



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-22-00199-CR

THADDEUS S. MAYFIELD A/K/A THADDEUS J. MAYFIELD, Appellant

V.

THE STATE OF TEXAS

On Appeal from Criminal District Court No. 1
Tarrant County, Texas
Trial Court No. 1743171R

Before Womack, Wallach, and Walker, JJ.
Opinion by Justice Wallach

OPINION

Thaddeus S. Mayfield a/k/a Thaddeus J. Mayfield appeals his conviction for fraudulent use or possession of identifying information of an elderly individual and sentence of sixty years' imprisonment. In his first and second issues, Mayfield challenges the sufficiency of the evidence. In his third and fourth issues, he complains of error in the jury charge. We hold that none of these issues present reversible error, and we affirm the judgment of the trial court.

I. BACKGROUND

In August 2021, Robert Hallman encountered a problem when he tried to pay his mortgage bill online. He contacted the bank and eventually learned that someone had manually changed information on his personal mortgage account; someone had deleted Hallman's information and put the name "Thaddeus Mayfield" on the account. Then Robert and his wife, Pamela, started receiving correspondence in their mail from several different credit card companies "and people issuing lines of credit" declining the Hallmans' applications for credit. Suspecting fraudulent activity, Robert filed reports with the Fort Worth Police Department, the Federal Trade Commission, and the Federal Bureau of Investigation. On October 2, 2021, Mayfield was arrested for theft at a Walmart. In his shorts, police found multiple cards and "sticky notes" with other people's names and other information on them.¹

¹Specifically, police seized four sticky notes with writing on them, a Credit Karma card in the name of Harry McBride, a Visa debit card with the name cut off,

Officer Andrew Koenig with the Mansfield Police Department submitted the cards and sticky notes as evidence, and Detective Brandon Blansit, who worked in the department's financial crimes division, investigated the case. Detective Blansit learned that both Robert and Pamela Hallman's information had been used fraudulently to secure credit. The State charged Mayfield with fraudulent use or possession of five or more but less than ten items of identifying information of an elderly individual.² *See* Tex. Penal Code Ann. § 32.51(b)(1), (c)(2), (c-1)(1). A habitual offender notice alleged that Mayfield had previously been finally convicted of two other felony offenses. *See id.* § 12.42(d). Officer Koenig, Detective Blansit, Robert, and Pamela all testified at Mayfield's trial. Photographs of the sticky notes and cards, as well as the notes and cards themselves and Officer Koenig's body-worn camera video from the night of Mayfield's arrest, were all admitted into evidence without objection.

A jury found Mayfield guilty as charged in the indictment. Mayfield subsequently pled true to the habitual offender notice, and the jury assessed his punishment at sixty years' confinement in prison. The trial court sentenced Mayfield accordingly, and he now appeals.

an American Express serve® card in the name of Michael Washington Jr., and a Visa debit card in Robert's name.

²Mayfield was originally indicted under one cause number and was then later reindicted under a different cause number. All references in this opinion to "the indictment" refer to the direct reindictment under the new cause number.

II. EVIDENTIARY-SUFFICIENCY ISSUES

In his first issue, Mayfield argues that the evidence is “insufficient to support commission of the offense” because there was no evidence that he used any person’s identifying information without the other person’s consent.

In our evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime’s essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). This standard gives full play to the factfinder’s responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Harrell v. State*, 620 S.W.3d 910, 914 (Tex. Crim. App. 2021). We determine whether the necessary inferences are reasonable based on the evidence’s cumulative force when viewed in the light most favorable to the verdict. *Broughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018); *see Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) (“The court conducting a sufficiency review must not engage in a ‘divide and conquer’ strategy but must consider the cumulative force of all the evidence.”). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict, and we must defer to that resolution. *Broughton*, 569 S.W.3d at 608. Reversal on evidentiary-sufficiency grounds is restricted to the “rare occurrence” when a factfinder does not act rationally. *Arroyo v. State*, 559 S.W.3d

484, 487 (Tex. Crim. App. 2018); *Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016); see *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014) (stating that a reviewing court should not act as a “thirteenth juror”).

To determine whether the State has met its burden to prove a defendant’s guilt beyond a reasonable doubt, we compare the crime’s elements as defined by a hypothetically correct jury charge to the evidence adduced at trial. *Hammack v. State*, 622 S.W.3d 910, 914 (Tex. Crim. App. 2021); see also *Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018) (“The essential elements of an offense are determined by state law.”). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried. *Hammack*, 622 S.W.3d at 914. The law as authorized by the indictment means the statutory elements of the offense as modified by the charging instrument’s allegations. *Curlee v. State*, 620 S.W.3d 767, 778 (Tex. Crim. App. 2021); see *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014) (“When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence will be measured by the element that was actually pleaded, and not any alternative statutory elements.”).

A person commits the offense of fraudulent use or possession of identifying information “if the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of . . . identifying information of another person

without the other person's consent or effective consent." Tex. Penal Code Ann.

§ 32.51(b)(1). The indictment charged that Mayfield

DID WITH INTENT TO HARM OR DEFRAUD ANOTHER, OBTAIN, POSSESS[,] TRANSFER, OR USE IDENTIFYING INFORMATION OF ANOTHER PERSON, WITHOUT THE PERSON'S CONSENT, AND THE TYPE OF INFORMATION, NAME OF THE OWNER OF SUCH IDENTIFYING INFORMATION, AND NUMBER OF ITEMS, IS AS FOLLOWS:

1. THE NAME AND DATE OF BIRTH OF ROBERT HALLMAN, AN ELDERLY INDIVIDUAL,
2. THE TEXAS DRIVER'S LICENSE NUMBER OF ROBERT HALLMAN, AN ELDERLY INDIVIDUAL,
3. THE SOCIAL SECUIRTY NUMBER OF ROBERT HALLMAN, AN ELDERLY INDIVIDUAL,
4. THE FINANCIAL INSTITUTION NUMBER OF ROBERT HALLMAN, AN ELDERLY INDIVIDUAL,
5. THE NAME AND DATE OF BIRTH OF PAMELA HALLMAN, AN ELDERLY INDIVIDUAL,
6. THE TEXAS DRIVER'S LICENSE NUMBER OF PAMELA HALLMAN, AN ELDERLY INDIVIDUAL,
7. THE SOCIAL SECURITY NUMBER OF PAMELA HALLMAN, AN ELDERLY INDIVIDUAL[.]

A. The evidence is sufficient to support Mayfield's conviction.

Mayfield points out that "there was no direct testimony from any person that Mayfield did not have the consent to use the identifying information of any person, including that of Mr. or Mrs. Hallman" and contends that "there were no facts proven from which it can be inferred that lack of consent to use their identifying information

was apparent.” “Consent” means assent in fact, whether express or apparent. Tex. Penal Code Ann. § 1.07(11). “Effective consent” includes consent by a person legally authorized to act for the owner. *Id.* § 1.07(19).

Mayfield’s argument about the lack of direct testimony on this element misses that our standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Carter v. State*, 620 S.W.3d 147, 149 (Tex. Crim. App. 2021). The State did not need to put on direct testimony that Mayfield obtained, possessed, transferred, or used the Hallmans’ identifying information without their consent or effective consent. Lack of consent or effective consent “may be proven solely by circumstantial evidence.” *Lee v. State*, 962 S.W.2d 171, 174 (Tex. App.—Houston [1st Dist.] 1998, pet. ref’d). Further, in a legal-sufficiency review, “the question is not what evidence there isn’t[;] it’s what evidence there is.” *Acosta v. State*, 429 S.W.3d 621, 630 (Tex. Crim. App. 2014).

Here, Robert testified that, in the credit reports that his wife and he had, he “saw the name Thaddeus Mayfield across all the credit reports in different relationships to particular information on the credit reports” that did not reflect the Hallmans’ “true credit.” He testified that he also “found e-mails” that were not his and that should not have been in the credit reports. He testified that he did not know Mayfield. When shown a picture of the note that had Robert’s full name, his date of birth, his driver’s license number, his Social Security number, his address, his phone number, and his wife’s phone number on it, he testified that he did not give that

information “to anybody.” When asked if he had reported the fraudulent use of his information, Robert testified, “Yes. As soon as we found that we had an issue with our credit and fraudulent use, I filed a report with the Fort Worth Police Department, with the Federal Trade Commission, and with the Federal Bureau of Investigation.” He also testified that Pamela and he received a package in the mail from “loandirect.com” requiring his signature to finalize a request for refinancing his mortgage and that they had not requested that refinance or filled out a request for a loan from loandirect.com. He further testified that Pamela and he were able to get in touch with the lending institution and notify it that the attempted refinance was a fraudulent attempt to obtain funds using their name.

In addition, Pamela testified that she had never met an individual named Thaddeus Mayfield and that she would never, at any point in her life, have given Mayfield her identifying information. The jury also saw the video showing that Mayfield, when caught in possession of the Hallmans’ and others’ identifying information, falsely claimed that he knew Robert and that they lived together. Viewing all the evidence in the light most favorable to the verdict, a rational factfinder could have found beyond a reasonable doubt that Mayfield did not have the Hallmans’ consent to obtain, possess, transfer, or use their identifying information. We therefore conclude that the evidence is sufficient to support Mayfield’s conviction. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Harrell*, 620 S.W.3d at 913–14. We overrule Mayfield’s first issue.

B. The evidence is sufficient to support Mayfield's sentence.

In his second issue, Mayfield claims that the evidence is insufficient to support a judgment of conviction for an underlying second- or third-degree felony, making his sentence of sixty years in prison an illegal punishment. Because (1) Mayfield was tried and convicted of a felony offense other than a state jail felony, (2) Mayfield had previously been finally convicted of two felony offenses, and (3) the second previous felony conviction was for an offense that occurred subsequent to the first previous conviction having become final, he faced a punishment of imprisonment in the Texas Department of Criminal Justice for 25 to 99 years or for life. *See* Tex. Penal Code Ann. § 12.42(d). His sixty-year sentence was therefore legal. However, Mayfield now claims that the “underlying offense” of which he was convicted was only a state jail felony.

The offense of fraudulent use or possession of identifying information is “a state jail felony if the number of items obtained, possessed, transferred, or used is less than five” but a third-degree felony if the number of items obtained, possessed, transferred, or used is five or more but less than ten. Tex. Penal Code Ann. § 32.51(c)(1), (2). Mayfield contends that the “lawful unit of prosecution” under Section 32.51 “is one identity at a time.” Thus, Mayfield reasons, because the indictment named only two—“less than five”—complainants, and he was caught with “less than five” pieces of identifying information *for each complainant*, his offense “remained a state jail felony.” We have found no authority supporting Mayfield’s

interpretation of the statute, and he directs us to none. The authority he cites does not support his argument.

By the statute's plain language, it is not the number of *persons* that determines the level of the offense; it is “the number of items obtained, possessed, transferred, or used.” *Id.* § 32.51(c). As used in the statute, the phrase “item of identifying information” means any piece of identifying information enumerated in the statute that alone or in conjunction with other information identifies a person. *Id.* § 32.51(a)(1); *Cortez v. State*, 469 S.W.3d 593, 604 (Tex. Crim. App. 2015). Relying on *Cortez*, Mayfield claims that the “intent of the law is to punish identity theft—not theft of identities.” But in *Cortez*, the Court of Criminal Appeals determined that the legislative history of the statute “evinces a clear legislative intent to criminalize the *fraudulent use or possession of individual pieces of identifying information.*” *Id.* at 602 (emphasis added).

Mayfield also contends that the gravamen of Section 32.51 “is to criminalize identity theft of an individual; not [to criminalize] stealing the identities of groups of individuals.” We disagree. In *State v. Donaldson*, our sister court in Austin conducted its own statutory construction analysis of Texas Penal Code Section 32.51 and concluded that “the gravamen of the offense of fraudulent use or possession of identifying information is *the prohibited act of obtaining, possessing, transferring, or using an item of identifying information*” and further that “the allowable unit of prosecution is each separate item of identifying information.” 557 S.W.3d 33, 46 (Tex. App.—Austin

2017, no pet.) (emphasis added). The *Donaldson* court held that a trial court had erred in concluding that “each act of identity theft” was the allowable unit of prosecution under the statute. *Id.* at 46–47.

Although *Donaldson* did not address the exact issue Mayfield raises here, its analysis is compelling. We hold that the allowable unit of prosecution under Section 32.51 is each separate item of identifying information, *regardless of the total number of identities or persons to whom the information belonged*. We therefore hold that the indictment in this case, which alleged that Mayfield fraudulently obtained, possessed, transferred, or used seven separate items of identifying information from two different persons, properly charged him with a third-degree felony under the statute. *See* Tex. Penal Code Ann. § 32.51(b)(1), (c)(2). Mayfield’s “underlying offense” was a third-degree felony. *See id.* Because it was shown at trial that his offense was committed against two “elderly” individuals, *see* Tex. Penal Code Ann. § 22.04(c)(2),³ the offense was increased to a second-degree felony. *See id.* § 32.51(c-1)(1). His plea of true to the habitual offender notice increased the range of punishment for his offense to 25 to 99 years or life in prison. *See id.* § 12.42(d). His sixty-year sentence was within that range. Mayfield’s illegal-sentence argument has no merit.

We overrule Mayfield’s second issue.

³The testimony at trial established that Robert and Pamela were both sixty-five years of age or older on October 2, 2021.

III. JURY CHARGE ISSUES

In his third issue, Mayfield claims that the trial court erred by not charging the jury on the law regarding its consideration of presumptions mandated by Texas Penal Code Section 2.05. In his fourth issue, Mayfield claims that the trial court erred by including in the jury charge the presumption of intent to harm or defraud under Texas Penal Code Section 32.51(b-1). The State responds that the trial court did not err by including the intent presumption, and Appellant was not egregiously harmed by the lack of the Section 2.05 instruction in the charge. We agree with the State.

In its charge at the trial on the merits, the trial court instructed the jury, “The actor is presumed to have the intent to harm or defraud another if the actor possesses the identifying information of three or more other persons.” That instruction tracked the language in Texas Penal Code Section 32.51(b-1)(1). *See* Tex. Penal Code Ann. § 32.51(b-1)(1). However, the trial court did not follow Texas Penal Code Section 2.05(a)(2), which provides:

[W]hen this code or another penal law establishes a presumption with respect to any fact, it has the following consequences:

. . . .

. . . if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:

(A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;

(B) that if such facts are proven beyond a reasonable doubt

the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;

(C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and

(D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

Tex. Penal Code Ann. § 2.05(a). The trial court's charge did not include the instruction required by Section 2.05(a)(2). Mayfield did not request that this instruction be included in the charge, nor did he object to the inclusion of the Section 32.51(b-1) presumption in the charge.

We must review “all alleged jury-charge error . . . regardless of preservation in the trial court.” *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In reviewing a jury charge, we first determine whether error occurred; if not, then our analysis ends. *Id.* The State concedes that the trial court erred by not including an instruction pursuant to Texas Penal Code Section 2.05 in the jury charge. We agree that, because the trial court gave the Section 32.51(b-1)(1) presumption instruction, it erred by not instructing the jury pursuant to Section 2.05(a)(2). *See* Tex. Penal Code Ann. § 2.05(a)(2); *Ross v. State*, 594 S.W.3d 566, 569 (Tex. App.—Amarillo 2019, no pet.). Unpreserved charge error warrants reversal only when the error resulted in egregious harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see* Tex. Code Crim.

Proc. Ann. art. 36.19. The appropriate inquiry for egregious harm is fact- and case-specific. *Gelinas v. State*, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013); *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011).

In making an egregious-harm determination, we must consider “the actual degree of harm . . . in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel[,] and any other relevant information revealed by the record of the trial as a whole.” *Almanza*, 686 S.W.2d at 171. *See generally* *Gelinas*, 398 S.W.3d at 708–10 (applying *Almanza*). Errors that result in egregious harm are those “that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive.” *Taylor*, 332 S.W.3d at 490 (citing *Almanza*, 686 S.W.2d at 172). The purpose of this review is to illuminate the actual, not just theoretical, harm to the accused. *Almanza*, 686 S.W.2d at 174.

Neither the State nor the defendant has the burden to prove harm from charge error. The reviewing court must assess harm from the error’s context. *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000); *see also* *Warner v. State*, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008) (“[W]e affirm that burdens of proof or persuasion have no place in a harm analysis conducted under *Almanza*.”).

A. Appellant was not egregiously harmed by the lack of the Section 2.05 instruction in the charge.

Mayfield argues that failing to give the Section 2.05 instruction was “structural error” that “is not amenable to harmless-error analysis.” *See Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 2083 (1993). We disagree. Incorrectly defining the State’s burden of proof as being less than beyond a reasonable doubt is structural error and is never harmless. *Olivas v. State*, 202 S.W.3d 137, 142–43 (Tex. Crim. App. 2006). However, the Court of Criminal Appeals has distinguished between “a complete mis-direction or failure to instruct on the reasonable doubt standard,” which is structural error, and “a failure to instruct the jury on one element of an offense,” which is not. *Id.* at 143. If the jury is given “a partial or substantially correct charge on reasonable doubt,” then any error therein is subject to a harm analysis under *Almanza* and Texas Code of Criminal Procedure Article 36.19. *Id.* at 143–44 & n.20 (quoting *State v. Toney*, 979 S.W.2d 642, 644–45 (Tex. Crim. App. 1998)). Here, the trial court instructed the jury:

Now, therefore, if you find and believe from the evidence beyond a reasonable doubt, that Thaddeus S. Mayfield, on or about the 2nd day of October, 2021, in the County of Tarrant, State of Texas, did with intent to harm or defraud another, obtain, possess, transfer, or use identifying information of another person, without the person’s consent, and the type of information, name of the owner of such identifying information and number of items, is as follows:

1. The name and date of birth of Robert Hallman, an elderly individual,
2. The Texas driver’s license number of Robert Hallman, an

elderly individual,

3. The [S]ocial [S]ecurity number of Robert Hallman, an elderly individual,

4. The financial institution number of Robert Hallman, an elderly individual,

5. The name and date of birth of Pamela Hallman, an elderly individual,

6. The Texas driver's license number of Pamela Hallman, an elderly individual,

7. The [S]ocial [S]ecurity number of Pamela Hallman, an elderly individual[,]

as charged in the indictment, then you will find the defendant guilty of fraudulent use or possession of identifying information of an elderly individual.

Unless you so find and believe from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, then you will acquit the defendant of fraudulent use or possession of identifying information of an elderly individual as charged in the indictment and say by your verdict, "not guilty." [Emphasis added.]

The trial court's charge also contained this instruction:

The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit the defendant and say by your verdict, "not guilty."

[Emphasis added.]

However, these general instructions alone did not remedy the error in the charge. *Hollander v. State*, 414 S.W.3d 746, 750 (Tex. Crim. App. 2013). “Such a general instruction fails to educate the jurors with respect to the level of confidence they must have in the verity of the predicate facts before they may rely on the presumption to convict.” *Id.* Thus, Mayfield is correct that the jury charge “relieved the State from having any burden of proof on an essential element of the charge—intent”—but he wrongly argues that the charge “placed the burden of proof on [Mayfield] to show that he had no intent to both defraud or harm the complainants.” The charge did relieve the State of the burden of proving the intent element of the offense beyond a reasonable doubt, but it did not shift the burden onto Mayfield to prove anything.

We agree with Mayfield that including the Section 32.51(b-1) presumption in the jury charge without the qualifying instruction of Section 2.05(a)(2) resulted in an unconstitutional mandatory presumption. Mandatory presumptions are unconstitutional because they relieve the State of the burden of proving every element of the offense beyond a reasonable doubt. *Garrett v. State*, 220 S.W.3d 926, 930 (Tex. Crim. App. 2007). An instruction pursuant to Texas Penal Code Section 2.05(a)(2) effectively converts an unconstitutional mandatory presumption into a constitutionally acceptable “permissive presumption.” *Id.* at 931. Omitting a Section 2.05(a)(2) instruction when instructing the jury about a statutory presumption causes two significant problems: (1) the jury is never told it must find the predicate fact proven

beyond a reasonable doubt before indulging the presumption; and (2) the jury is never told it is not bound to find the presumed fact based on proof of the predicate fact. *Ramirez-Memije v. State*, 466 S.W.3d 894, 898 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

Relying on *Ross*, *Hollander*, and *Ramirez-Memije*, Mayfield argues that the error in the jury charge caused him egregious harm. All three of those cases, however, are distinguishable from Mayfield’s case. In *Ramirez-Memije*, “the presumed fact, i.e., an intent to harm or defraud, was the primary contested issue at trial, and the evidence was not overwhelming.” *Id.* at 898. The court of appeals said in that case that “the unconstitutional mandatory presumption precluded [the] appellant from presenting any defense.” *Id.* at 901. In *Hollander*, a criminal mischief case,⁴ “the facts giving rise to the presumption were hotly contested,” the State “made no determined effort to establish the appellant’s guilt independently of the Section 28.03(c) presumption, and the evidence that it proffered as predicate facts to support that presumption was

⁴Unlike *Ramirez-Memije* and *Ross*, *Hollander* did not involve the fraudulent use or possession of identifying information. *See* 594 S.W.3d at 568; 466 S.W.3d at 895–96. A jury convicted the appellant in *Hollander* of criminal mischief for tampering with a metering device in order to divert electricity, which he did not pay for, to the house in which he was residing. 414 S.W.3d at 747–48. There is a statutory presumption that a person who receives the “economic benefit” of the service has engaged in the prohibited conduct. Tex. Penal Code Ann. § 28.03(c); *see Hollander*, 414 S.W.3d at 748 (relying on then-current but substantively similar version of statute). The issue of whether power had been diverted to the appellant’s house during the periods of time that the appellant resided there was “vigorously contested” at the appellant’s trial. *Hollander*, 414 S.W.3d at 751.

purely circumstantial.” 414 S.W.3d at 751, 753. *Ross* is slightly more comparable to Mayfield’s case but still inapposite. In *Ross*, although the evidence of the predicate facts giving rise to the presumption—the appellant’s possession of three or more other persons’ identifying information—was uncontested at trial, the appellant’s defense “focused not on the predicate facts but on the evidence supporting the presumed facts that she had the intent to harm or defraud another.” 594 S.W.3d at 570–71. The complainant’s social security card, Texas health benefits card, Wells Fargo debit card, and Netspend MasterCard had been found in the back seat of the appellant’s car during a traffic stop, and the complainant’s driver’s license was found in the appellant’s purse when the appellant was booked into jail. *Id.* at 568.

The arresting officer in *Ross* also found cards in other persons’ names and a check bearing the name of yet another individual in the back seat of the appellant’s car. *Id.* The appellant did not testify at her trial, *id.* at 571, but the complainant testified that shortly after her cards were returned to her, the appellant had come to her place of work and told her she did not steal the complainant’s wallet. *Id.* at 568. Rather, the complainant said, the appellant told her she found it in the parking lot and requested that the complainant not press charges. *Id.* In Mayfield’s case, the Hallmans’ identifying information was actually found *on his person*, it was undisputed at trial that he possessed the identifying information of three or more other persons, and the evidence of his intent was not so circumstantial.

Robert testified that someone had manually changed the information on his

personal mortgage account, “and the name Thaddeus Mayfield showed up in that change.” He also testified that he saw Mayfield’s name across all the Hallmans’ credit reports. He further testified about the “package” that alerted them that somebody was trying to fraudulently refinance their mortgage to get over \$100,000 in cash. The jury also saw the video showing that Mayfield, when caught in possession of the Hallmans’ identifying information, lied about knowing and living with Robert.

Mayfield did not contest either the predicate fact giving rise to the presumption—that he possessed the identifying information of three or more other persons—or the presumed fact—that he had the intent to harm or defraud another.⁵ In his closing argument to the jury, he instead chose to emphasize the gaps in the evidence—namely that the State had failed to tie him to any of the contact information that had been put on Robert Hallman’s account or prove that he was the same “Thaddeus Mayfield” whose name appeared on the account and in the Hallmans’ credit reports. After asking the jury for a “not guilty” verdict, he concluded his closing argument by saying, “We know that’s a hard thing to ask.”

Mayfield also contends that “[t]he record here is replete with the prosecution both educating the jury in voir dire about the presumption and reminding them

⁵It is unclear from the record what Mayfield’s defensive strategy was. He chose not to make an opening statement and did not cross-examine any of the State’s witnesses. He exercised his right not to testify in his own defense, and he did not offer any evidence for the jury’s consideration. The only part of the record that reveals his defense to the charge against him is his closing argument at the trial on the merits.

repeatedly in closing arguments of its mandatory nature.” He points out that, in *Ross*, “the State also made heavy use of the statutory presumption in its argument to the jury, referring to the presumption repeatedly.” *Id.* at 571. Our review of the record reveals that the State referenced the statutory presumption of intent once in voir dire⁶ and three separate times in its closing argument. The State did not misstate the law, but it also did not inform the jurors about Section 2.05. Mayfield did not inform the jurors about the law on presumptions either, nor did he object any time the State mentioned the Section 32.51(b-1) presumption. This record further distinguishes this case from *Ross*, where “the State aggressively objected, pointing to the presumption” when defense counsel sought to inject into his argument the assertion that the State’s evidence of intent was lacking, and the trial court, “in response, merely again pointed the jury to the inadequate jury charge.” 594 S.W.3d at 572. The presumption also was discussed during voir dire in *Ross*, and that record showed that at least one member of the venire fundamentally misunderstood the effect of the statutory presumption. *Id.* at 572 n.4.

Our sister court in Eastland reviewed this same charge-error issue in *Philbin v. State*. In *Philbin*, another fraudulent-possession case, the State “emphasized” the presumption both in voir dire and in its closing argument. No. 11-16-00015-CR, 2017 WL 6803392, at *5 (Tex. App.—Eastland Dec. 29, 2017, no pet.) (mem. op., not

⁶By contrast, the trial court repeatedly emphasized to the prospective jurors during voir dire that they were required to “presume [Mayfield] to be innocent.”

designated for publication). The court of appeals took *Hollander* into consideration and held that the error did not egregiously harm Philbin. *Id.* Like the evidence in Mayfield’s case, the items of identifying information that law enforcement found in *Philbin* were all admitted into evidence. *Id.*

We note one other relevant piece of information revealed by the record. Detective Blansit testified, “The law states that if a person is in possession of three or more identifying pieces of information, then it is assumed that he is holding that information to harm or defraud a person.” Mayfield did not object to this testimony. The jury thus heard about the statutory presumption of intent from a source other than the trial court’s charge.

Considering the actual degree of harm in light of the entire jury charge; the state of the evidence, including the contested issues and weight of probative evidence; the argument of counsel; and any other relevant information revealed by the record of the trial as a whole, we determine that Mayfield was not egregiously harmed by the error in the jury charge. *See Tottenham v. State*, 285 S.W.3d 19, 32 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d) (finding no egregious harm when there was ample circumstantial evidence supporting the presumed fact of intent to defraud or harm and the defendant “did not present any evidence refuting the issue of intent”); *Webber v. State*, 29 S.W.3d 226, 237 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d) (finding no egregious harm because evidence of the predicate fact was “overwhelming”). We overrule Mayfield’s third issue.

B. The trial court did not err by including the statutory presumption of intent in the jury charge.

We further hold that the trial court did not err by including the intent presumption in the jury charge. When a rule or statute requires an instruction under the particular circumstances of the case, that instruction is “the law applicable to the case.” *Oursbourn v. State*, 259 S.W.3d 159, 180 (Tex. Crim. App. 2008). An implicit “if-then” proposition is inherent in rules or statutes requiring an instruction: If the evidence raises an issue of [voluntariness, accomplice witness, confidential informant, etc.], then the trial court shall instruct the jury that [whatever the statute or rule requires]. *Id.* Section 2.05(a)(1) follows this “if-then” structure:

[I]f there is sufficient evidence of the facts that give rise to the presumption, [then] the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact. . . .

Tex. Penal Code Ann. § 2.05(a)(1).

Here, the State presented evidence that Mayfield possessed the identifying information of at least three persons. Mayfield disputes that fact. He contends that, for purposes of prosecution under Section 32.51, “the possession or use of identifying information must relate to a non-fictitious person. Likewise, the presumption requires that the identifying information of the ‘three or more persons’ identify real people. One cannot steal the identity of a person who never existed.” He claims that “the evidence showed only the identifying information for two persons whose identities

were proven to exist: Mr. and Mrs. Hallman” and that there was no evidence to support a finding that a Michael Washington Jr. “ever existed as a living or a dead person, or, that any identifying information associated with him was possessed or used.” To the contrary, Officer Koenig’s body-worn camera video showed Mayfield claiming that he lived with Michael Washington and encouraging Officer Koenig to call him.⁷ That same video showed Mayfield’s girlfriend telling the police that they had been “staying at” Washington’s apartment.

Because the evidence that Mayfield possessed the identifying information of three or more other persons raised the issue, the trial court was statutorily authorized to instruct the jury on the intent presumption. *See id.* §§ 2.05(a)(1), 32.51(b-1)(1). Although it erred by not *also* giving the jury the instruction required by Section 2.05(a)(2), the trial court did not err to charge the jury on the statutory presumption of intent to harm or defraud another under Section 32.51(b-1)(1). *See id.*; *Oursbourn*, 259 S.W.3d at 180. We overrule Mayfield’s fourth issue.

⁷Mayfield also contends that “even if they existed as real persons, proof of Appellant’s possession or use of any identifying information actually associated with either [Washington or McBride] is non-existent.” Here again, the record belies Mayfield’s contention. Officer Koenig found Mayfield in possession of credit cards bearing the names “Harry McBride” and “Michael Washington Jr.” Both cards also had account numbers on them. “Identifying information” includes a person’s financial institution account number and “telecommunication . . . access device.” Tex. Penal Code Ann. § 32.51(a)(1)(C), (1)(D). Credit cards and account numbers are examples of telecommunication-access devices listed in the statute. *Id.* § 32.51(a)(2).

IV. CONCLUSION

Having overruled Mayfield's four issues, we affirm the trial court's judgment.

/s/ Mike Wallach
Mike Wallach
Justice

Publish

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