Affirmed and Memorandum Opinion filed September 28, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00396-CR

ROBERT JARRAD CLARK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 21st District Court
Washington County, Texas
Trial Court Cause No. 17311

M E M O R A N D U M O P I N I O N

A jury convicted appellant Robert Jarrad Clark of aggravated robbery and assessed punishment at forty-five years' confinement and a fine of $6,000. Appellant challenges his conviction in six issues, contending that (1) the evidence is legally insufficient, (2) the trial court erred by denying a requested lesser-included instruction for theft, (3) the trial court erred by striking a potential juror for cause, (4) the trial court erred by overruling an objection to the State's closing argument regarding appellant's failure to testify, (5) appellant was denied effective assistance

of counsel because trial counsel failed to publish pivotal evidence to the jury, and (6) appellant was denied effective assistance of counsel because trial counsel failed to properly impeach the complainant with a written statement.

We affirm.

I. SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant contends that the evidence is legally insufficient to support the jury's verdict of guilt. Appellant contends that the eyewitness testimony of the complainant and his wife "lacked sufficient reliability to establish beyond a reasonable doubt that Appellant was the assailant." Thus, appellant challenges the element of identity. *See Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984) (noting that the State must prove that the person charged was the person who committed the offense or was a participant in its commission).

A. Standard of Review and Legal Principles

"In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014) (quotation omitted). We defer to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). This legal sufficiency standard applies equally to circumstantial and direct evidence. *Id.*

"Unquestionably, the State must prove beyond a reasonable doubt that the accused is the person who committed the crime charged." *Smith v. State*, 56 S.W.3d

739, 744 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Identity may be proven by circumstantial or direct evidence. *Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986); *see also Smith*, 56 S.W.3d at 744 ("Identity may be proved through direct or circumstantial evidence, and through inferences."). When identity is at issue, we must consider the combined and cumulative force of all the evidence. *See Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012). When, as here, the jury returns a general verdict of guilt after being charged on both primary-actor and party-liability theories, we will affirm if the evidence is sufficient to support a guilty verdict under either theory. *See Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992).

B. The Evidence

The eighty-four-year-old complainant testified that he went to several banks and then returned to his home in Brenham. While the complainant was still in his driveway, a silver Ford pickup truck with tinted windows stopped at the end of the complainant's driveway. The complainant was carrying a deposit receipt from one bank, a withdrawal receipt from another bank, a check written out to another person, and two envelopes containing a total of $5,000 in cash.

At trial, the complainant identified appellant as one of two black men who got out of the truck and robbed the complainant. The complainant testified that appellant grabbed the complainant's arms and knocked the complainant down, causing pain and bruising to the complainant. The robbers took the items described above, got back in the truck, and drove in the direction of U.S. Highway 290.

The complainant testified that he could not remember what appellant was wearing at the time of the attack. The complainant did not recall whether appellant had tattoos on his face or arms. But, the complainant recognized appellant's face and facial hair. The complainant was "100 percent positive" about appellant's face.

The complainant's wife was in the front yard during the robbery. At trial, she identified appellant as the man who attacked her husband. She was "positive" appellant was the attacker. She got a good look at him. She testified that appellant had a beard and was wearing a red shirt and blue jeans. She did not notice any tattoos on his face or arms.

Neither the complainant nor his wife participated in a pretrial lineup to identify the robbers. They did, however, see appellant's picture in the newspaper after he was arrested.

Immediately after the robbery, the complainant's wife dialed 911. Less than ten minutes later, City of Brenham Police Officer Tommy Kurie stopped a silver Ford pickup truck traveling eastbound on U.S. Highway 290 toward Houston.[1] The license plate of the truck was similar to a partial plate number that the complainant's wife provided to police. Two black men were in the truck. Appellant was the passenger. Neither man had a valid driver's license. Appellant was wearing a black shirt and black pants, and he had "a lot" of tattoos on his arms.

Officer Kurie arrested the driver for driving without a valid license. Kurie performed an inventory search of the truck. He found the items that had been stolen from the complainant: the deposit receipt, the withdrawal receipt, the check, bank envelopes, and $5,000 in cash. Kurie found one of the receipts on the passenger's side floorboard.

The trial court also admitted evidence that appellant had participated in another bank jugging in 2013 along with two other people. Appellant pleaded guilty

[1] Officer Kurie was asked to watch for the truck because he was on the eastbound side of U.S. Highway 290 and this case involved "jugging"—where robbers surveil bank customers and follow them to another location to commit a burglary or robbery. A City of Brenham police officer had received information "out of Harris County in regards to the bank jugging," so they believed the robbers might travel past Kurie on U.S. Highway 290 toward Houston.

to burglary of a motor vehicle for the 2013 case. Appellant's role in that case was to get the money. The driver of the getaway vehicle in the 2013 case was also the driver of the pickup in this case. The trial court admitted a picture of the third man from the 2013 case as Defense Exhibit 5. That man had facial hair like appellant, but lacked tattoos unlike appellant.

C. Sufficient Evidence of Identity

The complainant and his wife identified appellant as one of the robbers. The sufficiency analysis could end here. *See, e.g.*, *Aviles-Barroso v. State*, 477 S.W.3d 363, 396 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) ("The testimony of a single eyewitness alone can be sufficient to support a conviction."). Appellant attacks the eyewitness identifications, noting for example that the witnesses did not notice appellant's tattoos, they described appellant as wearing clothes dissimilar from what he was wearing when he was arrested, and they saw a picture of appellant in the newspaper before making their in-court identifications. These factors were for the jury to consider when weighing the witnesses' credibility. *See, e.g.*, *Bradley v. State*, 359 S.W.3d 912, 917 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) ("The jury alone decides whether to believe eyewitness testimony, and the jury alone resolves any conflicts or inconsistencies in the evidence.").

In addition to the eyewitness identifications, appellant's unexplained possession of stolen items in a truck matching the getaway vehicle—close in time and location to the crime scene—would enable the jury to infer that appellant was one of the robbers. *See Batiste v. State*, 464 S.W.2d 149, 151 (Tex. Crim. App. 1971) ("Under the circumstances of this case, where a robbery has occurred at a location near the arrest and very close to the time of the arrest, and where the victim is unable to identify the robber, appellant's unexplained possession of the victim's eyeglasses at the time of his arrest is sufficient to sustain his conviction for robbery by

assault."); *see also Girard v. State*, 631 S.W.2d 162, 163–64 (Tex. Crim. App. [Panel Op.] 1982) (sufficient evidence although the defendant wore a mask and could not be identified by witnesses; about forty-five minutes after the robbery, the defendant had possessed one of several stolen items); *Louis v. State*, 159 S.W.3d 236, 239, 243–45, 247 (Tex. App.—Beaumont 2005, pet. ref'd) (sufficient evidence of identity for robbery despite the lack of eyewitness identifications or discovery of any instrumentalities of the crime—jumpsuits, masks, gloves, or guns—in part because the jury could infer guilt from the defendant's possession of stolen items a short time after the robbery); *cf. Poncio v. State*, 185 S.W.3d 904, 905 (Tex. Crim. App. 2006) ("The rule in this and most, if not all, jurisdictions seems well settled that, in cases like this, a defendant's unexplained possession of property recently stolen in a burglary permits an inference that the defendant is the one who committed the burglary.").

The evidence is legally sufficient to prove appellant's guilt beyond a reasonable doubt. His first issue is overruled.

II. LESSER-INCLUDED INSTRUCTION

In his second issue, appellant contends that the trial court denied his request for a lesser-included instruction for the offense of theft. Appellant alleges two general theories to support the inclusion of the instruction: (1) appellant was "not the assailant, even if he was a party to a theft," and (2) the complainant "suffered no injury." The State contends that appellant has not satisfied the second prong of the *Rousseau* test. *See Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). We agree with the State.[2]

[2] Based on the State's arguments, we assume without deciding that the first prong of the *Rousseau* test has been satisfied. *See Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011) (assuming without deciding that the first part of the test was satisfied—that theft was included within the proof necessary to establish the charged offense of aggravated robbery). The State also

A. Legal Principles for Lesser-Included Instructions

Under the second prong of the *Rousseau* test, "a defendant is entitled to an instruction on a lesser-included offense when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense." *Bullock v. State*, 509 S.W.3d 921, 925 (Tex. Crim. App. 2016); *see also Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). Anything more than a scintilla of evidence entitles a defendant to a lesser-included instruction, and we must consider the entire record. *Bullock*, 509 S.W.3d at 925. The record must show that the lesser-included offense is a valid, rational alternative to the charged offense. *Id.*

"Although this threshold showing is low, it is not enough that the jury may disbelieve 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.* The test is satisfied "if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations." *Id.* (quoting *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011)).

When considering if a lesser-included offense is a valid, rational alternative to the charged offense, we must compare the statutory requirements between the greater offense (aggravated robbery) and the lesser offense (theft) to determine whether evidence exists to support a conviction for the lesser offense but not the greater offense. *See id.* As the aggravated robbery was alleged in this case, the State was required to prove that (1) "in the course of committing theft"; (2) "with intent to obtain or maintain control of the property"; (3) appellant "intentionally,

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contends that appellant failed to preserve error and that the issue is multifarious. We assume without deciding that appellant preserved error and that the issue is not multifarious.

knowingly, or recklessly cause[d] bodily injury to" the complainant; and (4) the complainant was sixty-five years of age or older. *See* Tex. Penal Code §§ 29.03(a)(3)(A), 29.02(a)(1). To prove theft, the State was required to prove that appellant "unlawfully appropriate[d] property with intent to deprive the owner of property." *Id.* § 31.03(a). An appropriation is unlawful if (1) the appropriation is "without the owner's effective consent"; or (2) "the property is stolen and the actor appropriates the property knowing it was stolen by another." *Id.* § 31.03(b)(1)–(2).

B. "Not the Assailant" Theft

Appellant contends that a rational jury could conclude that appellant "had participated as a party to a planned theft and/or participated after the fact in possessing the stolen property." Appellant contends that this conclusion is rational because the eyewitness identification was "questionable," yet there was clear evidence that appellant was present in the pickup truck with the stolen property shortly after the robbery. Appellant cites no analogous cases, and we find none.

Initially, we reject appellant's "party to a planned theft" theory because if appellant was the second man who got out of the truck and assisted the first man in robbing the complainant, the only rational conclusion would be that appellant participated in the aggravated robbery as a party to the offense.[3] Under this theory, there is no evidence that refutes or negates any element of the greater offense. *See Bullock*, 509 S.W.3d at 925.

Regarding the "possessing stolen property" theory, there is no evidence directly germane to the lesser-included offense—in particular, that appellant was not a party to the robbery but later appropriated the stolen items after the robbery, knowing the items were stolen. Appellant was not entitled to a lesser-included

[3] The jury charge authorized appellant's conviction as a party.

instruction on theft based on his claim that the eyewitness identifications were "questionable." It is not enough that the jury may have disbelieved crucial evidence of appellant's participation in the robbery. *See Bullock*, 509 S.W.3d at 925.

C. "No Bodily Injury" Theft

Appellant contends that a rational jury could believe that the complainant did not suffer bodily injury as a result of the incident. The complainant testified that his knee was skinned when he fell, that he suffered bruising on his arms, and that he suffered pain in his knee as a result of the robbery. Pictures of the bruising were admitted as evidence.

Evidence of a cut, bruise, or pain is sufficient to show bodily injury. *See* Tex. Penal Code § 1.07(a)(8) ("'Bodily injury' means physical pain, illness, or any impairment of physical condition."); *Arzaga v. State*, 86 S.W.3d 767, 778 (Tex. App.—El Paso 2002, no pet.) (holding that the jury may infer pain as a result of injuries and that the "existence of a cut, bruise, or scrape on the body is sufficient evidence of physical pain"); *Goodin v. State*, 750 S.W.2d 857, 859 (Tex. App.—Corpus Christi 1988, pet. denied) (sufficient evidence although the complainant did not testify about physical pain because there was a reasonable inference that "bruises and muscle strain caused him 'physical pain'"). And evidence of pain manifesting after the robbery may be sufficient to show bodily injury. *See Henry v. State*, 800 S.W.2d 612, 614–15 (Tex. App.—Houston [14th Dist.] 1990, no pet.) (sufficient evidence of bodily injury when the complainant testified that she did not feel pain at the time of the struggle, but she felt pain the next day and had a bruise).

Appellant notes that a picture of the complainant after the incident does not show a tear in the complainant's pants, which undermined the complainant's wife's testimony that the pants were ripped. Appellant also points to the complainant's testimony that the complainant did not feel pain "at the time" of the robbery or "right

away," and that the complainant declined medical treatment. But, appellant points to no evidence that would refute or negate the complainant's testimony that he suffered bruises, skinned his knee, and felt pain in his knee as a result of the robbery. Appellant offers mere speculation, suggesting (1) "it is well within the zone of reasonableness that the skin of an 84-year old man may have some imperfections as a regular occurrence unassociated with any particular trauma"; (2) it is "possible that [the complainant] was misremembering the incident after a year"; and (3) "it would not be unreasonable to surmise that [the complainant] may be mistakenly attributing a later unrelated pain to the incident." There is no evidence, for example, that the complainant suffered the bruising and skinned knee as a result of anything other than the robbery, or that the complainant did not feel pain as a result of the robbery. It is not enough that the jury may have disbelieved the complainant's testimony about bodily injury. *See Bullock*, 509 S.W.3d at 925.

Appellant's second issue is overruled.

III. STRIKING POTENTIAL JUROR FOR CAUSE

In his third issue, appellant contends the trial court erred by improperly excusing a qualified potential juror for cause. For purposes of this appeal, we assume without deciding that the trial court erroneously struck the potential juror for cause. But, appellant was not harmed.

The State sought the exclusion of a potential juror because the juror's nephew was being prosecuted by the State for capital murder and allegedly was awaiting trial in the same jail as appellant. The prospective juror was questioned about the matter and said the issue would not affect him at all. The State expressed concern to the trial court that "some amount of communication would be passed between those people, get back to" the prospective juror, which would raise the "possibility of jury misconduct." The trial court struck the juror for cause.

In assessing harm, we must first determine whether the error was constitutional or non-constitutional. *See Gray v. State*, 233 S.W.3d 295, 298 (Tex. Crim. App. 2007); *see also* Tex. R. App. P. 44.2. The Sixth Amendment guarantees a defendant the right to a speedy and public trial by an impartial jury. *Gray*, 233 S.W.3d at 298. The right may be implicated during voir dire if "the jury, as finally constituted, was biased or prejudiced; or [the defendant] was deprived of a trial by an impartial jury." *Id.* (quoting *Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998)). But, the general Sixth Amendment right to an impartial jury is not violated merely by "rejection of allegedly unqualified persons for insufficient cause." *Id.* (quoting *Jones*, 982 S.W.2d at 391).

Appellant does not contend that he was deprived of an impartial jury, or that any other constitutional provision was violated. *See Jones*, 982 S.W.2d at 391 (noting that exclusion based on race, sex, or ethnicity, or because the juror opposes the death penalty, may violate a constitutional provision). When the error is merely the mistaken application of Article 35.16 of the Code of Criminal Procedure, concerning challenges for cause, we review the error for non-constitutional harm. *See id.* at 391–92.

We must disregard non-constitutional error that does not affect substantial rights. *See* Tex. R. App. P. 44.2(b). A defendant has a substantial right for the jurors who serve on the jury to be qualified. *Gray*, 233 S.W.3d at 298. "The defendant's rights go to those who serve, not to those who are excused." *Id.* at 299 (quotation omitted). Thus, a non-constitutional error related to a potential juror's improper excusal "requires reversal 'only if the record shows that the error deprived the defendant of a lawfully constituted jury.'" *Id.* (quoting *Jones*, 982 S.W.2d at 394). To obtain a reversal, an appellant "must prove that the error 'deprived [the appellant] of a lawfully constituted jury.'" *Id.* at 301. Absent a contrary showing in the record,

we presume that jurors are qualified. *Id.* at 301 (citing *Ford v. State*, 73 S.W.3d 923, 925 (Tex. Crim. App. 2002) (plurality op.)).

Appellant "has neither alleged, nor shown, any evidence in the record demonstrating that the trial judge's error deprived him of a jury comprised of qualified individuals." *Id.* Accordingly, we presume that the jurors were qualified. *See id.* Whether erroneous or not, the excusal of a potential juror in this case did not affect appellant's substantial rights because nothing in the record indicates that appellant was denied a lawfully constituted jury. *See id.*

Appellant's third issue is overruled.

IV. COMMENT ON FAILURE TO TESTIFY

In his fourth issue, appellant contends that the trial court erred by overruling his objection to the State's comment during closing argument about appellant's failure to testify "in violation of his rights under the Fifth Amendment to the United States Constitution."

A. The Comment and Objection

During trial, appellant presented a theory that a man other than appellant, Devon Hailey, had been a robber instead of appellant. There was evidence that Hailey had participated with appellant in another bank jugging and had an appearance consistent with the descriptions given by the complainant and his wife. During the State's closing argument, the State commented about appellant's failure to say "it wasn't me" after being charged with aggravated robbery:

> STATE: And is it even reasonable to you that you would be facing a serious charge like aggravated robbery for more than a year and you would know who did it but not ever come forward and go, hey—
>
> DEFENSE: Objection—(inaudible)—
>
> STATE: —it wasn't me.

COURT REPORTER: I didn't hear you.

THE COURT: What's your objection?

DEFENSE: Objection, he's commenting on the—on the defendant's right to testify—(inaudible)—

COURT REPORTER: Excuse me. I didn't hear you.

THE COURT: State it again so it's on the record.

DEFENSE: It's an improper comment on the defendant's Fifth Amendment right.

THE COURT: Overruled. You may proceed.

STATE: For the first time in your jury trial, for more than a year you're going to say, hey, what about this guy?

B. Harmless Error

Appellant contends that the State commented on his post-arrest silence in violation of the Fifth Amendment. Assuming without deciding that the trial court erred, we hold that appellant was not harmed.[4]

The parties disagree about how harm should be assessed in this case. Appellant contends that harm is "presumed," while the State contends that the error did not affect appellant's substantial rights under the standard for non-constitutional error. Because the harm analysis differs depending on whether an error is

[4] The State does not violate the Fifth Amendment by impeaching the defendant with post-arrest, pre-*Miranda* silence if the defendant testifies at trial. *See Fletcher v. Weir*, 455 U.S. 606–07 (1982) (per curiam). But, the law is not settled regarding whether the State may use a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt when the defendant does not testify. *See United States v. Salinas*, 480 F.3d 750, 757 (5th Cir. 2007) (noting the split of authority among the federal courts of appeals regarding "whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination"); *People v. Tom*, 331 P.3d 303, 311–12 (Cal. 2014) (declining to resolve the "split in the federal circuits and among the state courts as to whether the Fifth Amendment bars the government from offering evidence in its case-in-chief of a defendant's postarrest, pre-*Miranda* silence").

constitutional, we turn first to that question. *See Gray*, 233 S.W.3d at 298; *see also* Tex. R. App. P. 44.2(a)–(b).

"When a prosecutorial remark impinges upon an appellant's privilege against self-incrimination under the constitution of Texas or of the United States, it is error of constitutional magnitude." *Snowden v. State*, 353 S.W.3d 815, 818 (Tex. Crim. App. 2011); *see also Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995) (noting that a comment on a defendant's post-arrest silence violates the Fifth Amendment prohibition against self-incrimination because it is akin to a comment on a failure to testify and raises an inference of guilt arising from the invocation of a constitutional right). Thus, we analyze the error as constitutional error under Rule 44.2(a) of the Texas Rules of Appellate Procedure. *See Snowden*, 353 S.W.3d at 818 (citing Tex. R. App. P. 44.2(a)); *see also Wyborny v. State*, 209 S.W.3d 285, 291–92 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (applying the Rule 44.2(a) standard when the State used the defendant's post-arrest, pre-*Miranda* silence against him at trial in violation of the Texas Constitution).

Under Rule 44.2(a), we must reverse the judgment unless we can conclude beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment. *Snowden*, 353 S.W.3d at 818 (citing Tex. R. App. P. 44.2(a)). This standard creates a rebuttable presumption of harm. *Casias v. State*, 36 S.W.3d 897, 900 (Tex. App.—Austin 2001, no pet.); *see Arnold v. State*, 786 S.W.2d 295, 311 (Tex. Crim. App. 1990) (noting that the predecessor rule, which included the same standard as Rule 44.2(a),[5] "mandates an appellate 'presumption' of harm"); *see also Lake v. State*, No. PD-0196-16, 2017 WL 514588, at *6 (Tex. Crim. App.

[5] *See Snowden*, 353 S.W.3d at 818 & n.10.

Feb. 8, 2017) (plurality op.) (reasoning that the "beyond a reasonable doubt" harm analysis "does not preclude the presumption of harm being rebutted").[6]

Under this harm analysis, we must determine the likelihood that the error genuinely corrupted the fact-finding process. *Snowden*, 353 S.W.3d at 819. A constitutional error does not contribute to a defendant's conviction, and is therefore harmless, if the verdict would have been the same absent the error. *Crayton v. State*, 463 S.W.3d 531, 536 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007)). An analysis for whether a particular constitutional error is harmless should take into account every circumstance apparent in the record that logically informs the analysis. *Snowden*, 353 S.W.3d at 822. Factors may include 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 in the course of its deliberations. *Id.* And, we will consider the presence of overwhelming evidence of guilt. *Motilla v. State*, 78 S.W.3d 352, 357 (Tex. Crim. App. 2002).

Here, the State intended to undermine appellant's defensive theory that Hailey had committed the robbery, rather than appellant, by noting that appellant never communicated to the State that Hailey was the robber. The State based this argument

[6] Appellant cites *Cabrales v. State* for the proposition that "harm is presumed" when the State comments on a defendant's post-arrest silence in violation of the Texas Constitution. *See* 932 S.W.2d 653, 660 (Tex. App.—Houston [14th Dist.] 1996, no pet.). Although this court's opinion in *Cabrales* did not include an express analysis for harm concerning this error, we do not read *Cabrales* as suggesting that such error is structural and therefore immune from a harmless error analysis. *See Mercier v. State*, 322 S.W.3d 258, 262 (Tex. Crim. App. 2010) ("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." (quoting *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997))); *see also Chapman v. California*, 386 U.S. 18, 24–26 (1967) (applying harmless error analysis when the State's and trial court's comments allowed the jury to draw inferences of guilt from the defendants' failure to testify).

on evidence that was admitted without any objection concerning the Fifth Amendment. A police officer testified that no one told him about Hailey in the year after appellant had been arrested:

> Q. Okay. Do you have—was there any evidence, any evidence whatsoever that would indicate that [Hailey] was a suspect in this case?
>
> A. No.
>
> . . . .
>
> Q. And this happened over a year ago?
>
> A. Yes, sir.
>
> Q. Okay. Is today in court with this cross examination the first time any other name has been offered to you as a possible alternate suspect?
>
> A. Yes, sir.
>
> Q. Nobody's ever come forward and said you got the wrong guys.
>
> A. No.
>
> . . . .
>
> Q. Has anyone at any time prior to today come forward and suggested to you that you need to look at Mr. Hailey as the suspect in this case?
>
> A. No, sir.

In light of this unobjected-to testimony, the State's isolated comment about appellant's failure to proffer Hailey as the robber before trial likely did not impact the jury's verdict. *See United States v. Moore*, 104 F.3d 377, 346–47 (D.C. Cir. 1997) (harmless error resulted from prosecutor's comment on the defendant's post-arrest silence because evidence of the defendant's silence was admitted without objection and the evidence of guilt was overwhelming); *cf. Sanders v. State*, 422 S.W.3d 809, 817–18 (Tex. App.—Fort Worth 2014, pet. ref'd) (harmless constitutional error from the admission of evidence in violation of the Confrontation

Clause given the unobjected-to admission of evidence establishing the same facts as the inadmissible evidence).

Moreover, evidence of appellant's guilt was substantial—two witnesses identified him, and he possessed fruits of the crime while in the getaway vehicle shortly after the robbery—and there was no evidence linking Hailey to the robbery. *See Crayton*, 463 S.W.3d at 536 (harmless error from the State's comment on the defendant's failure to tell police that he acted in self-defense because the comment was brief, there was evidence that the defendant evaded police for months after the offense, and there was overwhelming evidence that the defendant did not act in self-defense). The case boiled down to whether the jury believed the identifications made by the complainant and his wife. *See Snowden*, 353 S.W.3d at 823–25 (harmless constitutional error regarding the State's comment on the defendant's lack of present remorse—equivalent to a comment on the defendant's failure to testify—because the error was isolated, the evidence of guilt was substantial, and the case boiled down to whether the jury found the complainant's testimony credible).

After considering the entire record, we are persuaded to a level of confidence beyond a reasonable doubt that the State's comment made no contribution to the jury's determination of guilt because the error was isolated, the comment was based on unobjected-to evidence of post-arrest silence, there was substantial evidence of appellant's guilt, and no evidence linked Hailey to the robbery. *See Moore*, 104 F.3d at 346–47; *Snowden*, 353 S.W.3d at 824–25; *Crayton*, 463 S.W.3d at 536. Nor can we conceive of any harm that the error had on appellant's punishment. *See Snowden*, 353 S.W.3d at 825. Thus, any error regarding the State's comment was harmless under Rule 44.2(a).

Appellant's fourth issue is overruled.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

In his fifth and sixth issues, appellant contends that trial counsel rendered ineffective assistance by failing to (1) "publish to the jury evidence pivotal to the defense case" and (2) "properly impeach the complainant with his written statement." We hold that appellant has not shown deficient performance for the first allegation of ineffectiveness, and he has not shown prejudice for the second.

A. General Standards

To prevail on a claim of ineffective assistance, an appellant must show that (1) counsel's performance was deficient by falling below an objective standard of reasonableness and (2) counsel's deficiency caused the appellant prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687–87 (1984); *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010). An appellant must satisfy both prongs by a preponderance of the evidence. *Perez*, 310 S.W.3d at 893.

Generally, a claim of ineffective assistance may not be addressed on direct appeal because the record usually is not sufficient to conclude that counsel's performance was deficient under the first *Strickland* prong. *See Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005); *see also Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) ("A reviewing court will rarely be in a position on direct appeal to fairly evaluate the merits of an ineffective assistance claim."). "Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Salinas*, 163 S.W.3d at 740.

We must presume that trial counsel's performance was adequate unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *State v. Morales*, 253 S.W.3d 686, 696–97 (Tex. Crim. App. 2008)

(quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). To overcome the hurdle of establishing deficient performance on direct appeal, "the record must demonstrate that counsel's performance fell below an objective standard of reasonableness as a matter of law, and that no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of his or her subjective reasoning." *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

Under the second prong of the *Strickland* test, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. In the context of deficient performance during the guilt–innocence stage of trial, the question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. A "reasonable probability" of a different outcome is a "probability sufficient to undermine confidence in the outcome." *Id.* at 694. In making the prejudice determination, we must consider the totality of the evidence before the jury. *Id.* at 695.

B. No Deficient Performance for Not Publishing State's Exhibit 66

In his sixth issue, appellant contends that his trial counsel was ineffective for failing to publish State's Exhibit 66 to the jury. The trial court admitted the exhibit, but the State never published it to the jury. The exhibit included an audio recording of a City of Brenham police officer's interview of the complainant and his wife soon after the robbery. During closing arguments, trial counsel urged the jury to listen to the exhibit. Based on this argument, appellant contends, "Clearly, it was not trial strategy, sound or otherwise, for defense counsel to fail to publish the recording to the jury."

We lack trial counsel's explanation for not publishing the exhibit to the jury, and counsel's argument to the jury indicates that counsel was operating under a

reasonable trial strategy. At the conclusion of his argument, he implied that the State did not play the recording for the jury because it was harmful to the State's case:

> I'm going to leave you with one more thing and that's if you want evidence in this case, if you want the pictures, if you want the disk or the rental car agreements, anything like that, simply ask.
>
> And I'm going to tell you right now there's one exhibit that you haven't seen. There's one exhibit that's in evidence that all you have to do is ask for it. It's Exhibit 66. It's a disk. And that disk, at the 11 o'clock, 11:18 a.m. Monday morning is Detective Weiss or Corporal Weiss in his interview with [the complainant and his wife]. And from 11:18 a.m. until about 11:29 a.m. you will hear the description that the [the complainant and his wife] gave about the suspects. You will hear the officers radioing back and forth questions for Corporal Weiss to ask the [complainant and his wife]. Well, did you see any facial tattoos, Mr. and Mrs. [the complainant]? We didn't see any tattoos. Well, did you see any facial hair? Oh, no, but maybe if it was a little bit. And didn't [the complainant] sit up on this stand and say the only thing he remembered was that beard? Yet within eight to ten minutes after this robbery he's sitting there telling these officers he doesn't remember facial hair? Yet that is the one thing he told y'all convinced him that the right person was sitting in that courtroom?
>
> And after you've played that video, you have to ask yourselves do you feel comfortable in [appellant] being the person that they accuse of doing this and then ask yourself, [the prosecutor], State of Texas, why did you not play this for us sooner?

Trial counsel could have decided that the jury's listening to the recording during deliberations, rather than in the courtroom, would have a dramatic effect—that the jury would discover inconsistencies between the recording and the witnesses' testimony and, ultimately, determine that the State was trying to downplay exculpatory evidence.

Under these circumstances, we cannot determine on a silent record that there could be no reasonable trial strategy to justify trial counsel's course of action.

Counsel's conduct was not so outrageous that no competent attorney would have engaged in it.

Appellant's fifth issue is overruled.

C. No Prejudice Regarding Impeachment of the Complainant

In his sixth issue, appellant contends that his trial counsel was ineffective for failing to impeach the complainant with a prior inconsistent statement. In particular, appellant contends that trial counsel was "at a complete loss as to how to lay the predicate for a prior inconsistent statement," and counsel "seemed unaware that there was even a predicate to lay, acting as if authentication of [the complainant]'s written statement was all that was required."

The complainant testified at trial that he did not remember what appellant was wearing during the robbery. In the complainant's handwritten statement to police (Defense Exhibit 2), the complainant had written "red shirt & blue jeans" in the margin. Trial counsel twice attempted to have the complainant's handwritten statement admitted as an exhibit without first complying with the procedure for the admission of extrinsic evidence of prior inconsistent statements. *See* Tex. R. Evid. 613(a).[7] The trial court sustained the State's hearsay objections. Later, trial counsel cross-examined the complainant about the "red shirt & blue jeans" notation:

> Q: Do you remember writing that the—the man who grabbed you was wearing a red shirt?
>
> A: I didn't know what kind of shirt he was wearing.

[7] Rule 613(a) provides that extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement. Tex. R. Evid. 613(a)(4). The rule requires a party to first tell the witness the contents of the statement, the time and place of the statement, and to whom the statement was made. Tex. R. Evid. 613(a)(1). And, the witness must be given the opportunity to explain or deny the prior inconsistent statement. Tex. R. Evid. 613(a)(3).

Q: Okay. Do you remember writing though that he was wearing a red shirt and blue jeans?

A: No.

COUNSEL: May I approach, Your Honor?

THE COURT: You may.

Q: I'm going to show you again Defense Exhibit No. 2. Specifically I want to direct your attention right over here.

A: What was the question?

Q: Do you remember the man wearing a red shirt and blue jeans?

A: I remember writing but I don't—I don't know what he was wearing really, but I couldn't tell you right now. Right then I did, but I couldn't tell you right now what he was wearing.

Q: Okay. But you can still remember exactly what he looks like; correct?

A: Yes.

During closing arguments, defense counsel argued to the jury (without objection from the State) that the complainant and his wife "wrote in their statements" that appellant was wearing a red shirt and blue jeans.

Based on this record, and the substantial evidence of guilt discussed above, we conclude that appellant has not demonstrated prejudice as a result of the allegedly deficient performance—trial counsel's failure to "properly" impeach the complainant by following the procedure outlined by Rule 613. Trial counsel, in fact, impeached the complainant's testimony concerning what appellant was wearing, and the complainant admitted to making the statement in Defense Exhibit 2. Trial counsel also elicited testimony (1) from the complainant's wife that the primary robber had been wearing a red shirt and blue jeans; (2) from one police officer that the police were looking for a red shirt and blue jeans; and (3) from another police officer that no red shirt was found in the truck. Any additional evidence that trial counsel could have adduced from "properly" impeaching the complainant would not

give rise to a reasonable probability that the jury would have had a reasonable doubt respecting guilt.

Appellant's sixth issue is overruled.

VI. CONCLUSION

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Brown, and Wise.
Do Not Publish — Tex. R. App. P. 47.2(b).