol. 2, No. 23](#); 07/04/1994), or proof that crosses the "50 yard line," see *Brooks v. State*, 323 S.W.3d 893 (Tex.Cr.App. 2010)(see §§, [Vol. 18, No. 39](#); 10/11/2010)[FN 38](Cochran, J., concurring), or proof that "tips the scales," see *Montanez v. State*, 195 S.W.3d 101 (Tex.Cr.App. 2006)(see §§, [Vol. 14, No. 1](#); 05/01/2006)(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 (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 (Tex.Cr.App. 2012)(see §§, [Vol. 20, No. 13](#); 04/02/2012)("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. *** 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. *** 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.

Holding (Harm Analysis): 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 (Tex.Cr.App. 2014)(see ¶¶, [Vol. 22, No. 5](#); 02/03/2014). 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 (Tex.Cr.App. 2017)(see ¶¶, [Vol. 25, No. 5](#); 02/13/2017). *** 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.” *** 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 (Tex.Cr.App. 2007)(see ¶¶, [Vol. 15, No. 22](#); 06/11/2007). 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.” *** The trial court’s comment, by its very utterance, tended “to threaten the integrity of the criminal adjudicatory process itself.” *** We are not satisfied, to a level of confidence beyond a reasonable doubt, that the erroneous comment did not contribute to the conviction.

Sidebars

([David A. Schulman](#)) “Sixty percent is far short of a ‘near certitude.’ It’s not even a high probability.” Perfectly stated. This opinion is not only well written and expressed, it is more that adequately supported by the cited case law. I’m left, however, with one question (which this Court could not/should not answer). Specifically, what in the hell was the trial judge thinking. There was a period when judges were required to give the jury the definition of “reasonable doubt” which the Court of Criminal Appeals determined appropriate in [*Geesa v. State*](#), 820 S.W.2d 154 (Tex.Cr.App. 1991). That ended in [*Paulson v. State*](#), 28 S.W.3d 570 (Tex.Cr.App. 2000)(see ¶¶, [Vol. 8, No. 40](#); 10/09/2000), when the Court decided that “the better practice is to give no definition of reasonable doubt at all to the jury.” Since that has been the “**better practice**” since before this judge was even a licensed attorney, how does he not know this? Shouldn’t he have learned this at Baby Judge’s School? Maybe he missed that session.

([John G. Jasuta](#)) We will see what happens on PDR, although invoking Rule # 1 may be a bit hard in this case as the trial court obviously misstated the law. The procedural holding might stand up.