Appellate Standards of Review in Criminal Cases

The appellate standard of review is the starting point of any legal analysis, as it defines the level of deference applied to the proceedings below. Neither trial court error nor sufficiency of the evidence can be addressed outside the parameters of the standard of review. The Federal Rules of Appellate Procedure require appellant's and cross-appellant's briefs to set out the applicable standard of review for each issue raised. F.R.A.P. 28(a)(9)(B); F.R.A.P. 28.1(c)(2). According to the 1993 Advisory Committee note, "requiring a statement of the standard of review generally results in arguments that are properly shaped in light of the standard."

Texas practitioners and courts sometimes fail to even mention the standard of review in their briefs or opinions. This omission can lead to an improper analysis of the issue, which may result in an incorrect disposition. This paper defines and discusses the applicable standards of review and provides examples of each.

I. Review of trial court rulings

A. Definitions

1. Great deference

Appellate courts afford "almost total deference" to a trial court's determination of historical facts that are supported by the record. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The trial court's fact findings are the who, when, where, how, or why. *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008). Fact issues encompass matters of credibility but not strictly legal issues like whether certain facts establish reasonable suspicion or probable cause. *Id.* Issues that hinge on intent or mental state are fact issues entitled to great deference. For example, the deliberateness of a "question first, warn later" approach to custodial interrogation is subject to great deference. *Carter v. State*, 309 S.W.3d 31, 39-40 (Tex. Crim. App. 2010). *See also Meekins v. State*, 340 S.W.3d 454, 460 (Tex. Crim. App. 2011) (voluntariness of a defendant's consent to search subject to great deference); *Lujan v. State*, 331 S.W.3d 768, 773 (Tex. Crim. App. 2011) (trial court's implicit ruling that "primary purpose" of a roadblock was license and registration check upheld as supported by the record); *Gonazales v. State*, 369 S.W.3d 851, 855 (Tex. Crim. App. 2012) (trial court's finding that officer was primarily motivated by community caretaking purpose

depends on credibility and demeanor); *Watkins v. State*, 245 S.W.3d 444, 448 (Tex. Crim. App. 2008) (purposeful discrimination/Batson).

Great deference applies to the determination of fact issues even if they are not based on credibility and demeanor. *Manzi v. State*, 88 S.W.3d 240, 243 (Tex. Crim. App. 2002). This is so even if the findings are based on: controverted affidavits, *Id.* at 244, uncontroverted affidavits, *Charles v. State*, 146 S.W.3d 204, 206 (Tex. Crim. App. 2004), or a videotape. *Montanez v. State*, 195 S.W.3d 101, 109 (Tex. Crim. App. 2006). "Although appellate courts may review *de novo* 'indisputable visual evidence' contained in a videotape, the appellate court must defer to the trial judge's factual finding on whether a witness actually saw what was depicted on a videotape or heard what was said during a recorded conversation." *State v. Duran*, 396 S.W.3d 563, 570-71 (Tex. Crim. App. 2006). Deference is the proper standard when a video is admitted, even if it is not viewed by the judge. *Tucker v. State*, 369 S.W.3d 179, 185 (Tex. Crim. App. 2012).

Great deference applies even if the trial judge is not in an appreciably better position than the court of appeals to make credibility determinations. The deference afforded to a trial judge's determination of the facts is based on the expertise and experience judges acquire in fulfilling that role and the notion that substitution of an appellate court's judgment for that of the trial court would not be an efficient use of resources. *Manzi*, 88 S.W.3d at 243-44 (citing *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-75 (1985)).

2. *De novo*

Legal issues, such as probable cause, are reviewed *de novo*. *Guzman*, 955 S.W.2d at 89.[1] Similarly, application of law-to-fact issues that do not turn on credibility and demeanor are subject to *de novo* review. "The fact that credibility and demeanor are important factors in the trial court's assessment does not always mean that the question 'turns' on an evaluation of credibility and demeanor." *Abney v. State*, 394 S.W.3d 542, 547 (Tex. Crim. App. 2013). "Rather, a question 'turns' on credibility and demeanor 'when the testimony of one or more witnesses, if believed, is always enough to add up to what is needed to decide the substantive issue.'" *Id.* (citing *Loserth v. State*, 963 S.W.2d 770, 773 (Tex. Crim. App. 1997)).

[1]The exception to *de novo* review of probable cause determinations is the magistrate's finding of probable cause when issuing a search warrant. This determination is reviewed with great deference, due to the constitutional preference for search warrants over warrantless searches. *Swearingen v. State*, 143 S.W.3d 808, 810-11 (Tex. Crim. App. 2004).

Many issues involve mixed questions of law and fact, such as: admissibility of an oral confession; *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); the primary purpose of a traffic checkpoint; *Lujan v. State*, 331 S.W.3d 768, 772 (Tex. Crim. App. 2011); whether a suspect is in custody; *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007); the authority of a third party to consent to a search *Hubert v. State*, 312 S.W.3d 554, 559-60 (Tex. Crim. App. 2010); and the reasonableness of a detention. *Kothe v. State*, 152 S.W. 3d 54, 62-63 (Tex. Crim. App. 2004). The trial court determines what the facts are, and the appellate court accepts those facts as true if supported by the record. This is the great deference part of the analysis. But the appellate court determines *de novo* whether the accepted facts establish that the detention was reasonable, because '"reasonableness' is ultimately a question of substantive Fourth Amendment law." *Id*.

It is essential that courts correctly determine whether the issue at hand is a fact issue or a legal issue. The distinction between the two is not always an easy one. The Court of Criminal Appeals has recognized the problems created when courts confuse "the apples of explicit factual findings with the oranges of conclusions of law," and urged trial judges to make explicit fact findings and credibility determinations to avoid speculation on appeal. *Sheppard*, 271 S.W.3d at 291-92 (Tex. Crim. App. 2008).

For example, in *Robinson v. State*, 377 S.W.3d 712 (Tex. Crim. App. 2012), the officer stopped Appellant for failing to signal when his car moved from one street to another at a curve in the road, which the officer testified was a "turn." The defendant claimed that, because one street ended where the other began, he did not turn but merely followed the road, so no signal was required. The necessity of an article 38.23 instruction hinged on whether the question of the car's movement was a fact issue or a legal issue. The Court of Criminal Appeals concluded that the issue was legal, not factual; the witnesses simply disagreed about the significance of undisputed facts. *Id.* at 720.

3. Abuse of discretion

The abuse of discretion standard applies most often to the trial court's evidentiary rulings. The test for abuse of discretion is "whether the trial court acted without reference to any guiding rules and principles" or "whether the act was arbitrary or unreasonable." *Downer v. Aquamarine Operations, Inc*., 701 S.W.2d 238, 241-42 (Tex. 1985). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion

has occurred." *Id*. Reasonable minds can differ on issues such as the relevance of a particular piece of evidence, and "as long as the trial court's ruling was at least within the zone of reasonable disagreement," the appellate court should not substitute its reasonable perception for that of the trial judge. *Montgomery v. State*, 810 S.W.2d 272, 291(Tex. Crim. App. 1990) (op'n on rehearing). However, it explained, "when it is clear to the appellate court that what was perceived by the trial court as common experience is really no more than the operation of a common prejudice, not borne out in reason, the trial court has abused its discretion." *Ibid.*

The degree of latitude the abuse of discretion standard allows means that a trial judge, who must decide between two opposing rulings, could under some circumstances choose either option and still be upheld on appeal. *See Perillo v. State*, 758 S.W.2d 567, 577 (Tex. Crim. App. 1988) (no abuse of discretion in granting challenge for cause when the record, "presents an adequate basis to support the trial court's ruling *either* that the venireman was challengeable, as in fact the court ruled here, or that she was not.").

In *Guzman v. State*, 955.S.W.2d at 89, the Court of Criminal Appeals took pains to explain that the abuse of discretion standard continues to apply to evidentiary rulings, and that the *de novo*/great deference standard applies to a different type of trial court ruling. It explained:

> Our decision in this case in no way affects this Court's holdings in cases such as *Montgomery*. *Montgomery* sets out the standard by which appellate courts review trial courts' evidentiary rulings which is an abuse of discretion standard. An appellate court's review of a trial court's evidentiary rulings generally does not involve an "application of law to fact question" or a "mixed question of law and fact."

By this, *Guzman* may have meant that evidentiary rulings do not involve credibility determinations. For example, in *Sanchez v. State*, 354 S.W.3d 476, 487-88 (Tex. Crim. App. 2011), the Court of Criminal Appeals, addressing the outcry statute, held, "[Art. 38.072] charges the trial court with determining the reliability based on 'the time, content, and circumstances of the statement;' it does not charge the trial court with determining the reliability of the statement based on the credibility of the outcry witness." Similarly in a *Kelly/Daubert* hearing, the trial court's gatekeeper function requires it to exclude evidence that is not scientifically reliable, but credibility of the evidence and the witness is a matter for the jury. *Vela v. State*, 209 S.W.3d 128, 135-36 (Tex. Crim. App. 2006). Therefore, when addressing evidentiary rulings, the appellate court does not defer to fact findings and address

legal issues *de novo*, it addresses whether the trial court's ruling was within the zone of reasonable disagreement.

However, courts occasionally use "great deference" seemingly interchangeably with "abuse of discretion." For example, in *Pierson v. State*, __S.W.3d __ No. PD-0613-13, 2014 Tex. Crim. App. LEXIS 539 (Tex. Crim. App. 2014), the Court of Criminal Appeals held that great deference is afforded the trial court's decision to grant a mistrial when the decision is based on potential jury bias. Id at *27. It noted that the judge is in the best position to gauge the juror's demeanor. *Id*. at *29. It concluded that because the judge did not act irrationally by determining that an instruction to disregard would not remediate the bias, he did not abuse his discretion in granting the mistrial. *Id*. at *31. *See also Green v. State*, 374 S.W.3d 434, 441 (Tex. Crim. App. 2012) (applying abuse of discretion standard to the trial court's decision about whether the defendant was competent to be executed but recognizing that the "competency determination is, if not wholly a factual determination, at least a question of law and fact based on credibility and demeanor.").

4. Clearly erroneous

A ruling is clearly erroneous "when the reviewing court is left with the firm conviction that a mistake has been committed." *Harris v. State*, 827 S.W.2d 949, 955 (Tex. Crim. App. 1992). When there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. at 574. There seems to be little difference between great deference and clearly erroneous. In *Carter v. State*, 309 S.W.3d 31, 39 n.39 (Tex. Crim. App. 2010), the Court found the clearly erroneous standard, "similar to our 'great deference' standard of review for all factual findings...if such findings are supported by the record." In *Whitsey v. State*, 796 S.W.2d 707 (Tex. Crim. App. 1989) (op'n on rehearing) the Court adopted the federal clearly-erroneous standard for *Batson* cases, finding it was "synonymous" with and "essentially the same" as the great deference or "supported by the record" standard. *Id.* at 721, 726. *Whitsey* noted that the Fifth Circuit had used the standards interchangeably. *Id*. at 726. The Court of Criminal Appeals has done the same. *See, e.g.*, *Davis v. State*, 329 S.W.3d 798, 815 (Tex. Crim. App. 2010) ("The trial court's determination is accorded great deference and will not be overturned on appeal unless it is clearly erroneous.").

B. Specific issues

Sometimes, the standard of review is determined by the nature of the issue, *i.e.*, legal issues vs. fact issues. Sometimes, the standard is determined by the proceeding in which the issue is decided. For example, because the standard of review for a trial court's ruling on a motion for new trial or motion for mistrial is abuse of discretion, issues raised in those proceedings are subject to that standard of review. And sometimes the standard is determined by the nature of the law governing the issue, *e.g.*, rulings under the Rules of Evidence are reviewed under an abuse of discretion standard.

The following is a non-exclusive list of issues and their corresponding standard of review:

1. Admissibility under the Rules of Evidence:
Abuse of discretion. *See, e.g., Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012) (authentication); *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011) (Rule 404 (b)); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). (Rule 403).

2. Admissibility of scientific evidence: Abuse of discretion. *Blasdell v. State*, 384 S.W.3d 824, 829 (Tex. Crim. App. 2012).

3. Appointment of expert witness: Abuse of discretion. *Stoker v. State*, 788 S.W. 2d 1, 16 (Tex. Crim. App. 1989).

4. Bail: Abuse of discretion. *Ex parte Gill*, 413 S.W.3d 425, 428 (Tex. Crim. App. 2013).

5. *Batson*: Great deference/clearly erroneous. *Watkins v. State*, 254 S.W.3d 444, 448 (Tex. Crim. App. 2008); *Whitsey v. State*, 796 S.W.2d 707, 721 (Tex. Crim. App. 1989) (op'n on rehearing).

6. Change of venue: Abuse of discretion. *Gonzalez v. State*, 222 S.W.3d 446, 449 (Tex. Crim. App. 2007).

7. Competency: Abuse of discretion. *See, e.g., Green v. State*, 374 S.W.3d 434, 441 (Tex. Crim. App. 2012) (competency to be executed); *Chadwick v. State*, 309 S.W.3d 558, 561 (Tex. Crim. App. 2010) (competency to proceed *pro se*); *Montoya*

v. State, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009) (decision to inquire into competency).

8. Confessions/voluntariness: Great deference. *Carter v. State*, 309 S.W.3d 31, 41-42 (Tex. Crim. App. 2010).

9. Consent to search
Authority: *De novo*. *Hubert v. State*, 312 S.W.3d 554, 559 (Tex. Crim. App. 2010). **Voluntariness:** Great deference/clearly erroneous. *Meekins v. State*, 340 S.W.3d 454, 460 (Tex. Crim. App. 2011).

10. Constitutionality of a statute: *De novo*. *Ex parte Lo*, __S.W.3d __, PD-1560-12, 2013 Tex. Crim. App. LEXIS 1594 at *3 (Tex. Crim. App. 2013).

11. **Continuance:** Abuse of discretion. *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996).

12. Custodial interrogation
Custody: *De novo*. *State v. Saenz*, 411 S.W.3d 488, 494-95 (Tex. Crim. App. 2013). **Interrogation:** *De novo*. *Alford v. State*, 358 S.W.3d 647, 653 (Tex. Crim. App. 2012). **Deliberateness of "question first, warn later" interrogation**: Great deference/clearly erroneous. *Carter v. State*, 309 S.W.3d 31, 39-40 (Tex. Crim. App. 2010). **Whether a defendant's rights were scrupulously honored**: *De novo*. *Alford v. State*, 358 S.W.3d 647, 653 (Tex. Crim. App. 2012). **Whether a booking question was objectively, reasonably related to an administrative interest:** *De novo*. *Id.* at 660.

13. Discovery: Abuse of discretion. *Ex parte Miles*, 359 S.W.3d 647, 670 (Tex. Crim. App. 2012).

14. DNA testing
Fact issues: Great deference. *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). **Reasonable probability that exculpatory test results would prove innocence:** *De novo*. *Ex parte Gutierrez*, 337 S.W.3d 883, 895 (Tex. Crim. App. 2011).

15. Defenses/entitlement: *De novo*. *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007).

16. **Detention:** *De novo*. *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008).

17. Disqualification of prosecutor: Abuse of discretion. *Landers v. State*, 256 S.W.3d 295, 303 (Tex. Crim. App. 2008).

18. Indigence: "A reviewing court should uphold a trial court's ruling denying indigent status only if it finds that the trial court, having [applied the proper analysis] 'reasonably' believed the defendant was not indigent." *McFatridge v. State*, 309 S.W.3d 1, 6 (Tex. Crim. App. 2010).

19. Interpreters: Abuse of discretion. *Linton v. State*, 275 S.W.3d 493, 502-03 (Tex. Crim. App. 2009).

20. Mistrial: Abuse of discretion. *Hawkins v. State*, 135 S.W.3d 72, 76-77 (Tex. Crim. App. 2004). **Mistrial based on the risk of juror bias:** Great deference. *Pierson v. State*, __S.W.3d __, No. PD-0613-23, 2014 Tex. Crim. App. LEXIS 539 at *27 (Tex. Crim. App. 2014).

21. Motions for new trial: Abuse of discretion. *Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001).

22. Motion to quash: *De novo*. *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004).

23. Perjured testimony
Falsity: Great deference. *Ex parte Weinstein*, __ S.W.3d ___, WR-78,989-01, 2014 Tex. Crim. App. LEXIS 123 at *16-17 (Tex. Crim. App. 2014). **Materiality:** *De novo*. *Id*.

24. Probable cause
No warrant: *De Novo*. *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). **Search warrant:** Great deference. *Swearingen v. State*, 143 S.W.3d 808, 810-11 (Tex. Crim. App. 2004).

25. Reasonable suspicion: *De novo*. *Arguellez v. State*, 409 S.W.3d 657, 663 (Tex. Crim. App. 2013).
26. Recusal: Abuse of discretion. *Gaal v. State*, 332 S.W.3d 448, 456 (Tex. Crim. App. 2011).

27. Speedy trial
Fact issues: Abuse of discretion. *Cantu v. State*, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008). **Legal issues**: *De novo*. *Id*. **Balancing test**: *De novo. Id.*

28. Standing: *De novo*. *Parker v. State*, 182 S.W.3d 923, 925 (Tex. Crim. App. 2006).

29. Statutory construction: *De novo. Williams v. State*, 253 S.W.3d 673, 677 (Tex. Crim. App. 2008).

30. Substitution of counsel: Abuse of discretion. *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000).

31. Voir dire: Abuse of discretion. *Gonzales v. State*, 353 S.W.3d 826, 830 (Tex. Crim. App. 2011); *Green v. State*, 934 S.W.2d 92, 106 (Tex. Crim. App. 1996).

32. Voluntariness of confession: Great deference. *Carter v. State*, 309 S.W.3d 31, 41-42 (Tex. Crim. App. 2010).

33. Voluntariness of consent to search: Great deference/clearly erroneous. *Meekins v. State*, 340 S.W.3d 454, 460 (Tex. Crim. App. 2011).

C. Presumptions regarding trial court's rulings

The trial court's ruling will be upheld if it was right for any reason, even if the trial court explicitly stated the wrong reason. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). The prevailing party is entitled to the strongest legitimate view of the facts and all reasonable inferences that may be drawn from those facts. *State v. Weaver*, 349 S.W.3d 521, 525 (Tex. Crim. App. 2011).

1. No fact findings

When findings of fact are not entered, the appellate court assumes the trial court made implicit findings of fact that support its ruling, and the evidence is viewed in the light most favorable to the ruling. *Ross v. State*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). The trial court is free to disbelieve even uncontroverted testimony, and an appellate court will not presume that the trial court's ruling was

based on an incorrect ruling of law. *Id.*[2] "If a non-prevailing party wishes to avoid the effects of these appellate presumptions, then it should attempt to get the rationale for the trial court's ruling on the record through either a verbal explanation at the hearing or express findings of fact and conclusions of law." *Id.*

State v. Cullen, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006), held that upon the request of the losing party on a motion to suppress, the trial court *must* make findings of fact and conclusions of law adequate to allow an appellate court to review the trial court's application of the law to the facts. Findings may be orally stated on the record or in writing, served on the parties within 20 days of the trial court's ruling. *Id*. at 699-700.

2. Fact findings

If the trial judge makes express findings of fact, the appellate court must determine whether those findings are supported by the evidence, which is viewed in the light most favorable to the ruling. *State v. Kelly*, 204 S.W.3d 808 (Tex. Crim. App. 2006). If the trial court's findings are incomplete and the resolution of a fact issue that could be dispositive of the case has not been made, the court of appeals should remand to the trial court for findings as to that issue, regardless of whether fact findings were originally requested. *State v. Elias*, 339 S.W.3d 667, 676 (Tex. Crim. App. 2011). "[T]he trial court, once having taken it upon itself to enter specific findings and conclusions *sua sponte*, nevertheless assumed an obligation to make findings and conclusions that were adequate and complete, covering every potentially dispositive issue that might reasonably be said to have arisen in the course of the suppression proceedings." *Id.* The Court continued:

> The omission of findings and conclusions with respect to this potentially dispositive fact constitutes a 'failure . . . to act' for purposes of Rule 44.4 of the Rules of Appellate Procedure; because such a

[2]An exception to *Ross* arises in indigency determinations. A trial judge may not simply disbelieve a defendant's evidence *prima facie* showing of indigence. Rather, the trial judge must accept that evidence unless there is some reason on the record to justify its rejection. *Whitehead v. State*, 130 S.W.3d 866, 875 (Tex. Crim. App. 2004). Absent a reasonable, articulable basis in the record to show the defendant's *prima facie* showing is inaccurate or untrue, a trial court must accept the evidence as sufficient. But the State need not actually present rebuttal evidence to carry its burden; the defendant's own evidence can cast doubt on his indigence. *McFatridge v. State*, 309 S.W.3d 1, 6 n 20 (Tex. Crim. App. 2010). A defendant's own evidence that shows his expenses are unreasonable can justify a trial court determination that he is not indigent. *Tuck v. State*, 215 S.W.3d 411, 415 (Tex. Crim. App. 2007).

> failure is remediable by way of retroactive findings and conclusions upon remand, the court of appeals was authorized to remand the cause to the trial court with directions to supplement the record with the missing findings and conclusions. We hold that the court of appeals erred to affirm the trial court's ruling on the motion to suppress without first remanding the cause for the entry of supplemental findings of fact and conclusions of law under Rule 44.4. By this holding, we avoid the kind of appellate speculation that we decried in *Cullen*, and assure that appellate review of the legality of the initial stop will be based upon the actual findings of the judicial entity to which the fact finding function is institutionally assigned-the trial court.

Id.

State v. Mendoza, 365 S.W.3d 666 (Tex. Crim. App. 2012), reiterated that appellate courts should determine what the trial court actually believed rather than what it may have believed. *Id*. at 670-71. In that case, the trial judge included fact findings that merely stated what various witnesses testified to or what they "believed" or "felt" instead of what facts the trial court actually found to be true. The Court of Criminal Appeals characterized these findings as "weasel words," which, when combined with "factual juxtapositions" within the findings created doubt that the judge "fully credited [the officer's] version of events." *Id*. at 671.

Elias and *Mendoza* suggest that a remand is always necessary if the trial court's findings are incomplete or conflicting. However, in *State v. Mazuca*, 375 S.W.3d 294 (Tex. Crim. App. 2012), the Court found "nothing to be gained from a remand" for additional findings on attenuation of the taint because there was little testimony pertaining to [the issue] and none that seems particularly to have called for the trial court to evaluate witness credibility and demeanor." *Id*. at 308, n.70. Similarly, *State v. Weaver*, 349 S.W.3d 521 (Tex. Crim. App. 2011), noted that if the facts are not in dispute, a remand for additional findings is not required. *Id*. at 528, n.34.

II. Sufficiency of the evidence review

A. Legal sufficiency

In addressing legal sufficiency, the reviewing court considers all the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. The reviewing court must assume that the jury resolved all conflicts in the testimony in favor of the verdict of guilt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). All the evidence admitted at trial, even if improperly admitted, must be considered in a sufficiency review. *Porier v. State*, 662 S.W.2d 602, 609 (Tex. Crim. App. 1984). Juries are permitted to draw multiple reasonable inferences from the evidence as long as each inference is supported by the evidence and is not based on mere speculation. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007).

> Sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried."

Malik v. State, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

The hypothetically correct jury charge includes statutory elements alleged in the indictment. *Cada v. State*, 334 S.W.3d 766, 773-74 (Tex. Crim. App. 2011), and statutory definitions. *Geick v. State,* 349 S.W.3d 542, 547-48 (Tex. Crim. App. 2011). The hypothetically correct jury charge does not include allegations needlessly pled that give rise to an immaterial variance. *Gollihar v. State*, 46 S.W.3d 243, 256 (Tex. Crim. App. 2001).

B. Factual sufficiency

Brooks v. State, 323 S.W.3d 893 (Tex. Crim. App. 2010) overruled *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996), which established the factual

sufficiency standard of reviewing elements of the offense in criminal cases. *Brooks* set aside the factual sufficiency standard of review and held, "[T]he *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Id*. at 911.

C. Sufficiency of evidence to support an adverse finding on an issue on which the defendant bears the burden of proof

> When an appellant asserts that there is no evidence to support an adverse finding on which she had the burden of proof, we construe the issue as an assertion that the contrary was established as a matter of law. We first search the record for evidence favorable to the finding, disregarding all contrary evidence unless a reasonable factfinder could not. If we find no evidence supporting the finding, we then determine whether the contrary was established as a matter of law.

Matlock v. State, 392 S.W.3d 662, 669 (Tex. Crim. App. 2013).

"Only if the appealing party establishes that the evidence conclusively proves his affirmative defense and 'that no reasonable jury was free to think otherwise,' may the reviewing court conclude that the evidence is legally insufficient to support the jury's rejection of the defendant's affirmative defense." *Id.* at 670.

D. Sufficiency of the evidence to support revocation of community supervision

"For issues governed by the less rigorous burden of proof of 'preponderance of the evidence,' the appellate standard of review for legal sufficiency is [] less rigorous. For probation-revocation cases, we have described the appellate standard of review as whether the trial court abused its discretion." *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013).

III. Harmless error review

Neither the appellant nor the State bears the burden of demonstrating harm or harmlessness of the error. Instead, it is the appellate court's responsibility to review the record and make this determination. *Johnson v. State*, 43 S.W.3d 1, 5 (Tex. Crim. App. 2001).

"Except for certain federal constitutional errors labeled by the United States Supreme Court as 'structural,' no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis." *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997).

An error is "structural" only if it is the kind of error that affects the framework in which the trial takes place and defies analysis by harmless error standards. *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991). The Supreme Court has declared as structural error: 1) the total deprivation of counsel at trial; 2) a biased judge; 3) the unlawful exclusion of members of the defendant's race from a grand jury; 4) denial of the right to self-representation at trial; 5) denial of the right to a public trial; and 6) a defective reasonable doubt instruction. *Johnson v. United States*, 520 U.S. 461, 468 (1997).

A. Constitutional error

TEX. R. APP. PRO. 44.2 (a) provides:

> Constitutional error. If the appellate record in a criminal case reveals constitutional error that is subject to a 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.

In *Snowden v. State*, 353 S.W.3d 815, 821-22 (Tex. Crim. App. 2011), the Court reformulated the *Harris v. State*[3] factors for a Rule 44.2(a) analysis, by eliminating the first and last *Harris* factors–the "source of the error" and "whether declaring the error harmless would encourage the State to repeat it with impunity." The proper harm analysis under Rule 44.2(a) examines the nature of the error, whether it was emphasized by the State, the probable implications of the error, and the weight the jury would likely have assigned to it. *Id*. at 822.

The following have been held to be constitutional errors, subject to Rule 44.2(a): [4]

[3]790 S.W.2d 568 (Tex. Crim. App. 1989).

[4]This is a non-exclusive list.

1. A comments on a defendant's failure to testify violates the right against self-incrimination and is subject to a Rule 44.2 (a) analysis. *Snowden*, 353 S.W.3d at 818.

2. The State's failure to elect between offenses violates a defendant's rights to notice and a unanimous jury verdict. *Phillips v. State*, 193 S.W.3d 904, 913 (Tex. Crim. App. 2006).

3. The denial of an interpreter violates a defendant's Sixth Amendment right to confrontation. *Garcia v. State*, 149 S.W.3d 135, 145 (Tex. Crim. App. 2004).

4. "Shackling error may rise to the level of constitutional error when the record reflects a reasonable probability that the jury was aware of the defendant's shackles." *Bell v. State*, 415 S.W.3d 278, 283 (Tex. Crim. App. 2013).

5. *Crawford* error violates the Sixth Amendment and is subject to a Rule 44.2(a) analysis, considering the following factors:

> the importance of the hearsay to the State's case; whether the hearsay evidence was cumulative of other evidence; the presence or absence of evidence corroborating or contradicting the hearsay testimony on material points; and the overall strength of the prosecution's case.

Davis v. State, 203 S.W.3d 845, 854 (Tex. Crim. App. 2006).

6. Denial of the right to cross-examine the State's intoxilyzer expert denied the defendant's right to present a defense and violated due process. *Holmes v. State*, 323 S.W.3d 263, 173-74 (Tex. Crim. App. 2010).

7. A venireperson's withholding of material information during voir dire interferes with the ability to select an impartial jury and is subject to a Rule 44.2(a) harm analysis. *Franklin v. State*, 138 S.W.3d 351, 353-58 (Tex. Crim. App. 2004).

B. Non-constitutional error

TEX. R. APP. PRO. 44.2(b) provides:

> Other Errors. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

An error affects a substantial right when it has a substantial and injurious effect or influence on the jury's verdict. *Barshaw v. State*, 342 S.W.3d 91, 94 (Tex. Crim. App. 2011). "A conviction must be reversed for non-constitutional error if the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error." *Id.* A judge has a grave doubt when "the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* The factors utilized to conduct a harm analysis set out in *Harris v. State*, 790 S.W.2d 568 (Tex. Crim. App. 1989), are "not helpful" in a Rule 44.2(b) analysis and are "unnecessarily limiting." *Mason v. State*, 322 S.W.3d 251, 257 n10 (Tex. Crim. App. 2010).

Without listing all the errors that have been held to be non-constitutional, generally speaking, a mere statutory violation is non constitutional error.[5] Failure to adhere to a statutory procedure serving to protect a constitutional provision is a violation of the statute, not a violation of the constitutional provision itself. *Hughes v. State*, 24 S.W.3d.833, 837 n.2 (Tex. Crim. App. 2000). "Exclusions of evidence are unconstitutional only if they 'significantly undermine fundamental elements of the accused's defense.'" *Potier v. State*, 68 S.W.3d 657, 666 (Tex. Crim. App. 2002). When the exclusion of defense evidence does not prevent the defendant from presenting a defense and the evidence excluded would have only "incrementally" furthered appellant's defensive theory, error in excluding the evidence is non-constitutional, subject to a Rule 44.2(b) harm analysis. *Walters v. State*, 247 S.W.3d 204, 222 (Tex. Crim. App. 2007). The trial court's failure to admonish a defendant pursuant to TEX. CODE CRIM. PROC. art. 26.13 is non-constitutional error; but a guilty plea that is involuntary because the defendant was inadequately informed violates due process and is subject to a Rule 44.2(a) harm analysis. *Davidson v. State*, 405 S.W.3d 682, 691 (Tex. Crim. App. 2013).

Denial of a proper defense voir dire question is not a per se violation of the constitutional right to counsel. *Easley*, 2014 Tex. Crim. App. LEXIS 272 at *16-17.

Failure to prove venue does not implicate sufficiency of the evidence; it is non-constitutional trial error subject to a Rule 44.2(b) harm analysis. *Schmutz v. State*, __ S.W.3d __, PD-0530-13, 2014 Tex. Crim. App. LEXIS 121, *12, 15(Tex. Crim. App. 2014).

---

[5] *Easley v. State*, __S.W.3d__, PD-1509-12, 2014 Tex. Crim. App. LEXIS 272 (Tex. Crim. App. 2014), contains an in-depth discussion of errors that have been held to be non-constitutional. *Id.* at *10-15.

C. Jury Charge error

Harm from jury charge error is assessed under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984), even if the charge error in question is of constitutional magnitude. *Olivas v. State*, 202 S.W.3d 137, 145 (Tex. Crim. App. 2006). Although the record must show actual, not merely theoretical harm, neither party has the burden to either prove or disprove harm. *Warner v. State*, 245 S.W.3d 458, 461-62 (Tex. Crim. App. 2008).