Affirmed and Opinion, Concurring Opinion, and Dissenting Opinion filed March 9, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00502-CR

JOSEPH ANTHONY SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 1336966

O P I N I O N [1]

Appellant Joseph Anthony Smith challenges his conviction and punishment for aggravated robbery with a deadly weapon. This three-issue appeal divides the panel three ways on the issue of whether the trial court erred, during the punishment phase of trial, in charging the jury that voluntary intoxication is not a

[1] Section II. A. of this opinion is a plurality opinion of Chief Justice Frost. Justice Jewell joins the remainder of the opinion, making it a majority opinion of the court.

defense to the commission of a crime. The author of this opinion finds no error, a concurring justice finds harmless error, and a dissenting justice finds harmful error. The upshot is a plurality decision on this issue. Today, the court also considers whether the trial court erred in failing to charge the jury on a lesser-included offense during the guilt/innocence phase of the trial and whether the trial court reversibly erred in overruling appellant's objection to the prosecutor's closing argument. A majority of the court finds against appellant on both issues. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The complainant was backing his car out of the driveway heading towards the street around 5:00 a.m. when a man approached him wielding a gun. The man tapped the driver's-side window with the gun. Believing he was being robbed, the complainant handed the man his wallet and keys, saying, "Please take my wallet and keys. Please don't hurt me." The assailant asked the complainant if anyone else was home, and although both of the complainant's parents were at home, the complainant replied that nobody was at home because he did not want the assailant to think anyone was in the house. The assailant told the complainant to get back in the car, but the complainant refused. At that moment, a car drove down the street, distracting both the assailant and the complainant enough that the assailant moved the gun away from the complainant's face. The complainant grabbed the assailant's hand and began screaming for help while fighting with him for the gun. The two struggled, with the assailant attempting to muffle the complainant's screams.

The car driving down the street did not stop to help the complainant, but the complainant's neighbor heard his screams and came outside with a gun. The neighbor ordered the assailant to drop the gun. The assailant released the gun and

ran away.

The neighbor pursued the assailant, telling him to get on the ground. The assailant did not comply, but a second neighbor came out of his home with a weapon and pursued the assailant, who eventually stopped running. The second neighbor brought the assailant back down the street and forced him to wait until police arrived. The complainant brought the assailant's gun into the complainant's house and eventually turned the gun over to responding police officers.

Appellant was charged with aggravated assault with a deadly weapon. He pleaded "not guilty."

Guilt/Innocence Phase

The complainant and the first neighbor described what happened during their testimony at trial in the guilt/innocence phase. The trial court also admitted into evidence recordings of several phone calls appellant placed while he was incarcerated. In these phone calls, appellant repeatedly discussed the incident, characterizing it as a robbery, and explaining that his motivation was his lack of money.

Appellant asked the trial court to charge the jury on the lesser-included offense of aggravated assault. The trial court denied appellant's request. The jury found appellant guilty as charged.

Punishment Phase

During the punishment phase of the trial, the State presented evidence of other bad acts the State alleged appellant had committed, including an assault and a capital murder. Appellant introduced evidence that he had used the drug Xanax from his youth up to the point of appellant's incarceration. Appellant presented an expert witness who testified about the effects of Xanax use. Over appellant's

objection, the trial court included in the punishment-phase jury charge an instruction that voluntary intoxication is not a defense to the commission of a crime.

During the State's closing argument in the punishment phase, the prosecutor referred to appellant's reaction to testimony from the sister of the man killed in the capital murder allegedly committed by appellant. The trial court overruled appellant's objection.

The jury assessed punishment at confinement for life.

II. ISSUES AND ANALYSIS

Appellant raises three issues on appeal, challenging his conviction in the first issue (asserting jury-charge error) and his punishment in the second and third issues (asserting error in the punishment-phase jury charge and closing arguments). Because the second issue divides the panel three ways, we begin with it.

A. Punishment-Phase Jury Instruction

Appellant argues in his second issue on appeal that the trial court erred in charging the jury that voluntary intoxication is not a defense to the commission of a crime.

During the punishment phase of trial, the State introduced evidence that appellant had committed an extraneous offense, capital murder, the day before the aggravated robbery. The record contains evidence that appellant was addicted to Xanax, and intoxicated by Xanax, at the time of the charged aggravated-robbery offense and the time of the alleged capital murder. Appellant's sole punishment witness, Dr. Terry Rustin, testified that Xanax can cause aggressive or criminal behavior that an individual otherwise would not exhibit because the drug reduces inhibitions and causes people not to worry about the consequences of their actions.

The State asked the trial court to charge the jury that voluntary intoxication is not a defense to the charged aggravated-robbery offense, for which appellant already had been convicted. Appellant objected on the grounds that the instruction was not appropriate in the punishment phase and would cause the jury to ignore Dr. Rustin's testimony. The trial court overruled appellant's objection. But, the trial court told the jury, by written instruction, that the jury could consider all the facts shown by the evidence in assessing appellant's punishment.

In the charge, the trial court instructed the jury that "voluntary intoxication does not constitute a defense to the commission of a crime. 'Intoxication' means disturbance of mental or physical capacity resulting from the introduction of any substance into the body." After giving the voluntary-intoxication instruction, the trial court instructed the jury that "the mere presence of the defendant at the scene of the offense is not sufficient to conclude the accused committed the offense beyond a reasonable doubt." Following that instruction, the trial court told the jury that it could consider evidence of an extraneous crime or bad act in assessing punishment even if the defendant had not yet been charged with or finally convicted of the crime or act only if the State had shown beyond a reasonable doubt that the defendant committed the extraneous crime or bad act or that it is one for which the defendant could be held criminally responsible. Towards the end of the charge, the trial court instructed the jury that "in fixing the defendant's punishment . . . you may take into consideration all the facts shown by the evidence admitted before you in the full trial of this case."

In reviewing a complaint of jury-charge error, we first determine whether error occurred, and, if we find error, then we evaluate whether the error caused sufficient harm to require reversal. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

The jury charge correctly stated that voluntary intoxication is not a defense to the commission of a crime. *See* Tex. Penal Code § 8.04(a) (West, Westlaw through 2015 R.S.). Even so, evidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which the actor is being tried. *See id*. § 8.04(b); *Martinez v. State*, 17 S.W.3d 677, 691 n.14 (Tex. Crim. App. 2000). Appellant did not argue that at the time of the charged offense he was temporarily insane because of intoxication, that he did not know his conduct was wrong, or that he was incapable of conforming his conduct to the law. Nor did appellant ask the trial court to give an instruction that the jury consider temporary insanity caused by intoxication as mitigating evidence, and appellant did not argue below or on appeal that he should have received such an instruction.

The challenged statement—that voluntary intoxication is not a defense to the commission of a crime—is a correct statement of the law. *See* Tex. Penal Code §8.04(a). But, it did no work in the punishment-phase charge.

Under *Haley v. State*, in the punishment phase, the jury does not determine beyond a reasonable doubt whether the defendant is guilty of any criminal offense, nor does the jury determine whether any alleged extraneous crime or bad act constitutes a criminal offense. *See Haley v. State*, 173 S.W.3d. 510, 514–15 (Tex. Crim. App. 2005). Though the voluntary-intoxication instruction was unnecessary and out of place, it accurately stated the law and did not tell the jury to disregard evidence of voluntary intoxication in assessing punishment. *See* Tex. Penal Code § 8.04(a); *Haley*, 173 S.W.3d. at 514–15. If the jury believed it could not consider the voluntary-intoxication evidence in mitigation of appellant's punishment, as the dissenting justice concludes, then that belief could not have been based on the words in the charge.

The charge plainly stated the jury could consider all the evidence. An instruction that is "clear and unambiguous on its face"[2] does not amount to error. The dissenting justice asserts that the Court of Criminal Appeals's opinion in *Taylor v. State* compels the conclusion that an instruction under Penal Code section 8.04(a) does not belong in a punishment-phase charge.[3] The *Taylor* court concluded that the trial court did not err in including a section 8.04(a) instruction in the guilt/innocence charge, and the high court noted that this subsection is directed to the guilt/innocence phase. *See Taylor v. State*, 885 S.W.2d 154, 156–58 (Tex. Crim. App. 1994). But, the *Taylor* court did not say that including a section 8.04(a) instruction in a punishment-phase charge automatically amounts to error. *See id*. The *Taylor* precedent does not mandate a finding of charge error in today's case.

Not every out-of-place instruction infuses the charge with error. In *Gomez*, this court held that the trial court did not abuse its discretion in refusing to give a self-defense instruction in the punishment phase. *See Wesbrook v. State*, 29 S.W.3d 103, 122 (Tex. Crim. App. 2000); *Gomez v. State*, 380 S.W.3d 830, 837–38 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). Yet, this holding does not mean that a trial court per se errs by including a section 8.04(a) instruction in the punishment-phase charge. *See Gomez*, 380 S.W.3d at 837–38. Sometimes trial courts include unnecessary instructions in the jury charge. The surplus may render the charge imperfect without creating error.

To determine if the misplaced instruction amounts to error, we must look at the reasons it would be wrong to include the instruction in the charge. If those reasons are not implicated, then the inclusion of the out-of-place instruction cannot

[2] *See* post at 6 (Jewell, J., concurring).

[3] *See* post at 2–3 (Christopher, J., dissenting).

fairly be characterized as error. In today's case appellant points to jury confusion over the ability to consider mitigating evidence as the reason the trial court erred in including the challenged instruction. In this context, jury confusion would equate to charge error. And, conversely, if the plain language of the challenged instruction could not have confused a reasonable jury, then the instruction, though misplaced, would not amount to error.

Through the charge, the trial court told the jury that, in assessing appellant's punishment, the jury could consider all of the evidence. *See Casey v. State*, 215 S.W.3d 870, 886–87 (Tex. Crim. App. 2007); *Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994). And, the evidence included Dr. Rustin's testimony about appellant's voluntary intoxication on Xanax. Because nothing in the charge contradicted the statement that the jury could consider this evidence, a reasonable jury could not have believed, as appellant urges, that the jury had to disregard Dr. Rustin's testimony. The plain wording of the punishment-phase charge belies appellant's argument that the voluntary-intoxication instruction led the jury to believe it could not consider appellant's voluntary intoxication in fixing appellant's punishment. *See Casey*, 215 S.W.3d at 886–87; *Riddle*, 888 S.W.2d at 8. To conclude otherwise, this court would have to say that a charge that tells the jury it can consider all evidence means the jury could not consider some evidence.

Jurors, like everyone else, are trapped in the human condition. All are subject to "potential confusion" all the time. But, we must not presume that jurors will be misled by clear and unambiguous instructions. Instead, we should credit the jury with understanding plain English and with being able to distinguish between voluntary intoxication as a defense to a crime and voluntary intoxication as mitigating circumstances for punishment. That an instruction is meant for the guilt/innocence phase of trial rather than the punishment phase does not mean it is

error per se to include it in the punishment-phase charge. When the challenged instruction could not mislead the jury, its inclusion is not cognizable error.

Appellant's second issue is overruled.

B. Denial of Jury Instruction on Lesser-Included Offense

The Texas Code of Criminal Procedure provides, "[i]n a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." Tex. Code Crim. Proc. art. 37.08 (West, Westlaw through 2015 R.S.). We determine whether a defendant is entitled to a lesser-included offense instruction by conducting a two-step analysis. *Sweed v. State*, 351 S.W.3d 63, 67 (Tex. Crim. App. 2011). In the first step, we decide whether the purported lesser-included offense falls within the proof necessary to establish the offense charged. *Id.* at 68. To make this determination, we compare the statutory elements and any descriptive averments in the indictment for the greater offense with the statutory elements of the lesser offense. *Id.* Because a defendant cannot be held to answer a charge not contained in the indictment brought against him, the evidence produced at trial does not determine the lesser-included offense.

The State indicted appellant for aggravated robbery with a deadly weapon, alleging that while in the course of committing theft of property owned by the complainant, and with intent to obtain and maintain control of the property, appellant intentionally and knowingly threatened the complainant and placed him in fear of imminent bodily injury and death while exhibiting a deadly weapon, namely, a firearm. *See* Tex. Penal Code Ann. §§ 29.02, 29.03 (West, Westlaw through 2015 R.S.). A person commits aggravated assault if the individual commits assault by intentionally or knowingly threatening another with imminent

bodily injury, and the individual uses or exhibits a deadly weapon during the commission of the assault. *See* Tex. Penal Code Ann. §§ 22.01(a), 22.02(a) (West, Westlaw through 2015 R.S.). The proof necessary for the elements of aggravated assault with a deadly weapon is encompassed within the proof necessary to establish the aggravated robbery charged in the indictment. *See Zapata v. State*, 449 S.W.3d 220, 225 (Tex. App.—San Antonio 2014, no pet.).

The second step of the lesser-included-offense analysis is to determine if there is some evidence from which a rational jury could acquit the defendant of the greater offense while convicting the defendant of the lesser-included offense. *Sweed*, 351 S.W.3d at 68. The evidence must establish the lesser-included offense as a "valid rational alternative to the charged offense." *Id.* (quoting *Segundo v. State*, 270 S.W.3d 79, 90–91 (Tex. Crim. App. 2008). We review all of the evidence presented at trial. *Id*. Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser-included-offense charge. *Id.* Although a scintilla of evidence is a low threshold, "it is not enough that the jury may disbelieve some crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Id.* (quoting *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997)). This standard may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations. *Id.*

In his first issue, appellant argues that because the complainant testified that the complainant gave appellant his wallet before appellant could say anything, and because the complainant's wallet was found in the grass near the site of the incident, rather than on appellant's person, the evidence was subject to the

interpretation that appellant intended to commit the lesser-included offense of aggravated assault rather than aggravated robbery. Appellant acknowledges that he made a phone call from jail in which he stated that he intended to go inside the complainant's home and take things, but appellant argues that the phone call is unclear.

The complainant testified at trial that he handed his wallet to appellant, but then he and appellant began struggling over a gun. Appellant eventually ran away from the scene. This testimony suggests that appellant dropped the complainant's wallet during the ensuing struggle, not that appellant was uninterested in the complainant's wallet. This conclusion is bolstered by appellant's statements made after his incarceration.

Appellant made many phone calls in which he discussed the incident. In all of these phone calls, appellant described the incident as an aggravated robbery. In several phone calls, appellant referred to the complainant as either the "dude who was getting aggravatedly [sic] robbed" or the "[expletive] I aggravatedly [sic] robbed." In one phone call, appellant stated that he intended to put the complainant back in the car so he could go inside the house and see what was there. In a phone call between appellant and his father, appellant commented that he did not have anyone to blame "except being broke and stupid." In a phone conversation between appellant and his mother, appellant's mother stated that she did not understand why appellant committed the crime, noting that if he was trying to get her attention, appellant had her attention a long time ago. Appellant responded, "it's all about the money." Appellant explained that he was late on his rent, did not have a phone, and could not afford to pay for electricity to run the lights. In a phone call with a friend, the friend told appellant that appellant should have stayed home, but he got greedy. In yet another phone call, appellant stated

that if his accomplice had not left in the middle of the crime, appellant would have the complainant's phone and the complainant's cash and property, but, instead, because the accomplice left, and appellant was unable to complete the crime as intended, appellant was in trouble.

The record also reveals that appellant did not know the complainant and there was no evidence of any motive to assault the complainant other than to take the complainant's property. The evidence presented to the jury was subject to only one interpretation: appellant sought to rob the complainant. Accordingly, the trial court did not err in failing to charge the jury on the lesser-included offense of aggravated assault. *See Stewart v. State*, 995 S.W.2d 251, 254 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding trial court did not err in refusing instruction on lesser-included offense when testimony showed defendant was guilty of charged offense or no offense at all). We overrule appellant's first issue.

C. Punishment-Phase Jury Argument

In his third issue, appellant asserts that the prosecutor made an improper comment on the demeanor of a non-testifying witness during closing argument in the punishment phase of trial and that this utterance amounted to a comment on appellant's failure to testify. During the punishment phase of trial, the State introduced evidence that the day before the charged offense appellant killed a man by shooting him with a gun at close range. During closing argument the prosecutor stated:

> You also heard about the capital murder of [another individual], which was committed on February 12th of 2012. You heard that that was a contact wound to the side of the head. Imagine what the end of [that individual's] life was like. You heard his sister testify about the funeral service and having to cover up that wound in the head, and you heard about his children. And I hope that during that testimony you got an opportunity to see how the defendant reacted to that.

> Nothing, absolutely nothing; never a sign of remorse, never; never a sign of remorse. That is just plain wrong. That is evil, that is something you don't want in our community.

Appellant objected that the prosecutor's statements constituted an improper argument, outside the record, about how appellant looked during testimony. The trial court overruled appellant's objection. Presuming for the sake of argument that the trial court erred in overruling appellant's objection, the issue provides no basis for relief on appeal.

Because we presume for purposes of this analysis that the prosecutor's comment violated appellant's privilege against self-incrimination, we also presume the error was of a constitutional magnitude and conduct our assessment of harm using the standard set forth in Texas Rule of Appellate Procedure 44.2(a). *See Snowden v. State*, 353 S.W.3d 815, 818 (Tex. Crim. App. 2011); *Crayton v. State*, 463 S.W.3d 531, 536 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Under this presumption, we must reverse the judgment unless we conclude beyond a reasonable doubt that the presumed error did not contribute to the defendant's conviction or punishment. *See* Tex. R. App. P. 44.2(a); *Snowden*, 353 S.W.3d at 818; *Crayton*, 463 S.W.3d at 536.

As a reviewing court, we must calculate as nearly as possible the probable impact of the error on the jury in light of the record as a whole. *Wall v. State*, 184 S.W.3d 730, 746 (Tex. Crim. App. 2006). We consider factors such as the nature of the error, whether the State emphasized the error, the probable implications of the error, and the weight the jury likely would have assigned to the error in the course of its deliberations. *See Snowden*, 353 S.W.3d at 822, *Crayton,* 463 S.W.3d at 536. These factors are not exclusive; other considerations also may inform the harm analysis. *See Thompson v. State*, 426 S.W.3d 206, 211 (Tex. App.—Houston

[1st Dist.] 2012, pet. ref'd). If the reviewing court finds a reasonable likelihood that the error materially affected the jury's deliberations, the trial court's error is not harmless beyond a reasonable doubt. *See Neal v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008).

1. Nature and emphasis of the presumed error

The presumed error violates the constitutional right against self-incrimination. The trial court overruled appellant's objection to the statement, thereby conveying to the jury that it could consider the prosecutor's statement. This factor weighs in favor of finding the presumed error to be harmful. *See Whitehead v. State*, 437 S.W.3d 547, 553 (Tex. App.—Texarkana 2014, pet. ref'd). Next, we examine the extent, if any, to which the State emphasized the error. The State did not refer to appellant's demeanor after the disputed comment, although the prosecutor did state again, after arguing that the evidence showed appellant had committed capital murder, that appellant had no remorse for his action. The primary emphasis of the prosecutor's closing argument was appellant's lengthy history of violent acts, before and after his incarceration, and appellant's violence at times when he was not using Xanax. *See Grant v. State*, 218 S.W.3d 225, 234 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). The prosecutor's commentary about appellant's lack of remorse was brief and was not stressed during the closing argument. *See Crayton*, 463 S.W.3d at 536.

2. Probable implications of error and weight

Under the third and fourth factors discussed in *Snowden*, we are to consider the probable implication of the presumed error and the weight the jury likely would have placed upon it. *See Snowden*, 353 S.W.3d at 822. During the punishment phase of trial, the State introduced evidence that appellant had a prior record of convictions: theft in 2008 and 2010, possession of marijuana in 2009, possession

of marijuana and driving while intoxicated in 2010, and possession of marijuana and assault on a family member in 2011. In addition to these convictions, the record showed appellant had assaulted a friend and also had assaulted an inmate in jail, and appellant also killed a man by shooting him in the head at close range. The record also contained evidence that appellant had a Xanax addiction. Appellant did not have a prescription for Xanax and obtained money to purchase Xanax by selling the drug.

With respect to the assaults on appellant's friend, appellant's friend testified that appellant began punching the friend in the face because appellant believed the friend was trying to get the attention of appellant's girlfriend. The friend testified that he had injuries all over his face. Later that night, the friend got into the friend's vehicle and appellant appeared, attempting to fight the friend again. Appellant broke the friend's windshield. The friend was able to put the car in reverse, leave, and call the police. On another occasion, the friend was walking to a neighbor's house and appellant attempted to fight the friend again, but the friend was able to run away.

The State also presented evidence from Deputy Augustine Mendoza, a detention officer monitoring a cell block where appellant was confined. Appellant asked Deputy Mendoza if appellant could leave the cell block and go to a place where he could be by himself. Deputy Mendoza told appellant the answer was "no." Appellant got Deputy Mendoza's attention, waving his hands over his head, and then walked over to a steel table where another inmate was eating food and struck the inmate in the head from behind with a closed first. The inmate's head hit the steel table, and when the inmate attempted to pick up his head, appellant continued hitting the inmate with a closed fist until the inmate was unconscious. The inmate required treatment at a hospital. Deputy Mendoza testified that the

inmate and appellant had no history of controversy or aggression before this incident.

Finally, the State introduced evidence that the day before the charged aggravated-robbery offense, appellant shot a man in the head. The evidence showed that the body of an Asian man, Hong Le, was found in the man's car the day before the charged offense. Police did not find a wallet, cellphone, car keys, or Le's clothing. Dr. Stephen Wilson testified that Le sustained six gunshot wounds and those gunshots were the cause of death. Dr. Wilson found soot on Le's head, indicating that a firearm was placed against his skin when the gun was discharged. Officer April Palatino processed the vehicle, taking DNA swabs and tape lifts. Officer Glover took fingerprints from appellant while appellant was incarcerated. Kirk Miller, a scientist in the Houston Police Department Forensic Science Center, determined that latent fingerprints found on the vehicle in which Le's dead body was discovered matched appellant's fingerprints.

One of appellant's neighbors, a woman who often fed appellant leftover food, testified that appellant confessed to her that he had killed someone. The neighbor testified that she was headed home from church on a Sunday and ran into appellant who told her he had done something stupid. The neighbor asked what appellant had done, and appellant told her he killed somebody. The neighbor testified that she asked him why he did it and he started to tell her what happened. Appellant told the neighbor he had killed an Asian man.

During the guilt/innocence phase of trial, the State introduced evidence of many phone calls appellant made while incarcerated. In one phone call, appellant mentioned that "they got the thing that was used," worrying that the police would "put two and two together." Appellant also stated that he was worried about what else the police "might have on [him]." In another phone call, the speaker said,

"You got away lucky the first time." In yet another phone call, appellant noted that he had been charged with capital murder, stating "if I get away with this, it's gonna be crazy."

Le's sister testified during the punishment phase. She stated that Le had a ten-year-old daughter and his girlfriend had a thirteen-year-old daughter that Le treated as his own. Le's sister described the things she loved about her brother and described her mother's experience going to the morgue to identify her brother's body. Le's mother was not allowed to see her son's body; they simply had her sign the waiver to transfer his body to the funeral home. Le explained that her brother had so many injuries to his head that the funeral home suggested a closed-casket funeral, but they opted to place a towel over her brother's forehead so that people still could view the face.

Appellant called Dr. Terry Rustin as his sole witness during the punishment phase. Dr. Rustin testified that appellant was addicted to Xanax, a drug that lowers one's inhibitions and can cause one to commit crimes one otherwise would not commit because one does not have an appreciation of the consequences of one's actions.

Appellant's record of violent conduct, as well as the statements appellant made in phone calls, showed appellant's focus was on his future, not the effects of any crimes he committed. Appellant showed his disregard for others after Le's killing by robbing the complainant the next morning and attempting to shoot the complainant during the struggle connected with the robbery. Appellant did not show any heightened concern for others when he beat another inmate unconscious. The jury already had access to this information, which provided the jury with insight into appellant's mentality and values. The prosecutor's comment was brief and its impact minimal, particularly in light of the extensive evidence before the

jury. *See Crayton*, 463 S.W.3d at 536. Based upon the record, we conclude beyond a reasonable doubt that the presumed error did not contribute to the defendant's conviction or punishment. *See* Tex. R. App. P. 44.2(a); *Snowden,* 353 S.W.3d at 825; *Crayton*, 463 S.W.3d at 536; *Grant*, 218 S.W.3d at 234; *Wall v. State*, 286 S.W.3d 372, 376 (Tex. App.—Corpus Christi 2008, pet. ref'd) (holding constitutional violation during closing argument of punishment phase harmless under *Harris* factors, which were revised in *Snowden*). Accordingly, we overrule appellant's third issue. *See id.*

III. CONCLUSION

Two justices agree that appellant's second issue challenging the trial court's voluntary-intoxication jury instruction should be overruled; but, because these justices agree only on the judgment and not on the reasons for this decision, section II. A. is a plurality opinion. A majority of the court finds in section II. B. that the trial court did not err in failing to charge the jury on the lesser-included offense of aggravated assault during the guilt/innocence phase of the trial. Presuming for the sake of the argument that the trial court erred in overruling appellant's objection to the prosecutor's closing-argument comments about appellant's in-court demeanor, a majority of the court, in section II. C., concludes beyond a reasonable doubt that those comments did not affect appellant's conviction or punishment, and so any error was harmless. Having overruled appellant's issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Christopher and Jewell. (Jewell, J., concurring) (Christopher, J., dissenting)
Publish — TEX. R. APP. P. 47.2(b).