Dissenting Opinion to Denial of Rehearing En Banc filed May 24, 2011.

In The

Fourteenth Court of Appeals

NO. 14-08-00074-CR

DAVID MARK TEMPLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 1008763

DISSENTING OPINION TO DENIAL OF REHEARING EN BANC

I respectfully offer my dissent to this court's denial of appellant's motion for rehearing en banc.

INTRODUCTION

A jury convicted appellant David Mark Temple of murdering his wife Belinda Temple on January 11, 1999, with a 12-gauge shotgun blast to the back of her head. This court, Justice Charles Seymore for the unanimous panel, affirmed the conviction. Justice Seymore, however, also authored a concurring opinion criticizing the majority for

abdicating its responsibility to perform a constitutionally required factual-sufficiency review.

I suggest that en banc reconsideration is required in this case because: (1) opinions of this court conflict about whether *Jackson v. Virginia* requires a factual-sufficiency review; (2) we should resolve the conflict en banc and hold that a rigorous and proper application of *Jackson v. Virginia*, including analysis of whether a rational jury could have found the elements of the crime beyond a reasonable doubt, embodies a factual-sufficiency review; (3) the panel did not perform an appropriate *Jackson v. Virginia* sufficiency review of the evidence in appellant's case; and (4) a full *Jackson v. Virginia* sufficiency analysis in this case mandates reversal.[1]

[1] I also suggest that en banc reconsideration is appropriate in the case because of the flawed *Brady* and cumulative-error analysis performed by the *Temple* panel. Specifically, an "alternate suspect" RJS was the subject of the *Brady* point of error. On the fifth day of trial, one of the State's witnesses revealed to appellant's counsel for the first time that: RJS, the Temples' sixteen-year-old neighbor, lied to the police about skipping school on the day of the murder; RJS failed three polygraph tests; RJS had access to a 12-gauge shotgun and reloaded shells (the gun and ammunition used to murder Belinda) that the police had recovered; and RJS had recently shot that gun. The *Temple* panel held this *Brady* error was not preserved and was harmless. Yet, the record clearly reflects that (1) prior to trial the court assured appellant's counsel that he had read grand jury transcripts, which included RJS's testimony, and they contained no *Brady* materials, (2) appellant's counsel did not learn of the new information about RJS until several days after the beginning of trial, (3) appellant's counsel attempted to find RJS during trial but was unsuccessful, so he sought a continuance before resting his evidence—it was denied, and (4) the State, though it remained silent about RJS's location during the continuance hearing the day before, called RJS as a rebuttal witness. Regarding error preservation, the panel's reliance upon *Wilson* is misplaced on its face as appellant met the *Wilson* standard. *See Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999) (holding that when the appellant learned of the exculpatory material five days before testimony began, his *Brady* complaint was not preserved by his failure to seek a continuance "before testimony began *or before he rested his case in chief*" (emphasis added)). Further, at a minimum, applying the cumulative error test of *Harris v. State*, this *Brady* error, along with the plethora of evidentiary and jury-argument errors the *Temple* panel specifically **found**, has eliminated integrity in the trial that led to appellant's conviction. *See Harris v. State*, 790 S.W.3d 568, 587–88 (Tex. Crim. App. 1989) (holding that the reviewing court must focus upon the integrity of the process leading to the conviction and should "always examine whether the trial was an essentially fair one"); *see also Kelly v. State*, 321 S.W.3d 583, 602 (Tex. App.—Houston [14th] 2010, no pet.). However, as I conclude herein that the evidence is legally insufficient and that a judgment of acquittal is appropriate, I do not write separately on this legal error.

CONFLICT AMONG PANELS AND COURTS: FACTUAL SUFFICIENCY REQUIRED?

The Texas Court of Criminal Appeals recently changed the standard of appellate review on legal and factual sufficiency in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010). According to the *Brooks* plurality, the legal and factual-sufficiency standards had become "essentially the same standard" and there was "no meaningful distinction between them that would justify retaining them both." *Id.* at 894–95. So, it is beyond debate the *Brooks* court held that the *Jackson v. Virginia*, 443 U.S. 307 (1979), standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *See Brooks*, 323 S.W.3d at 895; *id.* at 926 (Cochran, J., concurring).

The new standard is easily stated: Intermediate appellate courts are to review **all of the evidence (not just the evidence that favors the conviction)** in the **light most favorable to the prosecution (not a neutral light)** and affirm if the evidence is legally sufficient for a **rational jury (not just "a jury")** to find all of the elements beyond a reasonable doubt. *Id.* at 899 (plurality opinion) ("It is fair to characterize the *Jackson v. Virginia* legal-sufficiency standard as: Considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt.").

However, this court and other appellate courts have applied the standard inconsistently. First, this court has stated two different standards of review. According to the author of the majority opinion in *Temple*, the panel held that *Brooks* eliminated a factual-sufficiency review in Texas criminal cases. *See Temple v. State*, No. 14-08-0074-CR, — S.W.3d —, 2010 WL 5175018, at *38 (Tex. App.—Houston [14th Dist.] Dec. 21, 2010, no pet. h.) (Seymore, J., concurring). Other panels of this court have concluded that *Brooks* did not eliminate the factual-sufficiency review, holding specifically that the *Brooks* decision "does not alter the constitutional authority of the intermediate courts of

appeals to evaluate and rule on questions of fact." *Muhammed v. State*, 331 S.W.3d 187, 191 n.3 (Tex. App.—Houston [14th Dist.] Jan. 11, 2011, no pet. h.) (Anderson, J.).[2]

A difference of opinion on the meaning and application of *Brooks* exists within the First and Second Courts of Appeals, as well. *See Mosley v. State*, Nos. 01-08-00937-CR, 01-08-00938-CR, — S.W.3d —, 2010 WL 5395655, at *15 (Tex. App.—Houston [1st Dist.] Dec. 30, 2010, pet. filed) (Jennings, J., concurring) (stating that the *Brooks* plurality eliminated factual-sufficiency appellate review); *Ervin v. State*, 331 S.W.3d 49, 67 n.4 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (Alcala, J.) (disagreeing with recent court of appeals' decisions that suggest *Brooks* abolished[3] factual-sufficiency challenges); *Wise v. State*, No. 02-09-00267-CR, — S.W.3d —, 2011 WL 754415, at *8 (Tex. App.—Fort Worth Mar. 3, 2011, no pet. h.) (Livingston, C.J., dissenting and concurring) (noting the majority's flawed application of the *Brooks* standard of review due to its failure to give the requisite deference to the jury's province to disbelieve even uncontradicted evidence).

Although en banc consideration of matters is disfavored, this case presents a textbook example of an en banc-worthy issue under Texas Rule of Appellate Procedure 41.2(c): uniformity of the court's decisions. *See* TEX. R. APP. P. 41.2(c). Appellant's entitlement to a full and constitutionally protected review of the evidence in this murder case should not depend upon which panel of the court is randomly assigned his case.

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[2] *Accord Quintanilla v. State*, No. 14-10-00011-CR, 2011 WL 665328, at *5 n.2 (Tex. App.—Houston [14th Dist.] Feb. 24, 2011, no pet. h.) (mem. op., not designated for publication); *Serrato v. State*, No. 14-09-00764-CR, 2011 WL 345635, at *3 n.3 (Tex. App.—Houston [14th Dist.] Feb. 1, 2011, no pet. h.) (mem. op., not designated for publication); *Ivey v. State*, No. 14-09-00698-CR, 2011 WL 303893, at *2 n. 1 (Tex. App.—Houston [14th Dist.] Jan. 27, 2011, no pet. h.) (mem. op., not designated for publication); *Wilson v. State*, No. 14-09-00731-CR, 2011 WL 166901, at *1 n.1 (Tex. App.—Houston [14th Dist.] Jan. 11, 2011, no pet. h.) (mem. op., not designated for publication); *Shepard v. State*, No. 14-08-00970, 2011 WL 166893, at *13 n.10 (Tex. App.—Houston [14th Dist.] Jan. 11, 2011, no pet. h.) (mem. op., not designated for publication); *Quinn v. State*, No. 14-09-00914-CR, 2010 WL 4891410, at *2 n.1 (Tex. App.—Houston [14th Dist.] Dec. 2, 2010, no pet. h.) (mem. op., not designated for publication).

[3] There is no doubt, however, that in holding that factual and legal-sufficiency reviews are indistinguishable, the Court of Criminal Appeals has eliminated or abolished "factual sufficiency" as an independent point of error on appeal. *See Howard v. State*, 333 S.W.3d 137, 138 n.2 (Tex. Crim. App. 2011).

A RIGOROUS AND PROPER *JACKSON V. VIRGINIA* ANALYSIS EMBODIES A FACTUAL-SUFFICIENCY REVIEW

Courts of the view that *Brooks* eliminated a factual-sufficiency review hold that opinion because the *Brooks* court unquestionably eliminated a "neutral light" handling of evidence on a sufficiency review. However, the plain language of *Brooks* belies a conclusion that the court has relieved appellate courts of their obligation to review **all of the evidence** for factual sufficiency. Because the *Brooks* plurality holds that a factual-sufficiency review is part of a *Jackson v. Virginia* legal-sufficiency review, and because the *Brooks* plurality demonstrates the difference between reviewing and weighing evidence, this court should hold uniformly that *Brooks* and *Jackson v. Virginia* require a factual-sufficiency review. The *Brooks* plurality was emphatic: "a rigorous and proper application of the *Jackson v. Virginia* legal-sufficiency standard is as exacting a standard as any factual-sufficiency standard." 323 S.W.3d at 906.

1. *Brooks* holds that the "no-rational-jury" analysis is a factual-sufficiency review.

The *Brooks* plurality explicitly stated that a factual-sufficiency review under *Jackson v. Virginia* is embodied in the determination of whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[4] *Brooks*, 323 S.W.3d at 902 n.19 (quoting *Jackson*, 443 U.S. at 319) (holding that the "rational-trier-of-fact" component is "the portion of the *Jackson v. Virgina* standard that essentially incorporates a factual-sufficiency review"); *see also Clewis v. State*, 876 S.W.2d 428, 438–39 (Tex. App.—Dallas 1994) (explaining that the "*Jackson v. Virginia* standard necessarily encompasses a factual-sufficiency review"), *vacated*, 922 S.W.2d 126 (Tex. Crim. App. 1996), *overruled by Brooks*, 323 S.W.3d at 902 n.19.

[4] Justice Seymore's dissent from the denial of en banc reconsideration suggests this court would likely conclude the evidence in this case is factually insufficient upon a neutral weighing of the evidence, which is mandated by the Texas Constitution. As I conclude that, when viewed in the light most favorable to the conviction, the evidence is legally insufficient and no rational juror could have found the elements of this offense beyond a reasonable doubt, I necessarily agree that the evidence would be insufficient under a neutral-light review.

2. *Brooks* requires reweighing for sufficiency of evidence, not for weight of evidence.

Again, the plain language of the *Brooks* decision states that "viewing the evidence in 'the light most favorable to the verdict' under a legal-sufficiency standard means that the reviewing court is required to defer to the jury's credibility and weight determinations." 323 S.W.3d at 899. The *Brooks* decision does not authorize a reviewing court to disregard evidence merely because the jury may have disregarded it. Stated differently, although the *Brooks* decision acknowledges that the court has never articulated precisely how much deference is due the jury's credibility and weight determinations, "total deference" is not required. *See id.* at 902 n. 19 (rejecting the suggestion from the dissenting opinion in *Lancon v. State*, 253 S.W.3d 699 (Tex. Crim. App. 2008), that "total deference" is the standard). It bears repeating. *Brooks* says total deference is not the standard.

Therefore, it is clear that the *Jackson v. Virginia* sufficiency standard requires Texas appellate courts:

(1) to review all of the evidence;
(2) to review that evidence in the light most favorable to the verdict; and
(3) to give deference to the jury on credibility and conflicts in the evidence.

Thus, *Brooks* forbids the reviewing court to (1) disregard any evidence,[5] or (2) neutrally (without deference) reweigh the evidence for the purpose of examining the jury's credibility determinations or resolution of conflicts in the evidence.

Significantly, however, we know from both *Jackson v. Virginia* and *Brooks* that there is some quantity or quality of evidence that a rational jury cannot disregard or disbelieve. The *Brooks* plurality was specific about that point:

[5] The command to review all of the evidence on a criminal-sufficiency challenge stands in contrast to the civil standard, rejected by *Brooks*, which authorizes the reviewing court to disregard contrary evidence unless reasonable jurors could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

> A hypothetical that illustrates a proper application of the *Jackson v. Virginia* legal-sufficiency standard is robbery-at-a-convenience-store case: The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilt is not a rational finding.

323 S.W.3d at 906–07. As the hypothetical states, the jury is free to believe or disbelieve evidence, but after a review of all of the evidence by the appellate court, it may become apparent that the jury's ultimate finding of guilt is not rational.

To emphasize the appellate court's role in this regard, *Brooks* refers the reader directly to *Tibbs v. Florida,* 457 U.S. 31 (1982), to decipher the difficult distinction between evidentiary sufficiency (legal) and evidentiary weight (factual). *See Brooks*, 323 S.W.3d at 899–901. The evidentiary-sufficiency standard gives "'the prosecution the benefit of all inferences reasonably to be drawn in its favor from the evidence,'" whether from direct or circumstantial evidence, and without the necessity of excluding every reasonable hypothesis except that of guilt. *Tibbs*, 457 U.S. at 38 n.11 (quoting *United States v. Lincoln*, 630 F.2d 1313, 1316 (8th Cir. 1980). *Tibbs* further provides that the evidentiary-weight standard reconsiders the credibility of the witnesses and evaluates whether the "evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." *Id.* (citing *Lincoln*, 630 F.2d at 1119).

Thus, the plain language of *Brooks* demonstrates that, although the light in which we view the evidence has changed, the court has not eliminated the requirement that appellate courts review all of the evidence and, "**albeit to a very limited degree**, to act in the capacity of a so-called 'thirteenth juror'" to perform a factual-sufficiency review. *Brooks*, 323 S.W.3d at 901 (quoting *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006)).

APPELLANT DID NOT RECEIVE A RIGOROUS AND PROPER *JACKSON V. VIRGINIA* SUFFICIENCY REVIEW

The *Temple* majority did not provide appellant an appropriate *Jackson v. Virginia* sufficiency review. As previously outlined, we know the *Temple* majority did not perform a factual-sufficiency ("no-rational-jury") analysis because the opinion's author, Justice Seymore, tells us so in his concurring opinion. *See Temple*, 2010 WL 5175018, at *38 (Seymore, J., concurring) (stating that this court "fail[ed] to review [appellant's] factual sufficiency challenges as questions of fact").

The face of the *Temple* opinion reveals Justice Seymore's observations to be accurate. The *Temple* panel demonstrably failed to apply a proper *Jackson v. Virginia* standard in two, independently flawed regards. First, the panel did not review all of the evidence. Second, the only "no-rational-jury" analysis applied by the panel in any way was not to all of the evidence, but rather to individual pieces of evidence.

A. The panel failed to review all of the evidence.

Instead of reviewing all of the evidence in the *Temple* record, the panel disregarded substantial evidence. In the name of deference to the jury, the panel concluded that any evidence favorable to the defense must have been disregarded by the jury, and therefore we, the reviewing court, must disregard it as well.

For example, when witnesses who lived adjacent to the Temple home testified that they heard a noise that sounded like a gunshot at 4:38 p.m., a time when appellant was not home, the panel concluded that "the jury was free to disbelieve it and rationally could have done so because [the witnesses] were children and no other witness testified that a gunshot was heard that day." *Id.* at *6 (majority opinion). This analysis falls short of an analysis of "all of the evidence" in two ways. First, there was no conflict in the testimony for the jury to resolve—according to Detective Schmidt, who interviewed the adjacent neighbors, no neighbor other than the Roberts children heard a gunshot at all, and yet, we know **there was a gunshot**; and we know from conclusive evidence that it

occurred between 3:32 p.m. and 5:36 p.m. Second, the panel does not even mention the testimony of two other witnesses—also adjacent neighbors—who corroborated a disturbance in their location at that time; their dogs inexplicably "went crazy" at the time.

Although an appellate court is not required to detail all of the evidence admitted at trial, a proper sufficiency review should discuss the most important and relevant evidence that supports the appellant's complaint on appeal. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003) (referring to factual sufficiency analysis). Appellant, in his brief, urges that the timeline "made it impossible for him to have committed the crime" because at the same time neighbors heard gun shots, appellant was documented to be in another location. To disregard the timeline of sounds and absence of sounds relied upon by appellant is to disregard, without commentary, uncontradicted evidence simply because the jury may have disregarded it.

Although ***the jury*** is free to disbelieve any or all of the evidence, we cannot disregard it for purposes of a "no-rational-jury" analysis. *See Redwine v. State*, 305 S.W.3d 360, 366 n.12 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) ("[D]isregarding all contrary evidence, no matter how mountainous or compelling it may be, appears incongruous with the reviewing court's task of deciding whether a rational factfinder could have found a defendant guilty *beyond a reasonable doubt* given that it is the evidence *contrary to* the verdict that commonly injects the element of 'reasonable doubt' into the jury's deliberations."). In deferring to the jury, the *Temple* panel incorrectly disregarded all evidence that does not support the verdict.

B. The panel misapplied a "no-rational-jury" standard to pieces of evidence.

There is further indication in the *Temple* opinion that the panel confused the standard. *Jackson v. Virginia* commands that the appellate court determine, upon review of all of the evidence, whether no rational jury could have found the elements of the crime beyond a reasonable doubt. The only two times the *Temple* panel mentions a "rational jury" in its analysis of the evidence, the panel determines whether a rational jury could have believed particular pieces of evidence. *See Temple*, 2010 WL 5175018, at *6,

*8 n.3 (stating that "the jury was free to disbelieve [the children's testimony] and rationally could have done so," and "no rational jury could credit Vielma's testimony"). That is contrary to the proper standard. The court is not to substitute its judgment witness-by-witness to determine whom the jury rationally believes or disbelieves. Instead, the jury, to whom we defer on pieces of evidence, can only become irrational after a review of all of the evidence. *See Brooks*, 323 S.W.3d at 906–07.

For an appellate court to abdicate its responsibility to look at evidence that the jury may have disbelieved or disregarded deprives a defendant of the constitutionally mandated, minimum-sufficiency review. And for an appellate court to confuse "no rational jury could believe" a piece of evidence for a standard that requires examination of whether "no rational jury could convict based upon all of the evidence" highlights the absence of a proper standard of review in this case. This court should grant en-banc review to harmonize its statement and application of the *Jackson v. Virginia* sufficiency-of-evidence review.

A RIGOROUS AND PROPER *JACKSON V. VIRGINIA* SUFFICIENCY REVIEW MANDATES REVERSAL IN THIS CASE

The *Temple* case is, according to the panel, a purely circumstantial-evidence case. However, an examination of the status of circumstantial evidence for all types of criminal cases, in context, as well as the specific homicide cases relied upon by the *Temple* panel, reflects a significant departure from the rigorous analysis Texas requires of such evidence. Further, the rigorous analysis contemplated by *Brooks*, giving deference to the jury as directed, still reveals that this conviction rests upon no evidence that would permit a rational jury to find, beyond a reasonable doubt, that appellant intentionally or knowingly caused the death of Belinda Temple. *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2003).

A. Murder convictions should not rest upon less circumstantial evidence than contraband-possession convictions.

Until 1983, when the Court of Criminal Appeals decided *Hankins v. State*, 646 S.W.2d 191 (Tex. Crim. App. 1983) (op. on reh'g), trial courts in criminal cases ***instructed juries*** not to convict on circumstantial evidence unless the jury excluded "every other reasonable hypothesis except the defendant's guilt." *Id.* at 197 (abolishing the requirement of a circumstantial-evidence charge); *see also Carlsen v. State*, 654 S.W.2d 444, 449 (Tex. Crim. App. 1983) (op. on reh'g) ("[I]f the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding."). Then, in 1991, the Court of Criminal Appeals officially eliminated that same "reasonable hypothesis" construct from the evidence sufficiency review, as well. *Geesa v. State*, 820 S. W.2d 154, 161 (Tex. Crim. App. 1991), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000).

Meanwhile, in the context of crimes involving possession of contraband, the Court of Criminal Appeals coined the phrase "affirmative links" (and later, just "links") to describe the method for evaluating the circumstantial evidence linking an accused to contraband, such as drugs or firearms. *See, e.g., Evans v. State*, 202 S.W.3d 158, 161–62 & n.9 (Tex. Crim. App. 2006); *Haynes v. State*, 475 S.W.2d 739, 742 (Tex. Crim. App. 1972). Stated differently, when the contraband is not in the exclusive control of the defendant in the place or premise where it is found, the State must make a showing of links[6] between the accused and the contraband. *Evans*, 202 S.W.3d at 161–62 & n.9

[6] Ultimately the nonexclusive list of links suggested by the Court of Criminal Appeals has evolved into the following: (1) whether the defendant was present when a search was conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made any incriminating statements when arrested; (7) whether the defendant made furtive gestures or attempted to flee; (8) whether there was an odor of contraband; (9) whether other contraband or drug paraphernalia were present; (10) whether the defendant owned or had the right to possess the place where the drugs were found; (11) whether the place where the drugs were found was enclosed; (12) whether the defendant was found with a large amount of cash; and (13) whether the conduct of the defendant indicated a consciousness of guilt. *Evans*, 202 S.W.3d at 162 n.12.

(noting that the term "links" is used "merely as a shorthand catch-phrase for a large variety of circumstantial evidence that may establish the knowing 'possession' or 'control, management, or care' of some item such as contraband"). Thus, had appellant been charged with possession of the firearm used to murder Belinda, the State would have had to establish links between such firearm and appellant. *See, e.g.*, *Williams v. State*, 313 S.W.3d 393, 397 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("If the firearm is not found on the defendant or is not in his exclusive possession, the evidence must link him to the firearm.").

The elimination of the "reasonable hypothesis" construct created tension with the line of cases requiring links to eliminate the reasonable hypothesis that the defendant was an innocent simply in the wrong place. *See Humason v. State*, 728 S.W.2d 363, 367 (Tex. Crim. App. 1987), *overruled by Geesa*, 820 S.W.2d 154. In 1995, the Court of Criminal Appeals addressed the collision between its elimination of the "reasonable hypothesis" standard and its retention of the "affirmative links" analysis. In *Brown v. State*, 911 S.W.2d 744 (Tex. Crim. App. 1995), the court determined that each defendant must still be affirmatively linked with the contraband he or she allegedly possessed, but this link need no longer be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. *Id.* at 748–49.

Today, more than fifteen years later, in a circumstantial-evidence case involving contraband, the State must still bring evidence that affirmatively links the accused to the contraband at issue. *See, e.g.*, *Roberts v. State*, 321 S.W.3d 545, 549 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). The court is not to look for a bright-line number of links answered affirmatively; instead, the court is to consider all of the links and determine "the logical force of all of the evidence, direct and circumstantial." *Evans*, 202 S.W.3d at 162. And still, the goal of the analysis of links is to protect an "innocent bystander—a relative, friend, or even stranger to the actual possessor—from conviction merely because of his fortuitous proximity to someone else's drugs." *Id.* at 161–62. All

of these affirmative links require a focus on both the existence of circumstantial link and the absence of circumstantial link.

The circumstantial evidence in this case received nothing that resembles the analysis afforded a defendant in a case involving possession of a narcotic or a firearm. But, it should have. Absent a confession, eyewitness, accomplice, or recovered weapon, a nonexclusive list of affirmative links in murder cases could be:

> (1) whether any of the defendant's DNA or other forensic evidence was tied to the crime or the scene, *see Clayton v. State*, 235 S.W.3d 772, 779–80 (Tex. Crim. App. 2007) (the defendant's bloody handprints at the scene); *King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000) (the defendant's DNA on a cigarette butt found at the scene);
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> (2) whether any of the decedent's DNA or other forensic evidence was tied to the defendant, *see Gardner v. State*, 306 S.W.3d 274, 285–86 (Tex. Crim. App. 2009) (fibers likely from the decedent's red robe found in the truck driven by the defendant); *King*, 29 S.W.3d at 565 (the decedent's blood on the defendant's sandals);
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> (3) whether the defendant had access to or possessed a weapon or ammunition of the type used to commit the murder; *see Guevara v. State*, 152 S.W.3d 45, 51 (Tex. Crim. App. 2004) (shell casings matching the likely murder weapon found in the defendant's closet and car, and the defendant practiced firing a rented weapon of the same caliber shortly before the murder);
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> (4) whether the defendant was in possession of "fruits of the crime," *Padilla v. State*, 326 S.W.3d 195, 200–01 (Tex. Crim. App. 2010) (money and jewelry from the decedent's home);
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> (5) whether the defendant made any incriminating statements, *see Guevara*, 152 S.W.3d at 51 (the defendant told a friend he was researching how to make a silencer); *King*, 29 S.W.3d at 564–65 (the defendant's letter indicating pride in the offense could be construed as an admission); *see also Smith v. State*, 332 S.W.3d 425, 437 (Tex. Crim. App. 2011) (the defendant told her ex-husband that she committed the murders);[7]

[7] The primary issue in *Smith* was whether the trial court properly refused an accomplice-witness instruction in light of the ex-husband's handling of the murder weapon. *Smith* is remarkable in the context of this case because, when the conviction rests in part upon "accomplice" testimony, corroborating evidence beyond motive and opportunity must, by statute, exist. *See* TEX. CODE CRIM PROC. ANN. art. 38.14 (West 2005). Thus, the *Smith* court analyzed the evidence linking the defendant to the crime scene and the weapon at issue. Here, because there is no allegation of an accomplice, the evidentiary threshold applied by the panel was less. If the *Temple* panel's analysis is correct, the State

(6) whether the defendant attempted to conceal incriminating evidence, made inconsistent or implausible statements, or lied, *Guevara*, 152 S.W.3d at 50; *see also Padilla*, 326 S.W.3d at 201 (the defendant's untruthful statements may be considered in connection with the other circumstances of the case); *King*, 29 S.W.3d at 564–65 (the defendant's false statements to the media indicated consciousness of guilt and an attempt to cover up the crime);

(7) whether the defendant had a motive to murder the decedent, *see Clayton*, 235 S.W.3d at 781 (drug-related); *Guevara*, 152 S.W.3d at 50 (the defendant was having an affair and would receive substantial retirement benefits upon his wife's death); *King*, 29 S.W.3d at 565 (racial animosity); and

(8) whether the defendant attempted to flee or escape apprehension, *see Clayton* 235 S.W.3d at 780–81 (sudden flight from the crime scene and avoiding arrest for eight months).

Here, upon an analysis of these proposed links, the logical force of the evidence would not be sufficient. And, though the Court of Criminal Appeals has not suggested a list of affirmative links for murder cases, it is clear from the cases relied upon by the panel in this case that the court requires *some* link.

B. The circumstantial evidence to support appellant's murder conviction is nonexistent by comparison to the circumstantial evidence in the cases upon which the *Temple* panel relied.

The *Temple* panel correctly set forth the current role of circumstantial evidence, even as to murder cases: It is as probative as direct evidence and it may, standing alone, be sufficient to establish guilt. *Temple*, 2010 WL 5175018, at *3 (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). Then, the panel referenced three cases from the Court of Criminal Appeals to support the proposition that a murder conviction may rest solely upon inferences raised by circumstantial evidence. *Id.* (citing *Clayton*, 235 S.W.3d at 778–82; *Guevara*, 152 S.W.3d at 49–52; *King*, 29 S.W.3d at 564–65). Examination of the evidence necessary to affirm in these cases reveals the *Temple* panel's misapplication of the principles of circumstantial evidence.

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would have needed *more* evidence to convict appellant if someone had come forward and claimed to have assisted appellant in murdering his wife.

In *Clayton*, the defendant's conviction rested upon, among other evidence, the following circumstantial evidence:

> The evidence at trial showed that there was a significant amount of blood inside the car [where Playonero was shot at close range] and a moderate amount on the outside of the car. A latent-fingerprint examiner with the Houston Police Department testified that he identified prints belonging to Playonero, Ayala, and Clayton. He testified that he identified three sets of prints, stamped in blood—one on the middle console, one on the gear shift, and one on the steering wheel. These prints belonged to Clayton. The prints identified as belonging to Playonero and Ayala were not bloody.

235 S.W.3d at 775. Thus, in *Clayton*, the circumstantial evidence affirmatively linking the defendant to the murder included the defendant's bloody handprint, to the exclusion of others, at the scene of the murder.

In *King*, the case about the dragging death of James Byrd, Jr., the defendant's conviction rested upon, among other evidence, the following circumstantial evidence:

> To summarize, the State presented several items of evidence that connect appellant to Byrd's murder: (1) DNA evidence from a cigarette butt at the crime scene—indicating appellant's presence during the murder, (2) DNA evidence on appellant's sandals—linking appellant to Byrd's injuries, (3) appellant's false statements to the media—indicating consciousness of guilt and an attempt to cover up the crime, (4) appellant's letter to Brewer—which could be construed as an admission that appellant participated in the crime, and (5) appellant's racial animosity—which supplies a motive for the murder.

29 S.W.3d at 565. Thus, in *King*, the circumstantial evidence linking the defendant to the murder included the presence of the defendant's DNA at the scene and the victim's DNA on defendant's shoes.

In *Guevara*, a case that is temptingly similar to this case on the facts, the defendant was convicted as a party to the murder of his wife. The defendant's mistress committed the actual murder—this fact was undisputed. 152 S. W. 3d at 47. The jury heard evidence about the affair, about the defendant's lies about the affair, and about the defendant's convenient alibi for the time of the murder. *See id.* at 50–51. The defendant

discovered his wife's body. *Id.* at 47. However, the jury also heard the following evidence:

- One month before the murder, the appellant took his wife to a shooting range to practice firing a rented 9mm gun, the same caliber gun that was used in the murder.
- The defendant also told a friend, Paul Knauss, that he was researching how to make a silencer.
- Police found shell casings in the defendant's car that, according to the firearms expert, probably matched the murder weapon.
- Police found a box of shell casings under some clothes in the defendant's closet, thirty of which matched casings from the murder scene.

Id. at 51. Thus, in *Guevara*, the circumstantial evidence linking the defendant to the murder included shell casings from the likely murder weapon in his car and his closet.

In each of these cases, the State presented circumstantial physical evidence actually linking the defendant to the murder. In this case, it is undisputed that the State offered no circumstantial physical evidence linking appellant to the crime. *See Temple*, 2010 WL 5175018, at *32. The failure to do so is not attributable to a lack of physical evidence. The State had blood, brain matter, guns, and ammunition. None of it linked appellant to the crime.

With the framework of circumstantial evidence relied upon in the *Clayton*, *King*, and *Guevara* cases, the *Temple* decision falls far short. In its analysis of harm, the *Temple* panel specifically identified the "circumstantial evidence presented," which the panel concluded, "was not negligible":

- Appellant was involved in an extra-marital affair with Heather, had left his pregnant wife and son during the New Year's holiday to spend two nights with Heather, and resumed his relationship with Heather a relatively short time after Belinda's death, including sending Valentine's Day flowers a month later.
- Appellant criticized Belinda's weight, housekeeping, and childrearing, and he detested Belinda's family.
- The scene of the murder was staged to make it appear burglarized.

- Appellant, his parents, and his brothers conspired to protect appellant by concealing the truth about the family's shotguns and appellant's affair.
- Appellant's explanation for his trip to Brookshire Brothers and then eastward to Home Depot was refuted by the length of time it took him to enter Home Depot after leaving Brookshire Brothers and Bernard Bindeman's testimony that he saw appellant heading south from an area near appellant's parents' house.
- Appellant's behavior and demeanor immediately following Belinda's death.
- Appellant's untruthfulness regarding taking E.T. to a park and placing E.T. in a child seat.
- Testimony from Quinton and Tammy that, following Belinda's death, appellant aggressively confronted them regarding their statements to the police and grand jury, even following them in his truck.

Temple, 2010 WL 5175018, at *32. Assuming that the matters recited above are circumstantial evidence at all, they fall far short of the quantum of circumstantial evidence necessary to support a rational jury in determining, beyond a reasonable doubt, that appellant caused Belinda's murder.

Some of the matters recited are not, however, circumstantial evidence. At best, they are inferences that the *Temple* panel attempted to draw from testimony—sometimes inappropriately. For example, the panel broadly concluded that the Temple family conspired to protect appellant, including concealing the truth about the family's shotguns. There is, however, no **evidence** that any member of the Temple family lied about the shotguns. Members of the Temple family testified that: (1) appellant never owned a 12-gauge shotgun, though his brothers did; (2) in the mid-1980s, appellant owned a 20-gauge shotgun; and (3) appellant occasionally borrowed guns from his brother when he hunted. A friend of the family testified that he recalled seeing appellant shoot a 12-gauge shotgun when hunting in the mid-1980s.

This Temple-family testimony about the shotguns is not inconsistent with the other evidence. And it does not need to be inconsistent for the jury to disregard it because it is interested, family testimony. *See Evans*, 202 S.W.3d at 163 (holding that the jury is not required to believe even the uncontradicted testimony of the defendant's

mother because "[s]he is, after all, the defendant's mother"). Yet, *Evans* does not suggest that the jury, when disbelieving the defendant's mother, may infer she was lying, and because she was lying, it is a circumstance of her son's guilt. If that were so, the State would only need to call the defendant's mother in every case to provide the silver-bullet inference. If the mother corroborated her son's innocence, the jury would be free to disregard her testimony, infer she was lying, and base its finding of guilt upon that inference. However, that is precisely the inference the *Temple* panel indulged in this case to fill the gap of evidence regarding appellant "causing the death of Belinda Temple."

Further, the Court of Criminal Appeals explains that

> an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.

Hooper, 214 S.W.3d at 16. It cannot be overemphasized: This inference regarding the family members "conspiring" to protect appellant concerning gun ownership more than fifteen years before this murder does not arise from actual facts proven through testimony. It is worse than speculation about the meaning of facts. It is speculation about what happened if the jury chose to disbelieve Kenneth Temple when he testified that he never purchased a 12-gauge shotgun for appellant: The jury substituted in place of the actual shotgun testimony—without any alternative evidence—the conclusions that: (1) Kenneth Temple **did** purchase appellant a 12-gauge shotgun in the 1980s, (2) appellant still owned that gun, (3) appellant owned double-ought, reloaded buckshot to fit into that gun, and (4) appellant used that gun and ammunition to shoot Belinda. This trial could have been much shorter if that inference exercise is permissible.

C. A rigorous and proper application of *Jackson v. Virginia* to all of the evidence, viewing it in the light most favorable to the conviction, reveals insufficient evidence for a rational jury to find beyond a reasonable doubt that appellant actually caused Belinda's death.

No rational jury could have found all of the elements of the offense charged against appellant. Specifically, there is no evidence, direct or circumstantial, to support even an inference that appellant actually caused Belinda's death.

There is evidence that supports an inference that appellant had a motive—he was having an affair. There is evidence that supports an inference that appellant had the opportunity to commit the crime—within the eighteen minutes that appellant failed to account for his time on the date of his wife's death[8] with conclusive evidence. However, the State offered no evidence of any type that he actually committed the murder.

A review of the entire record of evidence yields the following *Jackson v. Virginia* analysis:

1. Conclusive evidence and agreed evidence

The Court of Criminal Appeals defines *conclusive evidence* as that evidence dispositive of the fact or element at issue. *Evans*, 202 S.W.3d at 163 n.16. "Such evidence 'becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied.'" *Id.* (quoting *City of Keller*, 168 S.W.3d at 815). The *Evans* court placed into this category evidence upon which the parties mutually agree or assume. *Id.*

The following evidence is conclusive or agreed in this case:

- Belinda called appellant at home from her cell phone at 3:32 p.m., and the call lasted 30 seconds.
- Belinda was murdered in her home at 22502 Round Valley on January 11, 1999, between 3:32 p.m. and 5:36 p.m.

[8] The conclusive evidence (from video surveillance, cell phones, and 911 calls) in this case accounts for appellant's whereabouts—away from the murder scene—for all but eighteen to thirty-five minutes of the one-hundred-twenty-four-minute window in which the crime was committed.

- E.T., the three-year-old son of Belinda and appellant, did not witness the murder.
- Belinda was murdered by a shotgun blast to the back of her head while she was inside and facing the rear of the bedroom closet of the home she shared with appellant.
- Belinda was shot with a 12-gauge shotgun, and the shell contained double-ought, reloaded buckshot.
- Belinda was murdered with a contact shot—the shotgun was aimed at and touching her head when fired.
- The 12-gauge shotgun discharged at 22502 Round Valley between 3:32 p.m. and 5:36 p.m. on January 11, 1999.
- Appellant and E.T. were in a Brookshire Brother's grocery store (and on a video surveillance tape) twelve minutes from home from 4:32 p.m. to 4:38 p.m. on January 11, 1999. Accordingly, appellant was not home from 4:20 p.m. to 4:50 p.m.
- Appellant and E.T. were in a Home Depot store (and on a video surveillance tape) fourteen minutes from home at 5:13 p.m. to 5:14 p.m. on January 11, 1999. Accordingly, appellant was not home from 4:59 p.m. to 5:27 p.m.
- A contact gunshot to the back of Belinda's head would cause some back splatter or blow back of blood or brain matter.
- Forensic analysis revealed none of Belinda's blood, none of Belinda's brain matter, and no gunshot residue on appellant or any of his clothing—none that he was wearing and none recovered from the laundry, bathroom, or vehicle.
- Forensic analysis revealed none of Belinda's blood or brain matter within either of the Temple vehicles.
- The backdoor window, because it was tempered, was broken with a tool or a gun, but not a hand or fist.
- Forensic analysis revealed no glass fragments on appellant's clothing.
- Forensic analysis revealed none of appellant's fingerprints on the bedroom television that was "placed" on the floor as part of the "staging."
- An extensive search of the Temple residence and Temple vehicles revealed no 12-gauge shotgun, no 12-gauge shotgun shells, and in particular, no 12-guage double-ought, reloaded shotgun shells.
- A multiple-day search that involved fifteen homicide officers, a dive team, ten to fifteen trustees, and a DPS plane with heat-seeking equipment scouring over four or five areas (including rice fields, reservoirs, canals, and ponds) of

interest on the north side of Katy, where police believed appellant might have disposed of a weapon, revealed nothing.

- Subpoenaed emails between Heather and appellant revealed nothing beyond a flirtation—no murder plot, no discussions of weapon, no plans for the future that indicated a knowledge Belinda would be gone, etc.

2. Weighed evidence, including facts and inferences, with deference to the jury on credibility and conflict determinations

A rigorous and proper application of *Jackson v. Virginia*, as described by *Brooks*, requires an appellate court to defer to the jury on determinations of a witness's credibility and the weight to be given the testimony *by reviewing all of the evidence in the light most favorable to the conviction*. *Brooks*, 323 S.W.3d at 900. *Brooks* acknowledges, however, that the Court of Criminal Appeals has never articulated precisely how much deference such determinations are due. *Id.* (noting that even the court's factual-sufficiency decisions have always required a reviewing court to afford a great amount of deference "(though this Court has never said precisely how much deference) to a jury's credibility and weight determinations"). Nevertheless, it is clear that "total deference" is not required. *See id.* at 902 n.19.

The jury was entitled to weigh the disputed evidence of a relationship outside his marriage and disrespectful treatment of his wife and determine that appellant had a motive to kill his wife. *See Guevara*, 152 S.W.3d at 50. Former "friends" Tammy and Quinton Harlon and Belinda's twin sister Brenda testified that appellant criticized his wife's weight, housekeeping, and childrearing, and he detested Belinda's family. Heather Temple[9] admitted that she and appellant had a sexual relationship of a few encounters, and Heather and her roommate Tara gave testimony that appellant lied to his family and spent two nights with Heather in the two weeks prior to Belinda's death. The

[9] By the time the State tried appellant for murder 8 ½ years after the murder, appellant and Heather had married.

jury heard from investigators[10] that Heather told police appellant said he loved her. Quinton, who also had pursued Heather, testified that appellant was unsure if he was willing to leave Belinda for Heather. Appellant continued his relationship with Heather shortly after Belinda's death.

The jury was entitled to weigh the disputed circumstantial physical evidence of glass at the scene and officer testimony and conclude that the scene was staged to appear that a robbery had occurred.[11] Investigators testified that the broken glass in the back door and the overturned television in the bedroom appeared to have been staged because the glass was not in the right place and the television appeared gently set on the floor. Detective Mark Schmidt felt that the Temple home was staged to make it appear to have been burglarized. Insurance agents testified about the stolen jewelry claim made by the Temple family, which did not precisely match the list given to police—however, the family consistently listed only Belinda's jewelry.[12]

The jury was entitled to weigh the disputed testimony to conclude that appellant was lying. Here, the evidence supports an inference that appellant lied on several occasions. First, evidence supports a conclusion that appellant did not take the route home from Home Depot north across Interstate 10 that he claimed. Appellant was observed by Bernard "Buck" Bindemann, who was familiar with appellant from high school (approximately fifteen years earlier) at the intersection of Katy Hockley Cut-Off

[10] Though Heather disputed this police account, as this evidence is in conflict, the jury was free to resolve it in favor of the police and, viewing the evidence in the light most favorable to the conviction, I assume they did.

[11] It important to note the State advanced the theory that appellant must have staged the scene because his Chow, Shaka, would never have allowed a stranger into the backyard without at least barking. The *Temple* panel concluded, I believe correctly, that the jury was not free to indulge this inference because of the evidence that Shaka was in the garage at the time of the murder. *Temple*, 2010 WL 5175018, at *8 n.3. The dog's bed, fresh food, and water were in the garage; the latch on the backyard fence was broken; no one heard Shaka barking; no one observed the dog in the backyard during the afternoon; and the dog was known to remain in the garage even when the door was opened for vehicles to enter. Without this inference, the most the jury was entitled to infer, without speculation, is that robbery was not the motive for the murder—not that appellant committed the murder.

[12] Defense expert testimony and defendant's own testimony dispute that the scene was or could have been staged. However, as this evidence is in conflict, the jury was free to resolve it in favor of the police, and viewing the evidence in the light most favorable to the conviction, I assume they did.

and Morton Ranch Road between 4:50 p.m. and 5:00 p.m. on January 11, 1999. Appellant said he went to the park, then to Brookshire Brothers, then to Home Depot, and then home. Bindemann said he saw appellant at an intersection not on the described route home and not heading toward home. Second, appellant lied when he said he placed E.T. in a car seat before they drove north on Interstate 10. Crime scene photographs of appellant's vehicle do not show a car seat in the car. Third, appellant confronted his former best friends Quinton and Tammy Harlon about their grand-jury testimony and statements to police, and he told them to keep their mouths shut.

The jury was entitled to weigh the disputed testimony to conclude that appellant was not emotional about his wife's death. Police officers observed a lack of emotion in appellant following Belinda's death.[13]

3. All of the evidence, after appropriate deference

As discussed above, a reviewing court must consider *all* of the evidence. *Brooks*, 323 S.W.3d at 899. In the near one-month guilt/innocence phase of the trial, the parties presented more than sixty witnesses to the jury, including investigators, neighbors, family, police and medical responders, custodians of records, and others, directed almost exclusively to establishing the timeline of events. However, none of the investigators provided any link between appellant and the crime scene. The following evidence, falling into the categories I describe as "timeline evidence" and "RJS evidence," **omits all** evidence the jury was free to disbelieve, as previously outlined:

a. Timeline evidence

- Witnesses at the schools where Belinda and appellant worked, as well as the daycare where E.T. was enrolled, confirm that E.T. became ill in the morning, Belinda picked him up, and appellant came home to stay with E.T. so Belinda could go back to work. Belinda stopped by appellant's parents' house for soup on the way home, phoned appellant from her cell

[13] All fact witnesses who had a history with appellant, even those adverse to appellant such as the Harlons, testified that appellant was emotional over the loss of his wife and child. However, as this evidence is in conflict, the jury was free to resolve it in favor of the police, and viewing the evidence in the light most favorable to the conviction, I assume that they did.

phone at 3:32 p.m., and then arrived home between 3:45 p.m. and 4:00 p.m..

- Appellant and E.T. were on a videotape at Brookshire Brothers from 4:32 p.m. to 4:38 p.m. Brookshire Brothers was at least twelve minutes from the Temple home without considering that his necessary path traveled across Interstate 10 at approximately rush hour when the freeway was under construction. A Brookshire Brothers manager recalled having a discussion with appellant outside the store after 4:38 p.m. Appellant had put a quarter in the mechanical hobby horse for E.T. to ride, but it would not work.
- Neighbor Natalie Scott drove by the Temple home at 4:30 p.m. but did not hear or see anything.
- At about 4:30 p.m., Mr. and Mrs. Parker's (adjacent-to-the-back-fence neighbors) dog went "crazy" in the backyard. Mr. Parker went outside to investigate and found no reason for the dog's behavior but noticed their tool shed had been opened.
- At 4:38 p.m., Belinda's sister called the Temple home phone line. No one answered, and she left a message.
- At some point between 4:38 p.m. at 4:41 p.m., the Roberts brothers (adjacent neighbors to the Temples), ages nine, eight, and six, heard a gunshot. They specifically recalled the sound and comforting one another. They measured the time by the time they were dropped off by the bus, had a snack, did a few minutes of homework, and started a video, *Dr. Dolittle.* The boys were able to pinpoint within the movie where they heard the shot, and another witness confirmed the bus schedule that day. No other witnesses heard a gunshot at any time.
- At approximately 4:55 p.m. or 5:00 p.m., RJS's (a sixteen-year-old sophomore at Belinda's school and the Temples' across-the-street neighbor) dogs started barking in the house. He was sleeping after having smoked marijuana during the day, and the dogs woke him up. At the same time, between 4:50 p.m. and 5:00 p.m., Bernard "Buck" Bindemann observed appellant at the intersection of Katy Hockley Cut-Off and Morton Ranch Road.
- Natalie Scott drove by the Temple home at 5:10 p.m. She did not see or hear anything.
- At 5:10 p.m., Kenneth Temple called to see how E.T. was feeling. No one answered, and he left a message.
- At 5:14 p.m., appellant and E.T. were on videotape at Home Depot a few minutes away from Brookshire Brothers. Home Depot is at least twelve minutes from the Temple home without considering that his necessary path

traveled across Interstate 10 at approximately rush hour when the freeway was under construction.

- At around 5:25 p.m., Angela Vielma walked by the Temple home. She had a fight with her boyfriend and was walking to a friend's house. She observed appellant and E.T. drive into the garage. She did not see a dog or another vehicle in the garage.
- At approximately 5:35 p.m., appellant banged on the door of Mike and Peggy Ruggiero. They are adjacent neighbors on the garage side. Appellant was screaming, "Mike, Mike, it's me David. Let me in." When Mike opened the door, appellant said he needed them to keep E.T. because his house had been broken into. Peggy kept E.T. and phoned 911 at 5:36 p.m. while appellant and Mike returned to the Temple home. Appellant ran through the backyard and into the house, but Mike was stopped short by the Temple's dog. The dog did not like Mike and jumped on the fence at him—Mike stayed at the gate, holding it closed because of the broken latch, while appellant went into the house.
- At 5:38 p.m., appellant called 911 from inside the home.
- Sam Gonsoulin and Kathleen Johnson were the first responders. They were dispatched at 5:45 p.m. and arrived shortly thereafter. Johnson stayed outside with appellant while Gonsoulin went into the house. Gonsoulin was deceased by the time of the trial.

According to the *Temple* panel, the timeline evidence shows that appellant had eighteen minutes to commit the murder and dispose of all physical evidence. *See* 2010 WL 5175018, at *6.[14] Further, there was evidence that a gunshot was heard in the neighborhood at a time when appellant could not have committed the murder, and there was no evidence that a gunshot was heard during the time appellant could have committed the murder.

[14] However, the *Temple* panel did not view the evidence in the light most favorable to the conviction in arriving at this timeline. Appellant testified at trial that Belinda arrived home "closer to 4:00 p.m." but admitted that his initial estimate to officers was 3:45 p.m., and thus, the window for appellant to commit the murder and dispose of all physical evidence could have been thirty-five minutes: from 3:45 p.m. to 4:20 p.m. Appellant could have left his house no later than 4:20 p.m. to make the twelve-minute commute to Brookshire Brothers, where he appeared on a video camera at 4:32 p.m.

a. RJS evidence

As previously stated, RJS was the sixteen-year-old neighbor of the Temples. RJS and Belinda had a history: The jury heard of repeated run-ins with Belinda. She was one of his "counselors" at school and was constantly telling him to get to class because he was a class-skipper. In the fall of 1998, Belinda reported RJS's horrible school-attendance record to his parents, and they grounded him. Belinda also told RJS's parents about broken bottles in her yard, for which she suspected RJS. RJS stood and watched as his friends tore down the Temples' outdoor Christmas decorations less than a month before Belinda was murdered. These undisputed facts support a motive for RJS.

RJS and his family owned guns—12-gauge shotguns—and they used 12-gauge double-ought shotgun shells that they reloaded. Within days before Belinda's murder, RJS took a 12-gauge shotgun and some shells out with his friends to shoot. He knew that his buddy Casey had recently stolen a 12-gauge shotgun from his mother's boyfriend, so Casey and RJS decided to go shooting. Usually, after he shot his dad's guns, he would clean them, but he did not know whether these guns were cleaned. He recalled leaving his 12-gauge shotgun with Casey. However, police records show that, several days after the murder, RJS's father voluntarily surrendered two 12-gauge shotguns. There was no blood detected on either. RJS's father also surrendered live, reloaded shotgun shells; none of those submitted contained wadding that matched the murder shell. However, these undisputed facts support RJS's possession of a weapon and ammunition consistent with those used to kill Belinda.

On the day of Belinda's death, RJS cut school after seventh period and was at his home, across the street from the Temple home, several times on the afternoon of Belinda's murder.

However, RJS testified that while he was skipping school, he and his friends hung out, went from house to house, and smoked marijuana. RJS admitted to being addicted to marijuana at the time. Further, though he was prohibited from driving, he nonetheless drove that afternoon. Initially he and his friends arrived at his home at approximately

3:30 p.m. after smoking a joint. When he arrived home, he was surprised to find one of his front doors cracked open. So, he and his friends looked around the house to be sure there had not been a burglary.

Later, he and his friends drove around in one of the boy's tan, four-door car looking for more marijuana, but could not find any. The Ruggerio's, taking their nightly walk through the neighborhood, saw a car matching that description, containing two teens, speed from the neighborhood at approximately 4:30 p.m. RJS believed he returned home around 4:20 p.m. or 4:30 p.m. He then fell asleep on the couch. He slept soundly because he was stoned; however, his dogs woke him between 4:55 p.m. and 5:00 p.m., as discussed above. These facts support RJS's opportunity to commit the crime.

RJS talked to the police on several occasions and "probably" smoked marijuana before going to the station to talk to them. He was interviewed more than once. RJS then provided grand jury testimony but smoked marijuana the night before. RJS unabashedly admitted that during this time he lied to his parents about driving the car, smoking marijuana, having marijuana in the house, skipping school, and shooting his father's guns. Accordingly, there is direct evidence that RJS lied and was sufficiently addicted to marijuana that he smoked marijuana even when it was likely his drug use would be discovered.

4. No rational jury could find guilt beyond a reasonable doubt

My conclusion about this record is straightforward. First, the absence of evidence should be dispositive. A rational jury cannot find, beyond a reasonable doubt, that one individual caused the death of another based solely upon (1) circumstantial evidence of motive, (2) circumstantial evidence of opportunity, and (3) inferences of guilt, none of which actually provide an affirmative link to the crime. If, as outlined herein, the State calls the defendant's mother, who says her son did not commit the crime, and we permit the jury to disbelieve it *and* infer from their disbelief that the defendant is guilty, we have allowed the irrational. Indeed, the *Temple* panel allowed the irrational.

Second, as to the evidence as a whole—deferring to the jury—appellant's conviction should be reversed. A rational jury could not hear of RJS's motive, opportunity, and possession of a weapon and ammunition consistent with those used to kill Belinda and, yet, form no reasonable doubt that RJS rather than appellant committed the crime. Moreover, a rational jury could not believe that appellant committed this murder in the manner that he did, whether in *eighteen minutes or thirty-five*. In this short time period, appellant allegedly surprised his wife, forced her into a closet, with a telephone in her hand, made her turn around facing the rear, placed a 12-gauge shotgun to the back of her head, and pulled the trigger. Appellant cleaned up. He washed the blood and brain matter from himself (hair and clothing) and left no trace in any sink in the house or on any towel in the house. Or, he covered himself, so he was required to dispose of the covering, but not in the house because it was searched. Appellant drove the blood and brain-soaked clothing and dumped it during his outing, without leaving a trace in the car, and he did so in a manner that a massive hunt for the items turned up nothing. Appellant transported and disposed of the gun without leaving a trace of blood, brain matter, or gunshot residue in the car, and he did so in a manner that a massive hunt for the gun turned up nothing. Before he left home, appellant staged it to create an appearance of a burglary. He used a tool to break the tempered glass in the back door, without getting glass on himself or his shoes. He put the tool away. He slid the television off of its stand without leaving prints on it. He opened miscellaneous drawers. He did all of these things while: (1) his three-year-old son was waiting for him somewhere inside or outside the house; and (2) hoping no one in the neighborhood heard the blast and called for help. It is more than just hard to believe this actually happened; it is irrational to believe it.

CONCLUSION

This court should grant appellant's motion for rehearing en banc. The *Temple* panel decision should not remain the Fourteenth Court of Appeals' last word on this case; our authoring colleague, Justice Seymore, agrees, although for different reasons.

The unrest that *Brooks* has created in intermediate appellate courts' application of the standard of review cost appellant his only appeal of right. *Brooks* eliminated a factual-sufficiency point of error because the standard that would apply is indistinguishable from the legal-sufficiency review. It was not the purpose of *Brooks* to ease the burden of intermediate appellate courts. Appellant is still entitled to a full-record review, a detailing of evidence sufficient to support a rational jury's determination to convict, and an evaluation of the process used to convict that generates a confidence that appellant's conviction will and should stand the test of time and technology. This court will continue to wrestle with circumstantial evidence, and inferences, and how to afford appropriate deference in the refining of *Brooks*. And, yet, just as appellant did not receive the benefit of a *Clewis* neutral-light review because the State was unable to indict in 1999, appellant will not receive the benefit of a proper *Brooks* standard of review if we do not grant this rehearing.

/s/ Sharon McCally
Justice

Publish — TEX. R. APP. P. 47.2(b).

Motion for Rehearing En Banc Denied. Justice McCally filed a Dissenting Opinion to the Denial of En Banc Rehearing. Justice Seymore filed a Dissenting Opinion to the Denial of En Banc Rehearing, in which Justice Anderson joins. Justice Brown filed a Concurring Opinion to the Denial of En Banc Rehearing, in which Justice Boyce joins.