Affirmed; Plurality, Concurring and Dissenting Opinions filed December 28, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00093-CR

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RONALD EUGENE TILLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 785,627

P L U R A L I T Y O P I N I O N

Appellant, Ronald Eugene Tiller, was charged by indictment with the offense of robbery. The State alleged a prior felony conviction for the purpose of enhancing the range of punishment. A jury convicted appellant of the charged offense. Following appellant's plea of true to the enhancement allegation, the trial court assessed punishment at fifteen years and one day confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant raises a single point of error contending his constitutional right to post-arrest silence was violated. We affirm.

I. Differing Versions

The State's and appellant's versions of the events which gave rise to these allegations are considerably different. Therefore, we will set forth both versions of the controversy.

A. The State's Version

The State's version of the events may be stated as follows. The complainant consumed several margaritas and some beer prior to arriving at the Econo Lodge to procure the services of a prostitute. After meeting with the prostitute, the complainant traveled in his automobile to a nearby Stop-N-Go and withdrew $300.00 from an automatic teller machine (ATM). This activity was observed by appellant and his companion. After returning to the motel room, the complainant entered the bathroom, leaving several others in the sleeping quarters. While the complainant was in the bathroom, appellant and his companion burst through the motel room door. Upon exiting the bathroom, the complainant was grabbed by appellant and thrown to the floor. The complainant broke away from appellant and fled the scene. As the complainant fled, he saw appellant and his companion drive from the motel in the complainant's automobile. The complainant subsequently flagged down a policeman, reported the incident, and provided a description of the automobile. Appellant and his companion were stopped shortly thereafter; appellant was driving the complainant's automobile. Another police unit transported the complainant to the scene of the traffic stop where the complainant identified his car and identified appellant as the man who had taken his car keys. Appellant and his companion were then transported to the motel where both were identified by the individuals who were in the motel room when appellant and his companion entered. Appellant was then transported to jail.

B. Appellant's Version

Appellant's version of the events may be stated as follows. As the early events transpired, appellant was asleep in his companion's motel room. The companion was a drug dealer who knew the prostitute procured by the complainant. On the date in question, the companion sold cocaine to the complainant on three separate occasions. On the third

occasion, the complainant did not have the funds to pay for the contraband. However, based upon the guarantees of the prostitute, the complainant was permitted to leave with the contraband and the promise to soon return with payment. The prostitute told the companion where she and the complainant were having their assignation.

After waiting for the complainant to return with the payment to no avail, the companion decided to seek out the complainant and secure payment for the contraband. The companion sought the accompaniment of appellant because the complainant was bigger than the companion. Appellant agreed and the two proceeded to the complainant's room at the Econo Lodge motel where the prostitute permitted their entry. Shortly thereafter, the complainant exited the bathroom and became enraged upon seeing appellant and his companion. After struggling with appellant, the complainant fled the scene. Appellant saw the complainant's car keys and took them. Appellant then drove the complainant's automobile away from the motel. Appellant testified that he had not robbed the complainant and taken his automobile, but rather that he was holding the automobile as collateral for the drugs for which the complainant had not remitted payment.[1]

II. Trial

Appellant's point of error contends the trial court erred in permitting the State to comment on appellant's post-arrest silence. This point concerns two areas of questioning. The first is appellant's cross-examination. The second is the direct examination of the State's rebuttal witness.

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[1] Specifically, appellant explained: "The purpose was to take the car, to go back to our motel room and wait till things cooled down and bring the man back his vehicle, with the option of paying his money back, but it had nothing to do with robbery or assaulting him or we had no intentions on robbing him." Later, appellant explained that he took the complainant's automobile "because we didn't want [the complainant] to leave the, uhm, vicinity without paying the money."

Finally, on redirect examination the following question was asked and answered:

Q. But just so it's clear, this fight and the taking of the keys were two separate incidents?

A. Absolutely.

A. Appellant's Cross-Examination

After being stopped while in the act of driving the complainant's automobile, appellant "indicated to the officers that drugs were involved" in this incident.

> Q. What do you mean by that? Did you tell the officers why you had the car?
>
> A. Yes, I did.
>
> Q. And, uhm, did you tell, did you tell the officers that, that [the complainant] owed [the companion] money for the car, that [the companion] asked you to help him out?
>
> A. Yes, I did. I didn't say, exactly stipulated that I was there to help him but I told him that it was due to drugs that the reason why the car was abducted.

* * * * *

> Q. Is it – I believe you testified that you, that you wanted to tell the police what happened, or you made an attempt to tell the police what was going on?
>
> A. Yes, I did.
>
> Q. Okay. Do you recall which officer that was?
>
> A. ... One of those officers out of, out of the two precinct that I spoke with pertaining to that matter cause he came over and asked me did I want to make a statement, and I told him I didn't want to make a statement but I wanted to let you know due to the fact that when I learned that [the complainant] was twisting the story around, saying that he didn't know us, we was robbing him for his car, or his keys[.]
>
> Q. Right.

A. Okay. If in fact that I took the keys, I want to let the officer know that there was drugs involved. Had nothing to do with me robbing him for his car.

These statements were made following appellant's stop while driving the complainant's automobile. Appellant and his companion were subsequently transported to and incarcerated in the City of Houston jail. While so confined, appellant met with Officer R. H. McKenzie. In this connection, the following exchange occurred during appellant's cross-examination:

Q. And you stated also that, uhm, that you, that you wanted to tell your side of the story, correct?

A. Yes, ma'am.

Q. Isn't it true that you had that opportunity when Officer McKenzie came to talk to you and offered you to give a statement, give your side?

A. That is true.

Q. And at that time you declined?

A. Yes, ma'am. I know my Miranda rights.

Q. Okay. I mean, you stated you wanted to give a statement, but you changed your mind?

A. Yes. I had the right, so I exercised that right.

Q. Let me ask you this. [The complainant] had no, no –

DEFENSE COUNSEL Your Honor, I object to that and make a motion for mistrial. Prosecutor making reference to the defendant's right, uhm, not to make a statement which incriminates him, a post arrest statement.

THE COURT: Denied.

B. The State's Rebuttal

Although appellant did not give a written statement detailing his version of these events, his companion did provide McKenzie with a handwritten statement. At trial, the companion testified on appellant's behalf and disputed some of the declarations contained in his handwritten statement. After appellant rested his case-in-chief, the State called McKenzie as a rebuttal witness. McKenzie testified that the companion, contrary to his testimony, did not appear to be either intoxicated or confused when he provided McKenzie with a handwritten statement. The State concluded its questioning regarding the companion with the following question and answer:

> Q. And, uhm, and was [the companion] fully willing to give you a statement at the time?
>
> A. Yes, ma'am.

Immediately after this answer, the State began questioning McKenzie on the subject of appellant, at which point the following colloquy occurred:

> Q. Did you also, uhm, have an opportunity to visit with Mr. Tiller?
>
> A. Yes, ma'am.
>
> Q. Did you make him the same offer, gave him his warnings and offer?
>
> DEFENSE COUNSEL: Objection. Move for mistrial. To bring into issue a defendant's right, uhm, not to incriminate himself under the Fifth Amendment, Your Honor. I move for a mistrial.
>
> THE COURT: Denied.

DEFENSE COUNSEL: Post arrest silence.

THE COURT: Denied.

THE STATE: No further questions.

III. *Doyle* Error

The United States Supreme Court in *Doyle v. Ohio* held that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violates the Due Process Clause of the Fourteenth Amendment. *See* 426 U.S. 610, 619 (1976). The *Doyle* court noted that the error lies in the cross-examination of the defendant on the question of his silence, thereby implying an inconsistency that the jury might construe as evidence of guilt. *Id*. at n. 10. *Doyle* rests on the fundamental unfairness of implicitly assuring a suspect, by giving the *Miranda* warnings, that his silence will not be used against him and then using this silence to impeach an explanation subsequently offered at trial. *See Greer v. Miller,* 483 U.S. 756, 763 (1987). A *Doyle* violation occurs when the State uses, for impeachment purposes, the defendant's post-arrest silence. *See id*. It does not comport with due process to permit the prosecution to call attention to the defendant's silence. *See id*. at 763-64.

In *Greer*, respondent Miller took the stand on his own behalf and testified that he had taken no part in the crimes of kidnapping, robbery, and murder with which he was charged, despite the fact that one of the other participants in the crimes entered into a plea agreement and testified as to the involvement of Miller and one other defendant. *See* 483 U.S. at 758. When the prosecutor began his cross-examination, the following exchange occurred:

Q. Mr. Miller, how old are you ?

A. 23.

Q. Why didn't you tell this story to anybody when you got arrested?

Id. at 759. Defense counsel immediately objected. After sustaining defense counsel's

objection, the trial court twice instructed the jury to disregard the question. *See id.*

In conducting its analysis, the *Greer* court first adverted to other cases in which that court had applied *Doyle* and observed that, contrary to the facts in *Greer*, in each of those cases the trial court had permitted specific inquiry or argument respecting the defendant's post-arrest silence. *See id.* at 764. The Court held that there was no *Doyle* violation in *Greer* because the prosecutor was not allowed to *use* the defendant's silence for impeachment by virtue of: (1) the objection; (2) the trial judge's sustaining of that objection, and (3) the imparting of two curative instructions, one of which specifically advised the jury that it should disregard any question to which an objection was sustained. *See id.* at 763.

Here, however, both objections following the improper questions were overruled and, thus, no curative instructions were given. Therefore, according to Supreme Court precedent, the record before this Court clearly demonstrates prosecutorial misconduct rising to the level of a *Doyle* violation because without instructions to disregard, the fact of appellant's post-arrest silence was submitted to the jury as evidence from which it was permitted to draw any permissible inference.

The State agrees that although it is impermissible to impeach a defendant about his post-arrest silence, any alleged error during the cross-examination of Tiller was not preserved because appellant did not object timely when the subject was broached by the State. Specifically, the State argues: "It was not until the prosecutor began to ask another question regarding the complainant, which apparently had nothing to do with appellant giving a statement to police, that counsel finally objected."

A defendant must make a timely objection to preserve an error in the admission of evidence. *See Dinkins v. State*, 894 S.W.2d 330, (Tex. Crim, App. 1995)355 (citing *Johnson v. State*, 878 S.W.2d 164, 167 (Tex. Crim. App. 1994); *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991); *Sattiewhite v. State*, 786 S.W.2d 271, 283 (Tex. Crim. App. 1989), *cert. denied*, 498 U.S. 881, 111 S.Ct. 226, 112 L.Ed.2d 181 (1990). An objection should be made as soon as the ground for objection becomes apparent. *See Johnson v. State*,

803 S.W.2d 272, 291 (Tex. Crim. App. 1991); *Thompson v. State*, 691 S.W.2d 627, 635 (Tex. Crim. App. 1984). Therefore, if a question clearly calls for an objectionable response, a defendant should make an objection before the witness responds. *See Webb v. State*, 480 S.W.2d 398, 400 (Tex. Crim. App. 1972), *rev'd on other grounds, Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972). If he fails to object until after an objectionable question has been asked and answered, and he can show no legitimate reason to justify the delay, his objection is untimely and error is waived. *See Girndt v. State*, 623 S.W.2d 930, 934 (Tex. Crim. App. 1981); *Guzman v. State*, 521 S.W.2d 267, 269 (Tex. Crim. App. 1975) (Error was waived because defendant failed to object until three objectionable questions were asked and answered.). Because trial counsel did not lodge a timely objection during appellant's cross-examination, we hold that error is not preserved for appellate review.

However, the State's procedural default argument is limited to appellant's cross-examination. The State does not advance this argument in connection with the rebuttal testimony of McKenzie at which time appellant made a timely and specific objection. Consequently, that error was preserved for our review.

IV. Harmless Error

Because questioning Officer McKenzie about appellant's post-arrest silence was error of constitutional magnitude, resolution of this issue is governed by Texas Rule of Appellate Procedure 44.2 (a), which provides:

> 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. (emphasis added)

The first inquiry is whether a violation of the constitutional right to post-arrest silence is subject to harmless error review. We hold this type of error is subject to harmless error review. *See Dinkins*, 894 S.W.2d at 356. Additionally, we hold the State bears the burden of

proving beyond a reasonable doubt the error did not contribute to the conviction. *See Arnold v. State*, 786 S.W.2d 295, 298 (Tex. Crim. App. 1990). To discharge this burden, the State makes the following arguments.

First, the state claims the error was harmless because appellant's own testimony established the offense of robbery. We disagree. While appellant admitted to assaulting the complainant and to later taking his vehicle, appellant stated that the assault and the taking of the automobile were not related. Therefore, there was no robbery under appellant's version of events. *See* n. 1, above.[2]

Whether a robbery actually occurred, as the State contended, or whether this was a drug deal gone bad was the only issue in this case. And, as set forth in part I of this opinion, that issue was hotly contested. This case is unique in that virtually every witness was, at the time of trial, confined in the Texas Department of Criminal Justice, Institutional Division, a state jail felony facility, or the Harris County jail. Other than the testifying peace officers, the only remaining witness not in confinement at the time of his testimony was the complainant. However, he admitted being involved in criminal activity on the date in question. Therefore, the credibility of most of the witnesses was suspect. Consequently, any use of appellant's post-arrest silence to impeach or discredit his theory of defense could readily be characterized as harmful.[3]

Second, the State contends it made no attempt to discuss appellant's post-arrest silence

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[2] Additionally, we note that the trial court instructed the jury on the lesser offense of assault.

[3] We pause here to note that appellant's attempt to impeach the State's witness may have been impaired when the State failed to disclose impeachment evidence. Following the complainant's testimony, the trial was recessed for the day. When the trial resumed, appellant moved for a mistrial because the State had not supplied defense counsel with evidence which could be used to impeach the State's witnesses. The State was under the mistaken impression that it was not required to turn over such information because appellant's *Brady* [*v. Maryland*, 373 U.S. 83, 83 U.S. 1194, 10 L.Ed.2d 215 (1963)], motion had not been ruled upon. The State has an affirmative duty to disclose *Brady* evidence even if no request has been made. *See United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed2d 481 (1985); *Thomas v. State*, 841 S.W.2d 399, 403, 407 (Tex. Crim. App. 1992). The trial court recognized this duty, ordered the State to provide defense counsel with the material immediately, and denied the motion for mistrial.

until after appellant made it an issue. While we agree the State was fully entitled to question appellant about the voluntary statements made at the scene of his arrest, the State was not permitted to question McKenzie on this subject because at the time of McKenzie's involvement, appellant had validly re-asserted his right to post-arrest silence. *See* part III above. Therefore, the fact that appellant first broached the subject of the statements made shortly after his arrest, did not entitle the State to raise the subject before the jury in the rebuttal testimony of McKenzie.

Third, the State notes that it discontinued questioning on the topic when the objections were overruled. As a general rule, the asking of an improper question may be cured or rendered harmless either by a withdrawal of the question or by an instruction to disregard. *See Rogers v. State*, 725 S.W.2d 350, 359 (Tex. App.—Houston [1st Dist.] 1987, no pet.). However, there are two exceptions to this rule. First, the question is obviously harmful to the defendant. *See Gowans v. State*, 522 S.W.2d 462 (Tex. Crim. App. 1975); *Sensabaugh v. State*, 426 S.W.2d 224, 227 (Tex. Crim. App.1968). Second, the question is clearly calculated to inflame the minds of the jury and is of such character as to suggest the impossibility of withdrawing the impression produced on their minds. *See Boyde v. State*, 513 S.W.2d 588, 589 (Tex. Crim. App. 1974); *Mitchell v. State*, 455 S.W.2d 266, 267 (Tex. Crim. App. 1970); *White v. State*, 444 S.W.2d 921, 922 (Tex. Crim. App. 1969). We believe these exceptions are applicable in the instant case.

First, as noted above, the question was harmful in that it violated appellant's constitutional right to post-arrest silence. Second, it is clear from the cross-examination of appellant that the State knew appellant had asserted his right to post-arrest silence when asked by McKenzie to make a statement.[4] Therefore, when the State called McKenzie and broached

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[4] As noted above, during the State's cross-examination of appellant, the following exchange occurred:

Q. Isn't it true that you had that opportunity when Officer McKenzie came to talk to you and offered you to give a statement, give your side?

A. That is true.

(continued...)

this subject, the State knew McKenzie would comment on appellant's post-arrest silence. Consequently, we can only conclude the question was asked to inflame the minds of the jury and prejudice the rights of appellant to remain silent following his arrest. Moreover, we note that because the objection to the question was overruled, there was no instruction to the jury to disregard the improper question. *Compare Brown v. State*, 692 S.W.2d 497, 501 (Tex. Crim. App. 1985). While a curative instruction often serves to lessen the harm, no such instruction was given in this case. *See Rogers*, 725 S.W.2d at 359.

Fourth and finally, the State argues that reversal is not mandated because all of the trial testimony demonstrates beyond a reasonable doubt that appellant committed the crime of robbery. This single argument presents the sole basis for affirming this conviction. Although appellant did not concede his guilt, his testimony and that of the other witnesses provides sufficient evidence of his guilt to allow this court to affirm. Each of the eye witnesses testified that appellant, at some time during the encounter at the motel, used force against the complainant and took the complainant's automobile key. Thus, because the evidence presented at trial provides sufficient support for appellant's conviction, this Court can determine that, beyond a reasonable doubt, the prosecutor's misconduct resulting in the *Doyle* violation described above did not contribute to appellant's conviction.[5]

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[4] (...continued)

Q. And at that time you ***declined***?

A. Yes, ma'am. I know my Miranda rights.

[5] The dissent vigorously attacks our resolution of the harm analysis because we advert to the evidence of guilt and conclude that the comment on appellant's post-arrest silence did not harm appellant in light of the overwhelming evidence pointing to appellant's culpability. Indeed, there is a reference to *Dinkins*, a capital murder case, and the factors to be used in a harm analysis, suggesting we failed to follow the standards articulated in that opinion. *See* 894 S.W.2d at 356. A closer examination of the harm analysis in *Dinkins* reveals that evidence does play a role in a harm analysis.

The question in *Dinkins* involved the issue of testimony during the punishment phase to the effect that during police interrogation Richard Dinkins failed to protest his innocence, and this constituted a comment on his post-arrest silence. Even though the opinion adverts to the *Harris* factors, the emphasis in the harm analysis is that the evidence of Dinkins' failure to protest his innocence went to guilt phase issues, not punishment phase issues such as future dangerousness and provocation. *See Harris v. State*, 790 S.W.2d (continued...)

Therefore, we hold the error harmless, and we overrule appellant's sole point on appeal. We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered; Plurality, Concurring and Dissenting Opinions filed December 28, 2000.

Panel consists of Justices Anderson, Frost, and Baird.[6]

Do Not Publish — TEX. R. APP. P. 47.3(b).

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[5] (...continued)
568 (Tex. Crim. App. 1989). Thus, and this is key, the opinion states that "[t]he testimony did not augment the evidence at punishment . . . [and] [t]hus, it is unlikely the jury would place any weight in the testimony." 894 S.W.2d at 356. Similarly, here, the question to Officer McKenzie did not augment the evidence at the guilt stage relevant to that issue. In fact, the question put to Officer McKenzie was never answered. Any inference drawn by the jury based on the unanswered question put to the officer could not have enhanced the likelihood of the guilty verdict because, as aptly pointed out by the concurring opinion here, the jury already knew appellant had invoked his right to silence when McKenzie came to visit him while he was incarcerated. We are not unmindful of the harm that can flow from a comment on a defendant's post-arrest silence, but any harm virtually disappears where the jury knows from earlier testimony from appellant that he had asserted his right to refuse to talk to investigators about his version of the events. Thus, as in *Dinkins*, it is unlikely the jury, in reaching its verdict, placed any weight on the State's question to McKenzie as to whether appellant made a statement to him as appellant's companion had.

[6] Former Judge Charles F. Baird sitting by assignment.

Affirmed; Plurality, Concurring and Dissenting Opinions filed December 28, 2000.

In The

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NO. 14-99-00093-CR

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CONCURRING OPINION

If a *Doyle* violation occurred, it did not contribute to appellant's conviction because the jury received no new information as a result of it. In *U.S. v. Moore*, 104 F.3d 377, 389-90 (D.C. Cir. 1997), the court found a *Doyle* violation harmless error where the prosecutor alluded to evidence of the accused's silence, admitted without objection. The court in *Moore* stated that:

> The jury was thus already aware of the silence at the time [the accused] objected to the prosecutor's reference to such in closing argument. Hence, the reference to [the accused's] silence in closing argument created little[,] if any[,] additional prejudice. It would be tantamount to sandbagging to allow a defendant to sit

silent while potentially objectionable evidence comes in and then obtain a reversal by objecting to a prosecutor's reference to that evidence.

Before the prosecutor even began questioning Officer McKenzie, appellant testified that he had sought out an officer for the purpose of telling his side of the story and then later changed his mind about giving a statement to police. Asserting that he knew his *Miranda* right, appellant testified that he "exercised that right," voluntarily commenting on his own post-arrest silence, all without timely objection. By the time the state questioned Officer McKenzie, the jury was well aware that appellant had invoked his right to remain silent. *See U.S. v. Moore*, 104 F.3d at 389-90. Alluding to it again was harmless. *See U.S. v. Moore*, 104 F.3d at 389-90; *Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995) (indicating that testimony's influence on a jury's deliberation is a factor in determining harm of error); *Laca v. State*, 893 S.W.2d 171, 184 (Tex. App.—El Paso 1995, pet. ref'd) (determining whether an objectionable argument is harmless, in part, by whether a rational trier of fact might have reached a different result if the error and its effects had not resulted.).

/s/ Kem Thompson Frost
Justice

Judgment rendered; Plurality, Concurring and Dissenting Opinions filed December 28, 2000.
Panel consists of Justices Anderson, Frost, and Baird.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Judge Charles F. Baird sitting by assignment.

Affirmed; Plurality, Concurring and Dissenting Opinions filed December 28, 2000.

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D I S S E N T I N G O P I N I O N

Believing the harm analysis performed in the lead opinion is both legally and factually flawed, and believing further the concurring opinion's reliance on *United States v. Moore*, 104 F.3d 377, 389-90 (D.C. Cir. 1997), is misplaced, I dissent.

I. The Lead Opinion.

The lead opinion correctly recognizes that the instant harm analysis is governed by Texas Rule of Appellate Procedure 44.2 (a) which requires reversal "unless the court

determines beyond a reasonable doubt that the error did not contribute to the conviction." However, beyond that basic premise, the analysis is fundamentally flawed in three important respects.

A. Failure to Consider Harris Factors.

In *Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995), the Court of Criminal Appeals held that when conducting a harm analysis of this type, we are required to consider the factors enumerated in *Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989). Those factors are [a] the source of the error; [b] the nature of the error; [c] the extent it was emphasized by the State; [d] its probable collateral implications; [e] the probable weight a juror would place upon the error; and, [f] whether declaring the error harmless would encourage the State to repeat it with impunity. This command has been routinely followed by the courts of appeals. *See e.g., Mendoza v. State*, 959 S.W.2d 321, 326 (Tex. App.—Waco 1997, pet. ref'd)(citing both *Dinkins*, 894 S.W.2d at 356, and *Harris*, 790 S.W.2d at 587). However, the lead opinion wholly fails to identify the source of the error, consider the nature of the error, its probable collateral implications, the probable weight a juror would place on the error and whether the State would be encouraged to repeat the error with impunity.[1]

The failure to discuss these factors or to even cite *Harris* is curious. The lead opinion's author is obviously aware of the requirement that the *Harris* factors must be applied when performing a constitutional harm analysis. *See DeGraff v. State*, 944 S.W.2d 504, 507 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). However, he offers no explanation, justification or rationale for not utilizing the *Harris* factors. Even more puzzling is the lead opinion's specific citation to *Dinkins* at the very page where the Court of Criminal Appeals listed the *Harris* factors and held that such a harm analysis was appropriate for error arising from a comment on the defendant's post-arrest silence. *See supra* at ___; slip op pg. 10. The

[1] The only factor arguably considered is the extent the error was emphasized by the State. And in that context the lead opinion finds the question "was asked to inflame the minds of the jury and prejudice the rights of appellant." *See supra* at ___; slip op. pg. 12.

Harris factors are necessary to determine whether the error contributed to the conviction. By not considering the required factors, the instant analysis is fundamentally flawed and does not meet the requirement of rule 44.2(a).

B. Evidentiary Sufficiency Analysis

Erroneously Substituted for Harm Analysis.

The lead opinion begins its analysis by rejecting the State's argument that the error was harmless because appellant's own testimony established the offense of robbery. *See supra* at ___; slip op. pg. 10. However, the analysis subsequently states that the testimony of the "other witnesses provides ***sufficient evidence*** of guilt to allow this court to affirm." *See supra* at ___; slip op. pg. 13 (emphasis supplied). A sufficiency of the evidence determination has no place in a harm analysis.

The lead opinion is unable to cite any authority approving this type of harm analysis because this type of analysis has been specifically rejected by the United States Supreme Court and the Court of Criminal Appeals. In the seminal case of *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), the Supreme Court held that the question is ***not*** whether the legally admitted evidence was sufficient to support the conviction. Such a question would be fatuous because in this context appellate courts assume the evidence is sufficient. Rather the question is whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." In *Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S.Ct. 1710, 1717-18, 123 L.Ed.2d 353 (1993), the Supreme Court held *Doyle* errors are subject to the *Chapman* harmless error analysis. Similarly, the Court of Criminal Appeals in *Harris* specifically stated: "the reviewing court should focus ***not*** on the weight of the other evidence of guilt." 790 S.W.2d at 587-88. (emphasis added) Rather, when applying a correct harm analysis the reviewing court must focus upon the process and not on the result. *See id.*, 790 S.W.2d at 587-588. The Court of Criminal Appeals has not retreated from this position. In *Atkinson v. State*, the Court stated: "***[I]t is largely irrelevant***

that the evidence sufficiently, or even overwhelmingly, supports the verdict." 923 S.W.2d 21, 26 (Tex. Crim. App. 1996). (emphasis added)

The lead opinion admits that "sufficient evidence" presents the "sole basis for affirming this conviction." *See supra* at ___; slip op. op. 13. The basis for concluding the error is harmless is in direct conflict with the controlling decisions of both the United States Supreme Court and the Court of Criminal Appeals.

C. Factually Incorrect.

Finally, the lead opinion adopts the State's argument that the error is harmless because "the testimony of all the State's witnesses, appellant's codefendant and appellant himself show beyond a reasonable doubt that appellant committed the crime of robbery for which he was convicted." Neither the State nor the lead opinion cite any authority in support of this argument. Again, there is direct authority to the contrary. In *Atkinson,* the Court of Criminal Appeals held: "[I]t would ***not*** be proper to assume that an error at trial had absolutely no impact upon [the jury] just because the evidence was otherwise sufficient for a finding of guilt." 923 S.W.2d at 26. (emphasis added)

But more importantly, this argument is not supported by the record. The lead opinion concedes whether this was a robbery or a drug deal gone bad was hotly contested. *See Part I supra* at ___ slip op. pg. 2, and ___; slip op. pg. 11. The lead opinion further concedes, "there was no robbery under appellant's version of events." *See supra* at ___; slip op. pg. 10.[2] The evidence raised the issue of whether appellant was guilty of assault but not robbery. Consequently, the trial court instructed the jury on the lesser offense of assault. The evidence,

[2] Appellant admitted to struggling with the complainant but testified the struggle was unrelated to taking the vehicle. Appellant explained: "The purpose was to take the car, to go back to our motel room and wait till things cooled down and bring the man back his vehicle, with the option of paying his money back, but it had nothing to do with robbery or assaulting him or we had no intentions on robbing him." Later, appellant explained that he took the complainant's automobile to prevent him from leaving the area without paying the money. Finally, on redirect examination appellant was asked: "But just so it's clear, this fight and the taking of the keys were two separate incidents?" Appellant answered: "Absolutely."

therefore, clearly indicates there was evidence before the jury that if guilty, appellant was guilty only of assault. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993). Therefore, it is neither accurate nor true to state that the testimony of the codefendant and appellant establish the offense of robbery.

II. The Concurring Opinion.

My concurring colleague neither mentions Rule 44.2(a), nor applies the *Harris* factors in her resolution of the harm issue. Instead, she relies solely on the case of *U. S. v. Moore*, 104 F.3d 377 (D.C. Cir. 1997), to hold the error harmless. In *Moore*, the prosecutor asked a question that violated the defendant's right of post-arrest silence. Defense counsel did not object so the witness was permitted to answer the improper question. Later when the prosecutor commented on that post-arrest silence in summation, defense counsel objected. The *Moore* court found error in the prosecutor's summation, but held the error harmless. That holding had two justifications, both revolved around counsel's failure to object when the *Doyle* violation occurred. First, the failure to object resulted in the jury learning of the post-arrest silence. Because that evidence was already before the jury, its subsequent mention in summation "created little if any additional prejudice." *Id.*, at 389-90. Second, to permit counsel to sit silent when the improper evidence was admitted and later complain would constitute "sandbagging." *Ibid*.

However, the dual justifications of *Moore* are not present in the instant case. Here, appellant objected. Therefore, unlike *Moore*, appellant did not "sit silent" while potentially objectionable evidence came in and then seek a reversal by objecting to the prosecutor's reference to that evidence. 104 F.3d at 390. Accordingly, appellant cannot be accused of sandbagging. Second, as the lead opinion correctly finds, the error was prejudicial. *See supra* at ___; slip op. pg. 12 ("[T]he question was asked to inflame the minds of the jury and to *prejudice* the rights of appellant to remain silent following his arrest.") (emphasis added). Therefore, this case is not controlled by *Moore* in any respect. Accordingly, the concurring

opinion's reliance on *Moore* is misplaced.

III. Conclusion

This case devolves into a single issue: Was the *Doyle* violation harmless? Appellant is entitled to have that basic and rudimentary issue resolved under the applicable rule of appellate procedure and the dictates of the United States Supreme Court and the Court of Criminal Appeals. Because neither the lead nor concurring opinions resolves the issue in that manner, I dissent.

/s/ Charles F. Baird
Justice

Judgment rendered; Plurality, Concurring and Dissenting Opinions filed December 28, 2000.
Panel consists of Justices Anderson, Frost and Baird.[3]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Former Judge Charles F. Baird sitting by assignment.