

**TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN**

NO. 03-18-00050-CR

The State of Texas, Appellant

v.

Matthew Freeman, Appellee

**FROM THE DISTRICT COURT OF TOM GREEN
COUNTY, 391ST JUDICIAL DISTRICT
NO. D-15-0520-SA, THE HONORABLE
MARTIN (BROCK) JONES, JUDGE PRESIDING**

MEMORANDUM OPINION

After this Court reversed Matthew Freeman's judgment of conviction for family violence assault by impeding the normal breathing or circulation of the blood and remanded the case for further proceedings, *see Freeman v. State*, 525 S.W.3d 755 (Tex. App.—Austin 2017, pet. ref'd), Freeman filed a pretrial application for writ of habeas corpus asserting that the double jeopardy clauses of the United States Constitution and the Texas Constitution barred retrial. The trial court granted habeas relief, ordered Freeman acquitted, and ordered his immediate release from custody. The State appeals the trial court's order granting habeas relief. For the reasons set out below, we reverse the trial court's order.

BACKGROUND

Freeman was charged by indictment with family violence assault by impeding the normal breathing or circulation of the blood, a third degree felony. *See Tex. Penal Code § 22.01(a)(1), (b)(2)(B).* The indictment also contained an enhancement paragraph alleging a prior felony conviction for felony DWI, which enhanced the punishment range to that of a second degree. *See id. § 12.42(a).* Freeman waived a jury and proceeded with a trial before the court. He pled guilty to the lesser-included offense of family violence assault causing bodily injury, a Class A misdemeanor, *see id. § 22.01(a)*, and pled true to the allegation in the enhancement paragraph. At the conclusion of the bench trial, the trial court found Freeman guilty of the greater offense of family violence assault by impeding the normal breathing or circulation of the blood as alleged in the indictment and assessed his punishment at 15 years' imprisonment.

Freeman appealed his conviction to this Court. In a single point of error, he asserted that the trial court violated his constitutional rights by finding him guilty by the clearer weight and degree of credible testimony rather than by beyond a reasonable doubt.¹ This Court concluded that Freeman "met his burden of showing

¹ In finding appellant guilty of the charged offense, the trial judge said,

The Court finds by the clearer greater weight and degree of credible testimony that the Defendant is guilty of the offense of assault by impeding the breath or circulation, as alleged in Paragraph 1 of the indictment.

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that the trial court applied the incorrect standard” regarding the State’s burden of proof and further concluded that the error of applying the incorrect standard was structural error not subject to a harm analysis. *Freeman*, 525 S.W.3d at 758–59. We reversed the trial court’s judgment of conviction and “remanded for further proceedings consistent with [the Court’s] opinion.” *Id.* at 759.

After remand, Freeman filed a pretrial application for writ of habeas corpus, asserting that he was entitled to a judgment of acquittal because he “ha[d] been tried by the court and the court failed to find [him] guilty beyond a reasonable doubt.”² Freeman maintained that because his trial ended without the judge finding him guilty beyond a reasonable doubt, he had been “functionally acquitted” of the offense. He argued, therefore, that, given his prior acquittal, double jeopardy protections barred retrial.

The trial court conducted a hearing on the application at which a copy of this Court’s opinion and

² Freeman filed his first habeas application after the Court of Criminal Appeals refused the State’s petition for discretionary review of this Court’s opinion but before this Court’s mandate issued on November 7, 2017. The trial court conducted a hearing on the application, after which the court denied the application and reinstated Freeman’s bond. After the issuance of the mandate from this Court, Freeman filed a subsequent habeas application on January 4, 2018. Also on January 4, 2018, several hours later, Freeman filed yet another application, which added a special plea of double jeopardy pursuant to article 27.05 of the Code of Criminal Procedure. The trial court’s order granting this last application is the subject of this appeal.

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mandate were admitted. Freeman argued that this Court’s opinion, “while [it] didn’t directly say it’s an acquittal,” recognized that the trial court failed to make a finding of guilt beyond a reasonable doubt. He further argued, as he did in his habeas application, that this failure constituted a “functional acquittal.” At the conclusion of the hearing, the trial court orally granted Freeman’s application for writ of habeas corpus and, “[i]n accordance with the opinion of the Court of Appeals and the mandate issued by that Court directing this Court to enter a judgment consistent with its opinion,” “enter[ed] a judgment of acquittal.”³ The trial court’s subsequent written order “grant[ed] the relief requested” and ordered that “the defendant is hereby acquitted of the Offense alleged in the indictment.”

The State appeals the trial court’s order, *see Tex. Code Crim. Proc. art. 44.01(a)(1)* (providing that State may appeal from order dismissing indictment), (a)(4) (providing that State may appeal from order sustaining claim of former jeopardy), arguing that the trial court’s grant of habeas relief and entry of a judgment of acquittal was an abuse of discretion.

STANDARD OF REVIEW

In reviewing a trial court’s decision on a pretrial application for writ of habeas corpus, we review the

³ We note that, in our opinion, this Court did not direct the trial court to “enter a judgment” consistent with our opinion. Rather, we remanded the case “for further proceedings” consistent with our opinion.

facts in the light most favorable to the trial court’s ruling and, absent an abuse of discretion, uphold the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *Ex parte Ali*, 368 S.W.3d 827, 830 (Tex. App.—Austin 2012, pet. ref’d). An abuse of discretion does not occur unless the trial court acts “arbitrarily or unreasonably” or “without reference to any guiding rules and principles,” *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)), or unless the trial court’s decision “falls outside the zone of reasonable disagreement,” *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). In our review, we defer to the trial court’s implied factual findings that are supported by the record. *See Wheeler*, 203 S.W.3d at 325–26.

DISCUSSION

The issue before the trial court at the habeas hearing was whether Freeman had been acquitted by the trial judge and, thus, retrial for the charged offense is barred by double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 787 (1969), protects a defendant against being placed twice in jeopardy for the same offense. U.S. Const. amend. V, cl. 2 (“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”). The clause embodies three

separate guarantees—protection against prosecution for the same offense following an acquittal, protection against prosecution for the same offense following a conviction, and protection against multiple punishments for the same offense. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *Brown v. Ohio*, 432 U.S. 161, 164–65 (1977); *Ex parte Marascio*, 471 S.W.3d 832, 847 (Tex. Crim. App. 2015); *Ex Parte Denton*, 399 S.W.3d 540, 545 (Tex. Crim. App. 2013). The Texas Constitution provides substantially identical protections. See Tex. Const. art. I, § 14 (“No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.”); see also *State v. Blackshere*, 344 S.W.3d 400, 406 n.8 (Tex. Crim. App. 2011); *Ex parte Mitchell*, 977 S.W.2d 575, 580 (Tex. Crim. App. 1997). The double jeopardy claim that Freeman asserted in his habeas application invokes the prohibition against a second trial after being acquitted.

“One of the most fundamental rules of double jeopardy jurisprudence is that when a trial ends in an acquittal, the defendant may not be tried again for the same offense.” *Blackshere*, 344 S.W.3d at 406. “For purposes of double jeopardy, an acquittal occurs in the trial court only when the ruling of the trial court, whatever its label, actually represents a resolution in the defendant’s favor, correct or not, of some or all of the factual elements of the offense charged.” *Benavidez v. State*, 323 S.W.3d 179, 181 (Tex. Crim. App. 2010); accord *State v. Moreno*, 294 S.W.3d 594, 598 (Tex. Crim.

App. 2009); *State v. Stanley*, 201 S.W.3d 754, 760 (Tex. Crim. App. 2006). The Court of Criminal Appeals has observed that while no statutory provision explicitly defines the word “acquittal,” “the context in which it appears throughout the Code of Criminal Procedure creates a powerful inference that it means a finding of fact that the accused is not guilty of the criminal offense with which he is charged.” *Ex parte George*, 913 S.W.2d 523, 527 (Tex. Crim. App. 1995); *see Evans v. Michigan*, 568 U.S. 313, 318–19 (2013) (“[O]ur cases have defined an acquittal to encompass any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.”).

The trial judge’s verdict in this case does not satisfy the above consistently used definition of acquittal. First, the trial judge’s verdict represented a resolution of the factual elements of the charged offense *against* Freeman, not in his favor. Further, the judge’s recitations did not reflect a fact finding that Freeman was not guilty. The trial judge plainly stated that he found Freeman guilty of the charged offense. At no point did the judge suggest that Freeman had been found not guilty or that the evidence did not support a guilty verdict. The trial judge’s verdict was not an acquittal.

Further, contrary to Freeman’s claim, the judge’s failure to find Freeman guilty beyond a reasonable doubt was not a “functional acquittal.” The term “functional acquittal” has been used by the Court of Criminal Appeals to characterize a trial court’s ruling setting aside a determination of guilt based on the court’s subsequent finding of insufficient evidence. *See*,

e.g., *State v. Savage*, 933 S.W.2d 497, 499 (Tex. Crim. App. 1996) (concluding that “a trial court’s JNOV ruling after a jury determination of criminal guilt accomplishes exactly the same effect as granting the defendant a new trial for insufficient evidence—a functional acquittal”). This characterization suggests that a “functional acquittal” would have happened here if the trial judge had revisited his guilty verdict at some later point, determined that the evidence was insufficient to prove Freeman’s guilt beyond a reasonable doubt, and made a finding based on that determination. Or, perhaps, if the trial judge’s recitation had indicated that he found that the evidence did not prove one or more of the elements of the charged offense beyond a reasonable doubt. However, the trial judge here made *no* finding with respect to whether Freeman was guilty beyond a reasonable doubt because he applied the wrong standard.

In support of his claim, Freeman cites to this Court’s opinion reversing his conviction. Our opinion, however, addressed the process by which the trial judge arrived at his verdict.⁴ We do not agree with Freeman’s suggestion that error in that process constitutes a functional acquittal. Moreover, Freeman misconstrues our opinion. In our opinion, we concluded that “[b]y applying the incorrect standard, the trial

⁴ At no point in the appeal of his conviction did Freeman argue, contend, or suggest that the trial judge’s verdict was a “functional acquittal.” His sole complaint was about the erroneous standard applied by the trial judge—that is, the error in the process that the judge employed to arrive at his verdict.

court denied Freeman his right to be convicted based on proof beyond a reasonable doubt.” *Freeman*, 525 S.W.3d at 759. Freeman appears to interpret that conclusion as indicating that we concluded that the trial court convicted Freeman on less than proof beyond a reasonable doubt and, therefore, functionally acquitted him. That is not what we said; that is not what we meant. We concluded that, due to error in the process of arriving at the verdict (the application of an incorrect standard of proof), Freeman was denied the right to be convicted based on proof beyond a reasonable doubt. The remedy for the denial of that right, then, is to provide a new trial in which the verdict is not the result of an erred process—that is, a trial in which the correct standard of proof is applied when determining the verdict.⁵ For that reason, we remanded the case for further proceedings.

In this case, there is little doubt from the record that the trial judge did not intend to acquit Freeman. The trial judge terminated the prosecution based on his finding that Freeman was guilty of the charged

⁵ We note that error in the jury charge—even relating to the burden of proof—results in reversal of the judgment of conviction and remand for a new trial, not an acquittal. *See Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993) (concluding that jury-charge error that misdefined State’s burden of proof as being less than beyond reasonable doubt constitutes structural error and remanding case for further proceedings); *Reyes v. State*, 938 S.W.2d 718, 721 (Tex. Crim. App. 1996), *overruled by Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000) (concluding that total omission of reasonable-doubt instruction then required by *Geesa* was error that was not subject to harmless error, reversing judgment of conviction, and remanding for new trial).

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offense; he did not terminate the prosecution based on a finding that Freeman was not guilty or on a finding that the State's evidence was lacking or insufficient to convict Freeman.⁶ Nothing in the trial judge's recitation implied that he had made a finding that Freeman was not guilty of committing the charged offense or that the evidence was insufficient. Rather, the recitation reflects that the judge applied the wrong standard in making the finding of guilt that he did.

Because Freeman was not acquitted or "functionally acquitted," the double-jeopardy protection against a second trial after an acquittal does not bar Freeman's retrial for the charged offense. *See Lockhart v. Nelson*, 488 U.S. 33, 38 (1988) ("It has long been settled, however, that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction."); *accord Ex parte Davis*, 957 S.W.2d 9, 12 (Tex. Crim. App. 1997) (observing that, generally, double jeopardy does not bar retrial after reversal but noting exception

⁶ We observe that Freeman filed a motion for new trial, asserting that "[t]he verdict in this cause is contrary to the law and the evidence," and the trial court denied the motion. An allegation that a verdict is against the law and the evidence raises an evidentiary sufficiency challenge. *State v. Zalman*, 400 S.W.3d 590, 594 (Tex. Crim. App. 2013) (citing *Bogan v. State*, 180 S.W. 247, 248 (Tex. Crim. App. 1915)). Thus, in denying the motion, the trial court rejected the contention that the evidence was insufficient to support Freeman's conviction.

when conviction reversed for legally insufficient evidence). Consequently, we hold that the trial court abused its discretion in concluding otherwise.

CONCLUSION

Because Freeman’s trial did not end with an acquittal and the trial judge’s verdict was not a “functional acquittal,” retrial for the charged offense following this Court’s reversal of Freeman’s conviction does not violate double jeopardy. Thus, the trial court abused its discretion in granting Freeman’s application for writ of habeas corpus and entering a judgment of acquittal. We reverse the trial court’s order granting habeas relief and ordering Freeman acquitted.

Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Bourland

Reversed

Filed: November 14, 2018

Do Not Publish

REPORTER'S RECORD
TRIAL COURT CAUSE NO. D-15-0520-SA
VOLUME 5 OF 6 VOLUMES

THE STATE OF TEXAS) IN THE DISTRICT
VS.) COURT
MATTHEW FREEMAN) 391ST JUDICIAL
) DISTRICT
)
) TOM GREEN
) COUNTY, TEXAS

**DEFENDANT'S APPLICATION
FOR WRIT OF HABEAS CORPUS
AND
SPECIAL PLEA OF DOUBLE JEAPORDY [sic]**

On the 10th day of January, 2018, the following proceedings came on to be heard in the above entitled and numbered cause, before the Honorable Brock Jones, Judge presiding, held in San Angelo, Tom Green County, Texas.

The proceedings were reported by stenographic method.

COPY

* * *

[13] THE COURT: Record will reflect the Application for Writ of Habeas Corpus is granted.

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In accordance with the opinion of the Court of Appeals and the mandate issued by that Court [14] directing this Court to enter a judgment consistent with its opinion, it will be the judgment of the Court the relief prayed for in the writ application will be granted.

The Court enters a judgment of acquittal. Get that to me.

MR. BUTLER: Thank you, Your Honor.

THE COURT: Thank you.

MR. BUTLER: Your Honor, with that, can my client go ahead and be released today?

THE COURT: You've got to get me some paperwork.

MR. BUTLER: Certainly. Do you want me to prepare you an Order of Acquittal?

THE COURT: Yes, sir.

MR. BUTLER: Okay. I will get that to you today.

(Hearing concluded.)

* * *

NO. D-15-0520-SA

STATE OF TEXAS § **IN THE DISTRICT**
 § **COURT**
vs. § **391st JUDICIAL**
MATTHEW FREEMAN § **DISTRICT**
 § **TOM GREEN COUNTY,**
 § **TEXAS**

ORDER ON SECOND AMENDED BRIEF AND
APPLICATION FOR WRIT OF HABEAS CORPUS
SEEKING JUDGMENT OF ACQUITTAL AND
IMMEDIATE RELEASE OF DEFENDANT AND
SPECIAL PLEA OF DOUBLE JEOPARDY

The Court having considered Movant's Second Amended Brief and Application for Writ of Habeas Corpus Seeking Judgement of Acquittal and Immediate Release of Defendant and Special Plea of Double Jeopardy, and heard arguments of counsel does hereby grant the relief requested and **ORDERS THE DEFENDANT IS HEREBY ACQUITTED** of the Offense alleged in the indictment, and is ordered immediately released from custody in this matter.

1 – 10 – 18

Date

/s/ Brock Jones
Judge Presiding

**TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN**

ON MOTION FOR REHEARING

NO. 03-16-00130-CR

Matthew Freeman, Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF TOM GREEN
COUNTY, 391ST JUDICIAL DISTRICT
NO. D-15-0520-SA, THE HONORABLE
THOMAS J. GOSSETT, JUDGE PRESIDING**

OPINION

We withdraw our opinion and judgment issued on March 22, 2017, and substitute the following opinion and judgment in their place. We overrule the State's motion for rehearing. Appellant Matthew Freeman was charged by indictment with assault on a family member by impeding the normal breathing or circulation of the blood, a third-degree felony. *See Tex. Penal Code § 22.01(b)(2)(B).* The indictment also alleged a prior felony conviction, enhancing the offense to a second-degree felony. *See id.* § 12.42(a). Freeman

pleaded not guilty to the charged offense but pleaded guilty to the lesser-included offense of assault on a family member with bodily injury and pleaded true to the enhancement paragraph. Following a bench trial, the trial court signed a judgment convicting Freeman and sentencing him to 15 years' imprisonment. In one appellate issue, Freeman contends that the trial court violated his constitutional rights by convicting and sentencing him without finding him guilty beyond a reasonable doubt. We agree, and we will reverse his conviction and remand the case for further proceedings.

“The Due Process Clause of the Fourteenth Amendment ‘protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’” *Miles v. State*, 357 S.W.3d 629, 631 (Tex. Crim. App. 2011) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)); *see Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (“This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings.”); Tex. Penal Code § 2.01 (“All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.”). This requirement is “basic in our law and rightly one of the boasts of a free society.” *In re Winship*, 397 U.S. at 362 (quoting *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting)). “The reasonable-doubt standard plays a vital role in the American scheme of

criminal procedure. . . . The standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.” *Id.* at 363 (internal quotation marks omitted). We will presume that a trial court applied the reasonable-doubt standard unless the defendant rebuts that presumption. *See In re D.E.* W. 654 S.W.2d 33, 36 (Tex. App.—Fort Worth 1983, writ ref’d n.r.e.) (“The trial court, sitting without a jury, is presumed to have used the correct standard of proof absent a showing to the contrary. The burden is on appellant to show that the proper standard was not applied.”); *see also Ex parte Jackson*, 911 S.W.2d 230, 234 (Tex. App.—Houston [14th Dist.] 1995, no writ) (same).

In this case, Freeman has rebutted the presumption that the trial court applied the correct standard. Freeman points out that, at the conclusion of the guilt-or-innocence phase of the bench trial, the trial court stated:

The Court finds by the clearer greater weight and degree of credible testimony that the Defendant is guilty of the offense of assault by impeding the breath or circulation, as alleged in Paragraph 1 of the indictment.

This statement indicates that the trial court did not apply the correct standard. Instead of finding Freeman guilty “beyond a reasonable doubt,” the trial court purported to find him guilty “by the clearer greater weight and degree of credible testimony.” We cannot assume in light of this express statement by the trial court that

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it used a different standard in finding Freeman guilty than the one that it articulated. Therefore, Freeman has met his burden of showing that the trial court applied the incorrect standard.¹

In its appellate brief, the State suggests that, even if the trial court committed constitutional error by applying the incorrect standard, we should perform a harm analysis pursuant to Rule 44.2(a). *See Tex. R. App. P. 44.2(a)* (providing that court of appeals must reverse judgment of conviction for constitutional error “unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment”). However, if the trial court’s failure to find Freeman guilty beyond a reasonable doubt was “structural error,” we must reverse his conviction without performing a harm analysis. *See Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014) (“A ‘structural’ error ‘affect[s] the framework within which the trial proceeds, rather than simply an error in the

¹ In its appellate brief, the State argues that a later statement of the trial court shows that the court actually applied the correct reasonable-doubt standard. At the conclusion of the punishment phase of the bench trial, the court stated, “Matthew Freeman, the Court having found you guilty of the offense of 3rd Degree Felony assault on a person with whom you had a dating relationship, as alleged in the indictment, by impeding the breath or circulation, the Court does also find beyond a reasonable doubt that Paragraph 2 [the enhancement paragraph] is true.” We conclude that this later statement does not indicate that the court found Freeman guilty beyond a reasonable doubt. Instead, it merely indicates that, in addition to finding Freeman guilty, it also found beyond a reasonable doubt that the enhancement paragraph was true.

trial process itself’ and is not amenable to a harm analysis.”) (quoting *Jordan v. State*, 256 S.W.3d 286, 290 (Tex. Crim. App. 2008)); *see also Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (“These are structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards.”). “All structural errors must be founded on a violation of a federal constitutional right, but not all violations of federal constitutional rights amount to structural errors.” *Schmutz*, 440 S.W.3d at 35.

The United States Supreme Court has held that “a constitutionally deficient reasonable-doubt [jury] instruction” is structural error. *Sullivan*, 508 U.S. at 276. The Court explained that “[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt” is an error not subject to a harm analysis because it violates a “basic protectio[n] whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.” *Id.* at 281 (internal quotation marks omitted; brackets in original). We conclude that a similar structural error occurs when a trial judge fails to find a defendant guilty beyond a reasonable doubt in a bench trial. Requiring a harmless-error analysis under these circumstances would result in a situation in which, as Justice Scalia wrote for the Court in *Sullivan*, a “reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, the wrong entity judge[s] the defendant guilty.” *Id.* (internal quotation marks omitted; brackets in original).

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By applying the incorrect standard, the trial court denied Freeman his right to a conviction based on proof beyond a reasonable doubt. Therefore, we must reverse Freeman’s conviction without performing a harm analysis and remand to the trial court.² *See id.* at 282 (concluding that structural error had occurred, declining to perform harm analysis, and stating that “the case is remanded for proceedings not inconsistent

² While neither party addressed error preservation in its appellate briefing, the State has argued in a motion for rehearing that Freeman failed to preserve his issue. *See Darcy v. State*, 488 S.W.3d 325, 327–28 (Tex. Crim. App. 2016). Although Freeman did not object to the trial court’s application of the incorrect burden of proof, we conclude that proof beyond reasonable doubt in a bench trial is a “systemic requirement” or “fundamental error.” *See Fears v. State*, 479 S.W.3d 315, 339 (Tex. App.—Corpus Christi 2015, pet. ref’d) (“[B]y arguing the State shifted the burden of proof, appellant’s argument could be interpreted as going to the absolute, systemic requirement that a person may only be found guilty of an offense if a rational trier of fact finds sufficient evidence to prove all of the elements of the offense beyond a reasonable doubt”); *Huff v. State*, No. 07-10-00174-CR, 2010 WL 4828491, at *3 (Tex. App.—Amarillo Nov. 29, 2010, no pet.) (mem. op., not designated for publication) (“[I]t could be said that appellant’s contentions go to the absolute systemic requirement that a defendant be convicted only on proof beyond a reasonable doubt”); *Perez v. State*, No. 2-07-374-CR, 2009 WL 161029, at *6 (Tex. App.—Fort Worth Jan. 22, 2009, no pet.) (mem. op., not designated for publication) (“Constitutional error that is ‘structural’ and therefore not subject to a harm analysis also seems to fall into this category [of errors that require no preservation]. The very limited class of structural, constitutional errors includes . . . an instruction that erroneously lowers the burden of proof for conviction below the ‘beyond a reasonable doubt’ standard.”) (citation omitted). Therefore, we have considered Freeman’s complaint despite the fact that his trial counsel did not object to the trial court’s erroneous statement of the burden of proof.

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with this opinion”); *Steadman v. State*, 360 S.W.3d 499, 510 n.41 (Tex. Crim. App. 2012) (citing cases where courts found structural error and remanded for new trial).

Accordingly, we sustain Freeman’s sole appellate issue.

CONCLUSION

We reverse the trial court’s judgment of conviction and remand for further proceedings consistent with this opinion.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland
Reversed and Remanded on Motion for Rehearing

Filed: May 9, 2017

Publish

**TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN**

NO. 03-16-00130-CR

Matthew Freeman, Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF TOM GREEN
COUNTY, 391ST JUDICIAL DISTRICT
NO. D-15-0520-SA, THE HONORABLE
THOMAS J. GOSSETT, JUDGE PRESIDING**

OPINION

Appellant Matthew Freeman was charged by indictment with assault on a family member by impeding the normal breathing or circulation of the blood, a third-degree felony. *See Tex. Penal Code § 22.01(b)(2)(B).* The indictment also alleged a prior felony conviction, enhancing the offense to a second-degree felony. *See id. § 12.42(a).* Freeman pleaded not guilty to the charged offense but pleaded guilty to the lesser-included offense of assault on a family member with bodily injury and pleaded true to the enhancement paragraph. Following a bench trial, the trial court signed a judgment convicting Freeman and sentencing him to 15 years' imprisonment. In one appellate issue, Freeman contends that the trial court

violated his constitutional rights by convicting and sentencing him without finding him guilty beyond a reasonable doubt. We agree, and we will reverse his conviction and remand the case for further proceedings.

“The Due Process Clause of the Fourteenth Amendment ‘protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’” *Miles v. State*, 357 S.W.3d 629, 631 (Tex. Crim. App. 2011) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)); *see Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (“This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings.”); Tex. Penal Code § 2.01 (“All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.”). This requirement is “basic in our law and rightly one of the boasts of a free society.” *In re Winship*, 397 U.S. at 362 (quoting *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter [sic], J., dissenting)). “The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. . . . The standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.” *Id.* at 363 (internal quotation marks omitted). We will presume that a trial court applied the reasonable-doubt standard unless

the defendant rebuts that presumption. *See In re D.E.* W. 654 S.W.2d 33, 36 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (“The trial court, sitting without a jury, is presumed to have used the correct standard of proof absent a showing to the contrary. The burden is on appellant to show that the proper standard was not applied.”); *see also Ex parte Jackson*, 911 S.W.2d 230, 234 (Tex. App.—Houston [14th Dist.] 1995, no writ) (same).

In this case, Freeman has rebutted the presumption that the trial court applied the correct standard. Freeman points out that, at the conclusion of the guilt-or-innocence phase of the bench trial, the trial court stated:

The Court finds by the clearer greater weight and degree of credible testimony that the Defendant is guilty of the offense of assault by impeding the breath or circulation, as alleged in Paragraph 1 of the indictment.

This statement indicates that the trial court did not apply the correct standard. Instead of finding Freeman guilty “beyond a reasonable doubt,” the trial court purported to find him guilty “by the clearer greater weight and degree of credible testimony.” We cannot assume in light of this express statement by the trial court that it used a different standard in finding Freeman guilty than the one that it articulated. Therefore, Freeman has met his burden of showing that the trial court applied the incorrect standard.¹

¹ In its appellate brief, the State argues that a later statement of the trial court shows that the court actually applied the

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In its appellate brief, the State suggests that, even if the trial court committed constitutional error by applying the incorrect standard, we should perform a harm analysis pursuant to Rule 44.2(a). *See Tex. R. App. P. 44.2(a)* (providing that court of appeals must reverse judgment of conviction for constitutional error “unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment”). However, if the trial court’s failure to find Freeman guilty beyond a reasonable doubt was “structural error,” we must reverse his conviction without performing a harm analysis. *See Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014) (“A ‘structural’ error ‘affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself,’ and is not amenable to a harm analysis.”) (quoting *Jordan v. State*, 256 S.W.3d 286, 290 (Tex. Crim. App. 2008)); *see also Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (“These are structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’

correct reasonable-doubt standard. At the conclusion of the punishment phase of the bench trial, the court stated, “Matthew Freeman, the Court having found you guilty of the offense of 3rd Degree Felony assault on a person with whom you had a dating relationship, as alleged in the indictment, by impeding the breath or circulation, the Court does also find beyond a reasonable doubt that Paragraph 2 [the enhancement paragraph] is true.” We conclude that this later statement does not indicate that the court found Freeman guilty beyond a reasonable doubt. Instead, it merely indicates that, in addition to finding Freeman guilty, it also found beyond a reasonable doubt that the enhancement paragraph was true.

standards.”). “All structural errors must be founded on a violation of a federal constitutional right, but not all violations of federal constitutional rights amount to structural errors.” *Schmutz*, 440 S.W.3d at 35.

The United States Supreme Court has held that “a constitutionally deficient reasonable-doubt [jury] instruction” is structural error. *Sullivan*, 508 U.S. at 276. The Court explained that “[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt” is an error not subject to a harm analysis because it violates a “basic protectio[n] whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.” *Id.* at 281 (internal quotation marks omitted; brackets in original). We conclude that a similar structural error occurs when a trial judge fails to find a defendant guilty beyond a reasonable doubt in a bench trial. Requiring a harmless-error analysis under these circumstances would result in a situation in which, as Justice Scalia wrote for the Court in *Sullivan*, a “reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, the wrong entity judge[s] the defendant guilty.” *Id.* (internal quotation marks omitted; brackets in original).

By applying the incorrect standard, the trial court denied Freeman his right to a conviction based on proof beyond a reasonable doubt. Therefore, we must reverse Freeman’s conviction without performing a harm analysis and remand to the trial court. *See id.* at 282 (concluding that structural error had occurred, declining to perform harm analysis, and stating that “the

case is remanded for proceedings not inconsistent with this opinion"); *Steadman v. State*, 360 S.W.3d 499, 510 n.41 (Tex. Crim. App. 2012) (citing cases where courts found structural error and remanded for new trial).

Accordingly, we sustain Freeman's sole appellate issue.

CONCLUSION

We reverse the trial court's judgment of conviction and remand for further proceedings consistent with this opinion.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland
Reversed and Remanded

Filed: March 22, 2017

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**4/3/2019 COA No. 03-18-00050-CR
FREEMAN, MATTHEW Tr. Ct. No. D-15-0520-SA
PD-1370-18**

On this day, the Appellee's petition for discretionary review has been refused.

Deana Williamson, Clerk

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* DELIVERED VIA E-MAIL *
