IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0992-15

ANTWAIN MAURICE BURKS, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS FORT BEND COUNTY

RICHARDSON, J., filed a dissenting opinion in which NEWELL, J., joined.

DISSENTING OPINION ON REHEARING

According to the Texas Rule of Appellate Procedure 38.1(f), "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included."[1] Well, no, not really—not when an appellant raises the issue of legal sufficiency. So, when this Court recently held in *Cary v. State*[2] that, "[w]hen determining whether the evidence is

[1] TEX. R. APP. PROC. 38.1(f).

[2] 507 S.W.3d 761 (Tex. Crim. App. 2016).

sufficient to support a criminal conviction, the only standard an appellate court should apply is the *Jackson v. Virginia*[3] test for legal sufficiency"[4] (wherein the Supreme Court said that legally sufficient evidence is "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of *every* element of the offense"[5]), we didn't really mean exactly that. Now we are saying that the reviewing court does not always have to look at "every element of the offense," because that would be just too much to ask.

Today, this Court does an "about-face" from seven months ago and decides "that to require an intermediate appellate court to resolve aspects of legal sufficiency neither explicitly raised nor even mentioned in the appealing party's brief 'creates an unworkable burden on the lower courts to act as *de facto* defense counsel for every defendant who raises the issue of legal insufficiency.'"[6] Really?

First, I would not call it an "unworkable burden" to have to address whether there was sufficient evidence to support each element of the offense. An appellate court has the record. An appellate court has a Penal Code. An appellate court has the power to require

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[3] 443 U.S. 307.

[4] *Cary*, 507 S.W.3d at 765-66.

[5] *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (emphasis added).

[6] *Per Curiam* Opinion on Rehearing at page 2.

more briefing.[7] How unworkable is it to look up the elements of the offense of tampering with a human corpse? There are only four of them: (1) knowing that an offense had been committed,[8] (2) the person altered, destroyed, or concealed (3) a human corpse, (4) with the intent to impair its availability as evidence in a subsequent investigation of or official proceeding related to the offense.[9] How much of a burden is it to see if the evidence supports all four elements?

Second, the *issue* of whether the evidence is legally sufficient to support Appellant's conviction *was* "explicitly raised" on direct appeal. When legal sufficiency is raised as a point of error on appeal, an appellate court would know that, under *Jackson v. Virginia*, "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

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[7] *See* TEX. R. APP. P. 38.9(b) ("Briefing Rules to Be Construed Liberally. . . . (b) *Substantive Defects*. If the court determines, either before or after submission, that the case has not been properly presented in the briefs, or that the law and authorities have not been properly cited in the briefs, the court may postpone submission, require additional briefing, and make any other order necessary for a satisfactory submission of the case."); *see also* TEX. R. APP. P. 38.7 ("Amendment or Supplementation. A brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe.").

[8] I point out that the court of appeals in this case had no problem addressing the knowing-that-an-offense-had-been-committed element of the offense, even though Appellant had not made that argument. In a footnote, the court of appeals noted that Appellant did not assert that the evidence is insufficient to show he knew an investigation or official proceeding was pending or in progress, but it still concluded that the evidence was sufficient.

[9] TEX. PENAL CODE § 37.09(d)(1).

beyond a reasonable doubt."[10] I see a difference between raising an issue and making a particular argument to support that issue. But still, in his brief filed with the Fourteenth Court of Appeals, in support of his point of error that the evidence is not legally sufficient to support his conviction,

- Appellant set out the four elements of the offense, as included in the indictment, which specifically alleged that Appellant tampered with the corpse of Dontay Leonard "with the intent to impair its availability as evidence."
- Appellant asserted that "[t]he body was not concealed or hidden in any way" and that "Dontay Leonard was found in the middle of a street in an area lighted by street lights."
- Appellant cited to the record to support these assertions.
- Appellant then recited the standard that "[e]vidence is legally sufficient only if the state has affirmatively proven each of the essential elements of the offense."

So I ask, at what point did the task of looking at whether the evidence supports the intent-to-impair element of the offense become "unworkable?"[11]

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[10] *Cary*, 507 S.W.3d at 766 (quoting *Jackson*, 443 U.S. at 319).

[11] Appellant's counsel clearly dropped the ball, but Appellant is not without a remedy. Once his conviction is final, Appellant has the option of filing an application for writ of habeas corpus with the trial court pursuant to Texas Code of Criminal Procedure Art. 11.07, alleging ineffective assistance of appellate counsel. *See Ex parte Daigle*, 848 S.W.2d 691, 692 (Tex. Crim. App. 1993) (granting habeas applicant a new appeal based on appellate counsel's ineffectiveness for failing to raise point of error on appeal).

I would not say that Appellant raised *a new* legal sufficiency issue for the first time on discretionary review. He raised *the* issue of legal sufficiency on direct appeal but just did a better job arguing in support of it on discretionary review. But, according to this Court, his better argument came too late. Even though this Court has the ability to send the case back to the court of appeals with a suggestion for more briefing from Appellant, which is what we did on original submission, it will not do that now.

As was decided in the Court's opinion on original submission, I would remand this case to the court of appeals to address whether there was sufficient evidence to support the intent-to-impair element of the offense. With these comments, respectfully, I dissent.

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