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

D I S S E N T I N G O P I N I O N T O D E N I A L O F R E H E A R I N G E N B A N C

While this case was pending, a plurality of the Court of Criminal Appeals issued *Brooks v. State* and abolished factual-sufficiency review in derogation of the Texas constitutional and statutory right to appellate review of questions of fact in criminal cases. 323 S.W.3d 893, 894–912 (Tex. Crim. App. 2010) (Hervey, J., joined by Keller, Keasler, & Cochran, JJ., plurality op.) & *id.* at 913–26 (Cochran, J., joined by Womack, J., concurring); *see also* Tex. Const. art. V, § 6(a). In fact, the Court of Criminal Appeals recently acknowledged it had abolished factual-sufficiency review. *Howard v. State*, 333 S.W.3d 137, 138 n.2 (Tex. Crim. App. 2011) (citing *Brooks* and commenting, "The appellant also argues that the evidence was factually insufficient, but since the

appellant's brief was submitted we have abolished factual-sufficiency review"). Accordingly, I dissent to the majority's decision to deny my request for en banc reconsideration of this court's adherence to *Brooks* and the concomitant disregard of appellant's right to seek review of his questions of fact, guaranteed by the Texas Constitution.

JURISDICTION

Ostensibly, this court is required to follow the dictates of vertical stare decisis by acceding to the opinions and mandates of the Court of Criminal Appeals. However, this court also has the duty to defend the Texas Constitution by asserting its conclusive appellate jurisdiction over questions of fact in criminal cases.

> [T]he decision of [Texas courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error.

Tex. Const. art. V, § 6(a). Early in Texas history, criminal defendants were afforded the protections of appellate review of questions of fact. The Supreme Court of the Republic of Texas recognized "the defendant in a criminal prosecution in the district court has the right of appeal to this court from the judgment or sentence of the court below, and *to have the facts* as well as the law, at his own election, *opened for re-examination*." *Republic v. Smith*, Dallam 407, 410–11 (Tex. 1841) (emphasis added). In Texas, appellants may challenge as erroneous, a finding of fact on the ground the jury's verdict was against the preponderance of the evidence, i.e., the evidence was factually insufficient. *See, e.g.*, *Choate v. San Antonio & A.P. Ry. Co.*, 44 S.W. 69, 70 (Tex. 1898). The exclusive and conclusive jurisdiction of appellate courts was recently acknowledged by the Texas Supreme Court: "[A] review of the evidence for factual sufficiency is a power committed *exclusively* to the court[s] of appeals." *Regal Fin. Co. v. Tex. Star Motors*, No. 08-0148 --- S.W.3d ---, 2010 WL 3277132, at *7 (Tex. Aug. 20, 2010) (emphasis added).

There is a plethora of authority acknowledging the Texas constitutional imperative that intermediate courts of appeals have conclusive jurisdiction over factual-sufficiency issues in criminal cases, but the *Brooks* plurality disregarded their own precedent in derogation of that jurisdiction. *See Laster v. State*, 275 S.W.3d 512, 518–19 (Tex. Crim.

App. 2009); *Bigby v. State*, 892 S.W.2d 864, 872–75 & n.3 (Tex. Crim. App. 1994); *Ex parte Schuessler*, 846 S.W.2d 850, 852–53 (Tex. Crim. App. 1993); *Meraz v. State*, 785 S.W.2d 146, 152–54 (Tex. Crim. App. 1990); s*ee also Brooks*, 323 S.W.3d at 931 (Price, J., joined by Meyers, Johnson, & Holcomb, JJ., dissenting) (expressing that the plurality ignored stare decisis). Actually, the Court of Criminal Appeals previously cautioned against what happened in *Brooks*:

> [I]t [is] not appropriate for this Court to create a standard of review which is in conflict with the language of our State Constitution.

Meraz, 785 S.W.2d at 152; *see also* Susan Bleil & Charles Bleil, *The Court of Criminal Appeals Versus the Constitution: The Conclusivity Question*, 23 St. Mary's L.J. 423, 424 (1991).

The Court of Criminal Appeals further declared that the only way to preclude a Texas court of appeals from "determin[ing] if a jury finding is against the great weight and preponderance of the evidence," i.e., determining a question of fact, is for "the people of the State of Texas to amend the Constitution." *Meraz*, 785 S.W.2d at 152. Subsequently, the *Brooks* plurality conversely concluded: "As the Court with final appellate jurisdiction in this State, we decide that the *Jackson v. Virginia* 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." *Brooks*, 323 S.W.3d at 912 (plurality op.) (citation omitted). The *Brooks* plurality attempts to justify this jurisdictional incursion with the implicit suggestion that their authority to establish standards of appellate review trumps any jurisdictional impediment. *Id.* at 911 (citing *Clewis v. State*, 876 S.W.2d 428, 431 (Tex. App.—Dallas 1994), *vacated*, 922 S.W.2d 126 (Tex. Crim. App. 1996)). **However, I respectfully submit that our superior court has neither the jurisdiction nor constitutional authority to create or implement a standard of review that either explicitly or implicitly abolishes a Texan's right to appellate review of his questions of fact as questions of fact.**

This court and all intermediate appellate courts in Texas are presently faced with a fundamental question relative to the oath of office for members of the judiciary: whether to "protect and defend" the right, under the Texas Constitution, to appellate review of questions of fact as questions of fact in criminal cases. The question is not rhetorical because constitutionally mandated protection is at stake. Intermediate appellate courts in Texas have no inherent power to ignore an express constitutional mandate. *See Queen v. State*, 842 S.W.2d 708, 711 (Tex. App.—Houston [1st Dist.] 1992, no pet.). Moreover, in consideration of recent public acknowledgements that numerous Texans were actually innocent when convicted, our courts should be vigilant to insure that Texans are afforded all constitutional protections against erroneous conviction. The goal of our criminal justice system should be to convict the guilty and exonerate the innocent. *See United States v. Nobles*, 422 U.S. 225, 230 (1975).

EN BANC RECONSIDERATION

This court is presented with an extraordinary circumstance necessitating en banc review: whether to adhere to the decision of the Court of Criminal Appeals to dictate a standard of review for factual sufficiency that "abolishes" appellate review of questions of fact. *See* Tex. R. App P. 41.2(c) (allowing en banc review when extraordinary circumstances so require). En banc review is necessary because this court has already followed *Brooks* in several opinions. I separately called for en banc review to afford this court the opportunity to reverse course and fulfill a Texan's right to meaningful factual-sufficiency review. Unfortunately, a majority of my colleagues choose to disregard this affront to the Texas Constitution.

In my previous concurrence with the panel opinion, I lamented that I am constrained to follow this court's decision to deny appellant's request for appellate review of questions of fact. I declined to perform a factual-sufficiency review, concluding that any effort in this regard would contradict this court's precedent. Accordingly, for reasons outlined below, I dissent to this court's rejection of en banc reconsideration of the decision to deny appellate review of appellant's questions of fact as prescribed by Article 5, Section 6 of the Texas Constitution. Tex. Const. art. V, § 6(a).

DOES THE *JACKSON* STANDARD FULFILL THE TEXAS CONSTITUTIONAL GUARANTEE OF APPELLATE REVIEW FOR FACTUAL SUFFICIENCY OF THE EVIDENCE?

In *Clewis v. State*, the Court of Criminal Appeals held that in determining factual sufficiency of the evidence, an appellate court should view "'all the evidence without the prism of "in a light most favorable to the prosecution," [and set] aside the verdict only if it is so contrary to overwhelming weight of the evidence as to be clearly wrong and unjust.'" 922 S.W.2d 126, 129 (Tex. Crim. App. 1996) (adopting the standard prescribed by the court in *Stone v. State*, 823 S. W. 2d 375 (Tex. App.—Austin 1992, pet. ref'd, untimely filed)). The *Brooks* plurality overruled *Clewis*, holding that the standard of review for any challenge to sufficiency of evidence is the *Jackson v. Virginia* legal-sufficiency standard in which an appellate court considers all of the evidence in the light most favorable to the verdict, and determines whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 895 (plurality op.).

Apparently, following the Court of Criminal Appeals opinion in *Brooks*, a majority of this court concluded that there is an implicit factual-sufficiency component within the standard of review for legal sufficiency prescribed by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Accordingly, those members of this court must have concluded that protections afforded criminal defendants under Article 5, Section 6 of the Texas Constitution were not abrogated by *Brooks*. In her dissent to this court's denial of en banc review, Justice McCally bases some of her criticism regarding the panel opinion on what she considers to be failure to incorporate a factual-sufficiency component when reviewing all the evidence under the *Jackson* standard of review for legal sufficiency.[1] Risking redundancy, I remind my colleagues that the *Brooks* plurality adopted the unexpurgated *Jackson* standard of review for legal sufficiency as the standard for reviewing all challenges to sufficiency of evidence. *Brooks*, 323 S.W.3d at 895 (plurality op.).[2] Under *Jackson*, this court must totally defer

[1] I address Justice McCally's criticisms of the majority opinion below.

[2] Since the Brooks opinion, the Court of Criminal Appeals confirmed that factual sufficiency review has been "abolished." *Howard*, 333 S.W.3d at 138 n.2.

to the jury's weight and credibility determinations. *Jackson*, 443 U.S. at 319 & n.13, 326. Accordingly, for reasons outlined below, I strongly disagree with the proposition that a type of factual-sufficiency review contemplated under *Clewis* is subsumed under *Jackson*.

First, under *Jackson*, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319. The jury resolves conflicts in the testimony, weighs the evidence, and draws inferences from basic facts to ultimate facts, and the appellate court "impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* If the *Brooks* plurality implicitly concluded that the *Jackson* standard for legal-sufficiency review covers any questions of fact raised by an appellant, those members of the Court failed to acknowledge the unique constitutional duty of Texas courts of appeals to decide questions of fact by weighing all of the evidence. *See* Tex. Const. art. V, § 6(a). This is true because a question of fact as described in the factual-conclusivity clause is a "legal term of art signifying 'questions of weight and preponderance of evidence.'" *Cain v. State*, 958 S.W.2d 404, 408 (Tex. Crim. App. 1997) (quoting *Combs v. State*, 643 S.W.2d 709, 715 (Tex. Crim. App. 1982)). Conversely, as noted above, under the *Jackson* standard, the appellate court completely and totally defers to the jury's weight and credibility determinations. *Jackson*, 443 U.S. at 319 & n.13, 326.

Second, under *Jackson*, "the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." *Id.* at 319. The evidence is not weighed, and a successful challenge to legal sufficiency of the evidence results in acquittal, not a new trial. *See Tibbs v. Florida*, 457 U.S. 31, 41–42 (1982). Whether the evidence is legally sufficient under *Jackson* "*is of course wholly unrelated to the question of how rationally the verdict was actually reached*. . . . [T]he standard announced today . . . does not require scrutiny of the reasoning process" used by the fact-finder.

Jackson, 443 U.S. at 319 n.13 (emphasis added). Succinctly, evidence is legally insufficient where the "only proper verdict" is acquittal. *Tibbs*, 457 U.S. at 42.

Third and conversely,

> A reversal on [a factual-sufficiency] ground, unlike a reversal based on [legally-]insufficient evidence, *does not mean that acquittal was the only proper verdict*. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves. A deadlocked jury, we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause. Similarly, an appellate court's disagreement with the jurors' *weighing of the evidence* does not require the special deference accorded verdicts of acquittal.
>
> A reversal based on the *weight of the evidence*, moreover, can occur *only after the State both has presented [legally-]sufficient evidence to support conviction and has persuaded the jury to convict*. The reversal simply affords the defendant a second opportunity to seek a favorable judgment. An appellate court's decision to give the defendant this second chance does not create "an unacceptably high risk that the Government, with its superior resources, [will] wear down [the] defendant" and obtain conviction solely through its persistence.

Id. at 42–43 (citations and footnotes omitted) (emphasis added). Thus, the United States Supreme Court expressly rejected the contention (accepted as true by the *Brooks* plurality) that a "distinction between the weight [(factual sufficiency)] and [legal] sufficiency of the evidence is unworkable," noting that "trial and appellate judges commonly distinguish between the weight [(factual sufficiency)] and [legal] sufficiency of the evidence" and the Due Process Clause "sets a *lower limit* on an appellate court's definition of evidentiary sufficiency." *Id*. at 44–45 (emphasis added). Under *Jackson*, the appellate court may not reweigh evidence or scrutinize the jury's reasoning in any way. *Jackson*, 443 U.S. at 319 & n.13, 326.

To employ such complete deference when reviewing factual sufficiency of the evidence contravenes a Texas criminal defendant's constitutional right to appellate review of fact questions. Accordingly, I strongly disagree with the conclusion by a plurality of the Court of Criminal Appeals and a majority of my colleagues on this court

that the *Jackson* standard of review is sufficient to fulfill the Texas constitutional guarantee of appellate review of questions of fact in criminal cases. I am not alone. In his comprehensive concurring opinion in *Ervin v. State*, Justice Jennings described what can only be denominated as jurisdictional usurpation by the Court of Criminal Appeals. 331 S.W.3d 49, 56–70 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (Jennings, J., concurring).

THE CLEWIS CONUNDRUM

The *Brooks* plurality described the progression of previous opinions dealing with appellate standards of review for sufficiency of evidence in criminal cases. However, our colleagues on the Court of Criminal Appeals could not reconcile the concept of reviewing the evidence in a neutral light, as prescribed in *Tibbs*, with lengthy Texas jurisprudence, both civil and criminal, according much deference to the jury's determinations of weight and credibility. The *Brooks* plurality referred to *Lancon v. State*, 253 S.W.3d 699 (Tex. Crim. App. 2008), as the final nail in the coffin for factual-sufficiency review. *Brooks*, 323 S.W.3d at 901–02 (plurality op.); *see also id.* at 925–26 (Cochran, J., concurring). The plurality opined that requisite deference to the jury as the sole judge of a witness's credibility and the weight to be given testimony eliminates viewing the evidence in a "neutral light." *Brooks*, 323 S.W.3d at 902 (plurality op.) (overruling *Clewis*, 922 S.W.2d 126).

The *Brooks* plurality was so focused on resolving the analytical conundrum their court created by fashioning a standard of review for factual sufficiency in *Clewis* that they failed to acknowledge the difference between a constitutional guarantee of appellate review versus a standard of review gleaned under the principles of stare decisis. For example, the plurality concluded: "We believe that these and the reasons given by the Florida Supreme Court for abandoning its factual-sufficiency standard are good reasons for discarding the confusing and contradictory *Clewis* factual-sufficiency standard." *Id.* at 905. The plurality failed to acknowledge the fact that Florida does not have a similar constitutional guarantee of appellate review for questions of fact. The Florida Supreme Court simply exercised its jurisdictional and state constitutional authority to change the

standard of review in order to eliminate confusion and avoid disparate results. *Tibbs v. Florida*, 397 So. 2d 1120, 1125 (Fla. 1981) (per curiam). The Texas Court of Criminal Appeals does not have authority to amend the Texas Constitution. *See Meraz*, 785 S.W.2d at 152, 154.

Moreover, the *Brooks* plurality's stated reasons for discarding factual-sufficiency review are unsupportable: (1) troubling double jeopardy problems are presented because the *Clewis* factual-sufficiency standard is barely distinguishable from the *Jackson* legal-sufficiency standard and (2) the non-deferential standard in *Clewis* could violate the right to trial by jury under the Texas Constitution. *Brooks*, 323 S.W.3d at 902–06 (plurality op.). First, relative to double jeopardy, a court may set aside a conviction for any unspecified reason and order a new trial because initial jeopardy continues and the case is restored to its position before the former trial. *See Lofton v. State*, 777 S.W.2d 96, 97 (Tex. Crim. App. 1989). The risks of double jeopardy following reversal based on factual insufficiency were fully clarified by the United States Supreme Court in *Tibbs*. When an appellate court sits as a "thirteenth juror" and, after weighing the evidence in a neutral light without deference to the jury's resolution of conflicting evidence, determines the evidence is factually insufficient to support conviction, an acquittal has not occurred, but a "deadlocked jury." *Tibbs*, 457 U.S. at 42. Therefore, there is no double jeopardy risk. *Id.* The Double Jeopardy Clause does not prevent an appellate court from granting a convicted defendant an opportunity to seek acquittal through a new trial. *Id.* Consequently, it is acutely ironic that the Court of Criminal Appeals refers to the Double Jeopardy Clause to "protect" a defendant from the new trial he desires! The Court might have sound reasons to overrule *Clewis*, but it is without jurisdiction or authority to abolish a constitutionally protected right. *See Meraz*, 785 S.W.2d at 152.

Second, there is persistent irony relative to the *Brooks* plurality's concern that application of "a nondeferential standard could violate the right to trial by jury under the Texas Constitution." *Brooks*, 323 S.W.3d at 905 (plurality op.). The *Brooks* plurality placed unnecessary emphasis on the statutory provisions establishing the jury as the exclusive judge of the facts and weight to be given evidence. *Id.* at 908 (citing Tex. Code

Crim. Proc. Ann. arts. 36.13 (West 2007), 38.04 (West 1979); *Watson v. State*, 204 S.W.3d 404, 409 (Tex. Crim. App. 2006)). Their analytical error results from an overbroad interpretation contrary to the statute authorizing this court to reverse a criminal conviction "as well upon the law as upon the facts." *See* Tex. Code Crim. Proc. Ann. art. 44.25 (West 2006). Obviously, a criminal defendant is not concerned about preserving the jury's guilty verdict. On appeal, he seeks acquittal or a new trial and will be entitled to remand for a new trial if the court of appeals concludes that the evidence is factually insufficient.

It is axiomatic that a court of appeals does not substitute its judgment for that of the jury by sustaining a challenge to a question of fact and remanding for a new trial. *Cropper v. Caterpillar Tractor Co*., 754 S.W.2d 646, 651–52 (Tex. 1988) (quoting *Hopson v. Gulf Oil Corp.*, 237 S.W.2d 352, 358 (Tex. 1951)). "The fact that the court of appeals might engage in 'thought processes' akin to the jury's . . . does not establish a violation of the right of trial by jury." *Id.* at 651.

As noted above, the United States Supreme Court cut a broad path for state jurisdictions that provide appellate review for a defendant's questions of fact. An appellate court may weigh the evidence and act as a "thirteenth juror." *Tibbs*, 457 U.S. at 41–42. The *Brooks* plurality was troubled that this broad authority contradicts the "appropriate deference" standard in *Clewis.* **However, the United States Supreme Court recognized that state courts have the power to fulfill their state constitutional and statutory requirements of appellate review of questions of fact (with latitude for review of the evidence in a neutral light much wider than prescribed under *Clewis*), but the *Brooks* plurality chose to overrule *Clewis* and abolish appellate review for factual sufficiency of the evidence!** Denial of a Texan's state constitutional and statutory rights to appellate review for factual insufficiency through erroneous interpretation or application of United States Supreme Court authority implicates due process of law protections under the Fifth and Fourteenth amendments to the United States Constitution. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (concluding in states which provide for appellate review, a criminal defendant is entitled to the protections afforded

under the Due Process and Equal Protection Clauses of the United States Constitution). The Supreme Court subsequently opined: "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of ***unreasoned distinctions*** that can only impede open and equal access to the courts." *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996) (emphasis added) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)).

Clewis represented a compromise between long-standing deference to the jury's verdict and a criminal defendant's constitutional right to appellate review of questions of fact. The appellate court entertained qualified deference to the jury's assessment of the weight, credibility, or reliability of the admittedly legally-sufficient evidence. *Brooks*, 323 S.W.3d at 928 (Price, J., dissenting). When viewing the evidence in a neutral light, an appellate court was not required to resolve every conflict in the evidence, or draw every inference from ambiguous evidence, in favor of the defendant's guilt just because a rational jury could have drawn such an inference; the court accepted the proposition that qualified deference does not convert factual-sufficiency review into legal-sufficiency review. *See id.* at 929. Consequently, for many years, appellate courts concluded there is no inherent conflict in the factual-sufficiency standard of review when an appellate court is "deferential" to the jury's verdict while neutrally considering and weighing all of the evidence in the record. The *Brooks* plurality concluded that the *Clewis* standard of review for factual sufficiency is indistinguishable from the standard of review for legal sufficiency prescribed in *Jackson*. *Brooks*, 323 S.W.3d at 895, 901 (plurality op.). Their analytical conundrum was resolved, but they threw the baby out with the bath-water!

I respectfully submit that each member of this court has a sworn duty to provide appellate review responsive to David Temple's contention that the evidence is factually insufficient to support the jury's verdict of guilt beyond a reasonable doubt.[3]

[3] In his concurring opinion to denial of en banc review, Justice Brown expresses concern that we would somehow defy "hierarchical precedent" by refusing to adhere to the dictates of the *Brooks* plurality. However, we have a sworn duty to address the constitutional crisis created by the *Brooks* decision. As Justice Frankfurter succinctly expressed: "A timid judge, like a biased judge, is intrinsically a lawless judge." *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring). The

FACTUAL INSUFFICIENCY

As previously mentioned in my concurring opinion, any effort to perform a factual sufficiency review required by the Texas Constitution would be unavailing because a majority of this court has followed *Brooks* without reservation. After another exhaustive review of the record, and in consideration of Justice McCally's explication of the evidence, my concern about this court's reticence to address the constitutional crisis created by *Brooks* is heightened. In the panel opinion, we acknowledged that the circumstantial evidence supporting the jury's verdict is not negligible. After reviewing the entire record, this is the highest attribution we could muster. However, constrained by the Court of Criminal Appeals's opinion in *Brooks*, the panel ultimately concluded that the evidence was sufficient under the *Jackson* standard of review for legal sufficiency. It is my considered opinion that, after weighing all the evidence in a neutral light, a majority of this court would likely conclude the evidence of guilt beyond a reasonable doubt is so obviously weak as to undermine confidence in the jury's verdict.[4]

RESPONSE TO JUSTICE MCCALLY'S DISSENT TO DENIAL OF EN BANC REVIEW

Having expressed strong disagreement with this court's unwillingness to prevent erosion of the Texas constitutional right to factual-sufficiency review, I now address Justice McCally's concerns about the panel opinion which I authored. I agree with Justice McCally that this case does not involve strong circumstantial evidence and that other cases cited by the panel in which murder convictions were upheld involved stronger circumstantial evidence.

Brooks plurality did not distinguish or overrule *Meraz*, in which the Court of Criminal Appeals acknowledged that it simply has no jurisdiction to fashion a standard of review that conflicts with the Texas Constitution. *Meraz*, 785 S.W.2d at 152. The *Brooks* plurality did not directly address the constitutional issue which is now squarely before this Court. However, even if the *Brooks* plurality had sufficiently addressed the constitutional issue and overruled *Meraz*, we should not remain silent. Our former colleague on the First Court of Appeals, Justice Taft, stated my position with clarity: "Judicial restraint requires that I be bound, but I will not be gagged." *Windom v. State*, 961 S.W. 2d 267, 270 (Tex. App.—Houston [1st Dist.] 1997) (Taft, J., concurring), *rev'd*, 968 S.W.2d 360 (Tex. Crim. App. 1998).

[4] *See Vodochodsky v. State*, 158 S.W.3d 502, 510 (Tex. Crim. App. 2005) (acknowledging the requirement to set-aside a verdict for factual insufficiency after viewing the evidence in a neutral light and finding the proof of guilt is so obviously weak as to undermine confidence in the jury's verdict); *see also* W. Wendell Hall, *Standards of Review in Texas*, 38 St. Mary's L.J. 47, 265 (2006).

Apparently, Justice McCally's concerns are predicated on her interpretation of the degree of deference required after the *Brooks* plurality concluded that the standard of review for factual sufficiency under *Clewis* is the same standard of review adopted by the United States Supreme Court in *Jackson*. Regretfully, it appears that much of my disagreement with Justice McCally's interpretation of *Brooks* stems from the *Brooks* plurality's effort to transmogrify a *Jackson* standard of review for legal sufficiency into appellate review for factual sufficiency uniquely guaranteed by the Texas Constitution. Referring to footnote 19 in *Brooks*, Justice McCally contends there is a factual-sufficiency component in the *Jackson* standard for legal sufficiency. My colleague suggests that 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." J. McCally's Dissent to En Banc Review (quoting *Watson v. State*, 204 S.W.3d 404, 416–17 (Tex. Crim. App. 2006) (explaining standard for *factual-sufficiency review*)). The incongruity of this postulate should be apparent: How does an appellate court follow the clear dictate of *Jackson* and view all of the evidence in a light most favorable to the prosecution, *but* "*to a very limited degree*" *act as a thirteenth juror*? If an appellate court renders a judgment of acquittal after acting as a thirteenth juror to any degree, the State would have a valid claim that the Court did not follow the *Jackson* standard of review for legal sufficiency. However, if an appellate court reverses for factually insufficiency and remands for a new trial after reviewing the evidence under the *Jackson* standard with some degree of deference to the jury's findings, the appellant may have a valid double jeopardy defense. The Supreme Court admonished state appellate courts not to confuse these two standards of review. *Tibbs*, 457 U.S. at 43–45.

Justice McCally posited the robbery-at-a-convenience-store hypothetical in support of her contention that the panel majority did not follow *Jackson*, and disregarded dispositional evidence. In that scenario, the store clerk identified A, who was convicted by a jury for robbing the store. A properly authenticated videotape was admitted

showing B committed the robbery. In that instance, the jury's finding of guilt would not be rational, and the appellate court should reverse for legal insufficiency. However, that scenario is not presented in this case. Here, there is no conclusive, exculpatory evidence which is objectively measureable by an appellate court. In other words, no objectively measureable evidence conclusively negates the jury's implicit findings regarding disputed evidence. The scenario here is better represented by the proverbial twenty nuns hypothetical, in which the State's sole witness, a paid informant, testifies that he saw the defendant commit the crime. Twenty nuns testify that the defendant was with them at the time, far from the scene of the crime. Twenty more nuns testify that they saw the informant commit the crime. Under this scenario, if the defendant is convicted, he has no remedy under *Jackson* because the informant's testimony, however incredible, is legally sufficient to support his conviction. *See Clewis*, 876 S.W.2d at 444.

Justice McCally further opines that the panel did not properly apply the *Jackson* standard of review because "the panel did not review all of the evidence" and "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." However, this is a circumstantial evidence case, with dozens of complimenting and competing items of evidence the jury was required to compare and weigh. In compliance with instructions in the *Brooks* opinion, the panel invoked the well-established standard of review for legal sufficiency that courts "view *all of the evidence in the light most favorable to the verdict* to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt." *Temple v. State*, --- S.W.3d ---, No. 14-08-00074-CR, 2010 WL 5175018, at *3 (Tex. App.—Houston [14th Dist.] Dec. 21, 2010, no pet. h.) (emphasis added). As the panel recognized, no single circumstance in this case provided a sufficient evidentiary basis to support the verdict. *Id.* at *10 (quoting *Swearingen v. State*, 101 S.W.3d 89, 97 (Tex. Crim. App. 2003)). When the panel reviews all of these circumstances in the light most favorable to the verdict—which, of course, means the panel must defer to the jury's resolution of conflicting evidence unless a rational jury could not—their weight and consistency "'provide[d] the girders to strengthen the evidence and support a rational

jury's finding the elements beyond a reasonable doubt.'" *Id.* (quoting *Swearingen*, 101 S.W.3d at 97).

Although all of the evidence in the record was reviewed and considered in a light most favorable to the prosecution, the panel did not detail all of the evidence. The panel was not required to provide such intricate detail in affirming the jury's verdict. Before *Brooks* abrogated factual-sufficiency review, courts were required to detail all relevant evidence during factual-sufficiency review only when reversing. *See Steadman v. State*, 280 S.W.3d 242, 247 (Tex. Crim. App. 2009) ("Before reversing a conviction on the basis of factual insufficiency, an appellate court must detail all the relevant evidence and must explain in exactly what manner the evidence is factually insufficient."). Contrarily, when courts overruled a factual-sufficiency challenge, they were required to detail the evidence only to the extent necessary to explain why it was factually sufficient to support the verdict. *See Scott v. State*, 934 S.W.2d 396, 402 (Tex. App.—Dallas 1996, no pet.). The rationale for this rule is even more applicable when a court overrules a legal-sufficiency challenge because it views the evidence, not in a neutral light, but in the light most favorable to the jury's verdict. Accordingly, after an appellate court determines and explains why the evidence is legally sufficient to support the jury's verdict, there is no requirement to meticulously detail all remaining evidence and inferences. The absence of such surplus analysis in the panel opinion should not be misconstrued as the panel's failure to consider all of the evidence.

As an example of the panel's failure to review all of the evidence, Justice McCally argues the panel did not properly consider the Roberts brothers' testimony that they heard a gunshot at 4:38 p.m., a time when appellant was undisputedly not home. The panel acknowledged that the Roberts brothers' testimony supported appellant's defense. *Temple*, 2010 WL 5175018, at *6. However, we also recognized that "the jury was free to disbelieve [this testimony] and rationally could have done so because the Roberts brothers were children and no other witness testified that a gunshot was heard that day." *Id.* In other words, although the jury was free to believe the Roberts brothers' testimony, there was no requirement to do so because their statements were not conclusively proved.

The jury is the sole judge of the credibility and demeanor of a witness. *See Johnson v. State*, 23 S.W.3d 1, 8 (Tex. Crim. App. 2000) ("Unless the available record clearly reveals a different result is appropriate, an appellate court must defer to the jury's determination concerning what weight to give contradictory testimonial evidence because resolution often turns on an evaluation of credibility and demeanor, and those jurors were in attendance when the testimony was delivered."); *Jones v. State*, 984 S.W.2d 254, 258 (Tex. Crim. App. 1998) ("[A] jury is permitted to believe or disbelieve any part of a witness' testimony[.]"). In considering the cold record, we cannot discern whether the Roberts brothers were nervous, confident, or credible. Thus, under the *Jackson* standard of review, we are precluded from attributing credence to their testimony simply because it was not directly contradicted.[5] Accordingly, the panel properly deferred to the jury's implicit decision not to believe the Roberts brothers' testimony.[6]

I also disagree with Justice McCally's criticism that the panel reviewed the evidence in piecemeal fashion. The panel began its sufficiency analysis by noting the evidence conclusively established "that someone intentionally and knowingly caused Belinda's death." *Temple*, 2010 WL 5175018, at *4. Thus, the panel was required to determine whether legally-sufficient evidence supported the jury's finding that appellant was the killer. Viewed in the light most favorable to the verdict, the evidence supports the following findings and inferences:

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[5] Justice McCally also contends the panel's analysis of testimony from the Roberts brothers was inadequate because the panel did not consider testimony from the Parkers who lived next-door to the Robertses that their dogs inexplicably 'went crazy' near the time the Roberts brothers heard a gunshot. Although the Parkers' testimony that their dog was barking during the time the Roberts brothers heard a gunshot arguably supports the contention that there was a shotgun blast at that time, it does not render the Roberts brothers' testimony conclusive relative to the exact time a shotgun was fired inside appellant's house. Therefore, under the *Jackson* standard, we cannot conclude that the jury acted irrationally by finding the Roberts brothers not credible on this point.

[6] Additionally, Justice McCally contends the panel improperly applied the "rational jury" requirement by concluding "no rational jury could credit Vielma's testimony," because the panel purportedly did not consider Vielma's testimony in conjunction with all the evidence in the record. *See Temple*, 2010 WL 5175018, at *8 n.3. While I agree rationality of a jury's fact finding is to be determined from all the evidence, the panel correctly concluded it would be irrational for a jury to believe Vielma's testimony that a dog was not inside the Temple's garage. Vielma admitted she was unable to see or determine the dog's location within a particular area inside the garage, rendering her testimony that a dog was inside the garage sheer speculation. *Id.*

- Appellant could have been in his house when the murder occurred.[7]
- Someone staged the house to make it appear that it had been burglarized. Appellant had ample opportunity to stage a burglary while he was watching E.T., and Belinda was still at school.
- Appellant testified that he drove directly to Home Depot after leaving Brookshire Brothers. The drive time between Brookshire Brothers and Home Depot was approximately ten to fifteen minutes. Cameras captured appellant leaving Brookshire Brothers at 4:38 P.M. and arriving at Home Depot at 5:14 P.M. During this thirty-six minute window, a witness observed appellant driving from the opposite direction a person would choose when leaving Brookshire Brothers headed to Home Depot. Thus, the jury could have concluded that appellant lied about his activities after leaving Brookshire Brothers. The jury could have also rationally concluded that the thirty-six minute window afforded appellant ample opportunity to hide a gun and bloody clothing before arriving at Home Depot.[8] A finding that appellant misrepresented his activities during the afternoon Belinda was murdered rationally supported a finding of guilt because there is no explanation for appellant's prevarication other than to thwart police from discovering his activities.
- Appellant engaged in an extramarital affair with Heather for several months before the murder. He told Heather he loved her and expressed to a friend that he was unsure if he was willing leave Belinda for Heather. Within a very brief period of time after Belinda was murdered, appellant resumed his relationship with Heather, and later they were married.[9]
- While police were investigating the murder, appellant threatened certain friends to "keep [their] damn mouth[s] shut" and stop talking to police and also followed them in his car while they were driving.

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[7] In fact, as Justice McCally notes, the jury could have rationally believed appellant and Belinda were together inside their house for over half-an-hour after she arrived home from school. Thus, the jury could have rationally concluded there was ample time for appellant to commit the shooting.

Additionally, I agree the fact that blood spatter was confined to the closet is odd. Appellant's expert opined there must have been back-spatter because the shotgun was discharged close-range, and Belinda's blood was never found on appellant, his clothing, or in his vehicle. However, the absence of blood evidence in the house does not necessarily support appellant's contention that someone else committed the crime. A rational jury could have inferred that appellant had adequate time while Belinda was at work to prepare for quick-cleaning of the murder scene, particularly in light of other evidence that the actor or actors staged a burglary.

[8] The police conducted thorough searches of Katy and specifically the area around appellant's parents' house but never found a weapon or other evidence linking appellant to the murder. However, many of these searches occurred days after the murder, thereby allowing the jury to reasonably conclude appellant was afforded sufficient time to dispose of evidence.

[9] A rational jury could have found it shocking that a mere month after his wife was murdered, appellant sent Valentine's Day flowers to the woman with whom he had been having an affair.

Viewed cumulatively, through the prism "in a light most favorable to the jury's verdict," these facts sufficiently link appellant to the murder to support a non-speculative finding that he was the killer because he had motive and opportunity, his house was staged to appear burglarized, he misrepresented his activities during the afternoon of the murder, he quickly resumed a relationship with the woman who was the object of an illicit affair, and he threatened friends who were speaking with the police.[10] Admittedly, the circumstantial evidence supporting guilt beyond a reasonable doubt is not great, but it is also not negligible. Accordingly, constrained by the *Jackson* standard of review, the panel correctly concluded that a rational jury could have found appellant guilty of murdering his wife beyond a reasonable doubt.[11]

Finally, I am impressed by Justice McCally's detailed explication of the evidence, which I believe supports reversal for factual insufficiency. Accordingly, I urge my

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[10] As described by Justice McCally, there was evidence linking the Temples' teenage neighbor, R.J.S., to the murder. *See Temple*, 2010 WL 5175018, at *11, *33. However, whether the majority panel or another jury would have believed that this evidence created reasonable doubt regarding Temple's guilt is superfluous—the inquiry is whether a rational jury could have disregarded this evidence. R.J.S. testified that he did not murder Belinda. Because no evidence rendered this testimony unbelievable (in fact, this testimony was supported by evidence that none of the double-ought shells recovered from R.J.S.'s family contained wadding matching that found near Belinda's body), the jury was free to believe R.J.S. Therefore, we were mandated to defer to the jury's implicit finding that R.J.S. was not the killer. *See Clayton v. State*, 235 S.W.3d 772 (Tex. Crim. App. 2007) (explaining that we defer to the jury's resolution of conflicting evidence).

[11] Justice McCally also expresses concern about the panel's resolution of appellant's *Brady* issue and the cumulative harm analysis pertaining to evidentiary and jury-charge errors.

However, we determined appellant waived his *Brady* issue by failing to complain about the State's nondisclosure of *Brady* material until *twenty-one days after he became aware of the nondisclosure*. *Temple*, 2010 WL 5175018, at *11. Considering the fact that the Court of Criminal Appeals has recognized a *Brady* violation "must be made as soon as the grounds for complaint is apparent or should be apparent," appellant's twenty-one-day lull constitutes a clear waiver of the issue. *See Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999). Stated differently, appellant was not entitled to a three-week delay to determine whether the belatedly disclosed R.J.S. evidence necessitated a trial-halting continuance.

Regarding the panel's harm analysis, appellant argued in over seventy-five issues that the trial court erroneously admitted evidence and permitted improper closing argument. Most of these issues were not preserved or did not support error. *Temple*, 2010 WL 5175018, at *12–30. After determining that roughly ten non-constitutional errors were properly preserved, we conducted a cumulative-error harm analysis pursuant to rule 44.2(b) of the Texas Rules of Appellate Procedure. In light of the evidence supporting appellant's guilt, the immaterial nature of several of the errors, and particularly the effect of the many unpreserved errors, we determined the preserved errors did not have a substantial and injurious effect on the jury's verdict. *Id.* at *37.

colleagues to abjure the decision to abolish factual-sufficiency review in criminal cases. This court did not create a constitutional crisis relative to the decision to abolish factual-sufficiency review; the crisis is identifiable by simply reviewing prior opinions by the Court of Criminal Appeals, acknowledging that it is without constitutional authority to determine whether the evidence is factually sufficient, and admitting it does not have jurisdiction to determine questions of factual insufficiency until or unless the Texas Constitution is amended! *See Meraz*, 785 S.W.2d at 152; *see also Laster*, 275 S.W.3d at 518–19. This court has a constitutional duty not to ignore usurpation of its conclusive jurisdiction over factual-sufficiency issues in criminal cases, and each member of this court is under a sworn duty to defend Article 5, Section 6 of the Texas Constitution. Accordingly, I respectfully dissent to denial of rehearing en banc.

/s/ Charles W. Seymore
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.