Concurring 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

CONCURRING OPINION TO DENIAL OF REHEARING EN BANC

Both as a member of the original panel and of the en-banc court, I have voted against rehearing this cause. I write separately to respond to my colleagues who have dissented from our refusal to rehear. I will address each in turn.

I

Appellate courts rarely overturn jury verdicts. When they do, the reason for reversing often has more to do with trial-judge error than a conclusion that the jury just got it wrong.[1] Yet in this case Justice McCally would have us reverse the conviction

[1] Trial-judge errors that lead juries into reversible verdicts range from submitting wrongful-death cases when there is simply no evidence of causation, *see, e.g.*, *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 730 (Tex.

below and render a judgment of acquittal because, in her judgment, the verdict is "irrational." Such a leap would supplant the jury's evaluation of the evidence with our own—a gross invasion by the judiciary upon the right to trial by jury, a right that Texas has held "inviolate" since the days of the Republic.[2]

But I do not write to quarrel with Justice McCally over the merits. Like Justice Seymore, I believe the panel opinion appropriately addresses the evidence upon which a rational jury could have rendered the verdict rendered below. Instead, I write to dispel Justice McCally's contention that this court has issued inconsistent messages about the meaning of *Brooks v. State*. Respectfully, she is wrong when she contends that the court has stated "two different standards of review" arising from *Brooks*. In this case, as in others, we held that after *Brooks* "only one standard should be used to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency." *Temple v. State*, No. 14-08-0074-CR, — S.W.3d —, 2010 WL 5175018, at *2 (Tex. App.—Houston [14th Dist.] Dec. 21, 2010, no pet. h.) (relying on *Brooks v. State*, 323 S.W.3d 893, 905–07) (Tex. Crim. App. 2010) (plurality op.); *id.* at 926–28 (Cochran, J., concurring)); *see also Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (courts of appeals should apply the legal-sufficiency standard when addressing legal-sufficiency and factual-sufficiency arguments in appeals from criminal convictions).

Justice McCally is correct that in some opinions this court has also noted that *Brooks* "does not alter the constitutional authority of the intermediate courts of appeals to evaluate and rule on questions of fact." *See, e.g.*, *Muhammed v. State*, 331 S.W.3d 187, 191 n.3 (Tex. App.—Houston [14th Dist.] 2011, no pet.) And indeed it does not. Under

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1997), to allowing inadmissible confessions or extraneous offenses in criminal cases. *Pitts v. State*, 614 S.W.2d 142, 143–44 (Tex. Crim. App. [Panel Op.] 1981) (inadmissible confession); *Fox v. State*, 283 S.W.3d 85, 95 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (inadmissible extraneous-offense evidence).

[2] Repub. Tex. Const. of 1836, Declaration of Rights, Ninth, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1083 (Austin, Gammel Book Co. 1898) ("the right of trial by jury shall remain inviolate"); *accord* Tex. Const. art. I, § 15; Tex. Const. of 1869, art. I, §§ 8, 12; Tex. Const. of 1866, art. 4, § 20; Tex. Const. of 1861, art. I, § 12; Tex. Const. of 1845, art. I, § 12; *see also* Repub. Tex. Dec. of Indep., *reprinted in* 1 Gammel, *supra*, at 1065 (describing the right to trial by jury as "that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen").

Brooks, "[t]he *Jackson v. Virginia* legal-sufficiency 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 894 (plurality op.) (emphasis added). *Brooks* does not say that the courts of appeals' authority to review cases for factual sufficiency is dead. It says, rather, that the *Clewis v. State* factual-sufficiency standard is indistinguishable from a properly applied *Jackson v. Virginia* standard. *Id*. at 898–902.[3]

That still leaves a lot of factual review for the courts of appeals. We review for factual sufficiency in civil cases, of course, but also in criminal cases where the burden of proof is less than beyond a reasonable doubt. *See, e.g.*, *Ulloa v. State*, No. 14-10-00102-CR, 14-10-00101-CR, — S.W.3d —, 2011 WL 1283115, at *3 n.1 (Tex. App.—Houston [14th Dist.] Apr. 5, 2011, pet. filed) (distinguishing *Brooks* and conducting a factual-sufficiency review in an appeal from a trial court's denial of habeas-corpus relief in which the burden of proof on the defendant is a preponderance of the evidence); *Bernard v. State*, No. 14-10-00044-CR, — S.W.3d —, 2011 WL 1375570, at *2 (Tex. App.—Houston [14th Dist.] Apr. 12, 2011, pet. filed) (distinguishing *Brooks* and reviewing the factual sufficiency of a jury's punishment-phase negative finding on a special issue concerning sudden passion in which the burden of proof is a preponderance of the evidence).

When a court of appeals is called upon to review factual sufficiency on an issue that a criminal defendant must prove by a preponderance, it should consider all the relevant evidence to determine whether the finding is so against the great weight and preponderance of the evidence so as to be manifestly unjust. *Meraz v. State*, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990). As a panel of this court held in *Bernard v. State*, "[t]he five judges in *Brooks* did not overrule or disapprove of this part of *Meraz*; in fact, the two concurring judges expressly stated that this part of *Meraz* was correctly decided." *Bernard*, — S.W.3d at —, 2011 WL 1375570, at *2 (citing *Brooks*, 323 S.W.3d at 895;

[3] *See also* Ricardo Pumarejo, Jr., *Clueless over* Clewis *or: How I Learned to Stop Worrying and Welcome* Brooks v. State, 23 The Appellate Advocate: State Bar of Texas Appellate Section Report 246, 258 (Winter 2010).

id. at 924 & n.67 (Cochran, J., concurring); *Ervin v. State*, 331 S.W.3d 49, 53 n.2 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd)).

So when this court says *Brooks* has done away with factual-sufficiency review in some criminal cases, it is not inconsistent for us also to say that *Brooks* has not altered our constitutional authority "to evaluate and rule on questions of fact." *See, e.g.*, *Muhammed*, 331 S.W.3d at 191 n.3. *Brooks* did not abolish factual-sufficiency review in all criminal cases. Instead, the Court of Criminal Appeals announced that in cases where the burden of proof is beyond a reasonable doubt, the factual-sufficiency and legal-sufficiency standards are the same. This court has faithfully followed *Brooks* where appropriate, and faithfully conducted an old-fashioned factual-sufficiency review where *Brooks* does not apply.

Because there is no conflict among the rulings from this court on the interpretation of *Brooks v. State*, there is no reason for an en-banc rehearing of the panel opinion in this case. *See* Tex. R. App. P. 41.2(c).

II

Justice Seymore also has dissented from the court's failure to conduct an en-banc rehearing. But the thrust of his dissent is the allegation that *Brooks* has deprived the intermediate courts of appeals of their ability to carry out their constitutional duty to review facts. I dispute that the Court of Criminal Appeals has invaded our constitutional province. I further believe that in his dissent, Justice Seymore advocates a violation of the doctrine of hierarchical precedent.

A

There is no doubt—the factual-conclusivity clause in Article V, Section 6, of the Texas Constitution makes intermediate appellate courts' factual-sufficiency decisions "final and conclusive" upon the Court of Criminal Appeals. *Roberts v. State*, 221 S.W.3d 659, 662 & 663 n.2 (Tex. Crim. App. 2007); *see also* Tex. Const. art. V, § 6(a) (providing that an intermediate appellate court's decision "shall be conclusive on all questions of

fact brought before them on appeal or error"). But the factual-sufficiency clause does not prohibit the Court of Criminal Appeals from taking jurisdiction to decide, as a matter of law, whether an intermediate court of appeals applied the correct standard of review in addressing a party's factual-sufficiency claim. *See Roberts*, 221 S.W.3d at 663 (relying on *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661–62 (1951); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634–35 (Tex. 1986)).[4]

The factual-conclusivity clause allows the Court of Criminal Appeals to review an intermediate court's factual-sufficiency decision insofar as necessary to determine whether the intermediate court "properly applied 'rules of law.'" *Roberts*, 221 S.W.3d at 663 & n.3 (citing *Choate v. San Antonio & A.P. Ry. Co.*, 91 Tex. 406, 44 S.W. 69, 69–80 (1898); *Dyson v. Olin Corp.*, 692 S.W.2d 456, 457 (Tex. 1985); *Harmon v. Sohio Pipeline Co.*, 623 S.W.2d 314, 314–15 (Tex. 1981)). But no more than that is exactly what the *Brooks* court did—it laid out the legal boundaries of a proper factual-sufficiency review. And though they have no jurisdiction themselves to perform a factual-sufficiency review, it has been the legitimate realm of our state's courts of last resort to tell the courts of appeals how factual sufficiency should be reviewed. *See Pool*, 715 S.W.2d at 635 ("Even as to factual insufficiency, it has been the supreme court that has delineated the role of the courts of appeals.") (citing *In re King's Estate*, 150 Tex. at 666, 244 S.W.2d at 662); *see also* Tex. Const. art. V, § 5(a) (granting "final appellate jurisdiction" to the Court of Criminal Appeals "in all criminal cases of whatever grade").

I already have explained that *Brooks* did not do away with factual-sufficiency review; it simply recognized that when the burden of proof is beyond a reasonable doubt, factual sufficiency and legal sufficiency are one and the same. *Brooks*, 323 S.W.3d at 898–202; *see also Watson v. State*, 204 S.W.3d 404, 415 (Tex. Crim. App. 2007) (holding that factual-sufficiency review is "barely distinguishable" from *Jackson v. Virginia* standard). And the Court of Criminal Appeals, under its authority to verify that intermediate courts adhere to "rules of law," was completely within its rights to do so.

[4] The *Pool* court held that *In re King's Estate* established that "the supreme court might take jurisdiction, notwithstanding the finality of judgments of the courts of civil appeals on fact questions, in order to determine if a correct standard has been applied by the intermediate courts." *Pool*, 715 S.W.2d at 634–35.

Roberts, 221 S.W.3d at 663. Justice Seymore's exhortation notwithstanding, factual conclusivity—the constitutional prerogative of the intermediate courts—remains intact.

B

In his dissent, Justice Seymore does not merely lambaste the constitutional foundation of *Brooks*—he urges a refusal to "adhere to" it. He sees *Brooks* as such an "affront to the Texas Constitution" that we have no obligation to follow it. I do not agree that *Brooks* is so sinister. But even if it were, we would be no less compelled to go where it leads us.

Justice Seymore concedes that "[o]stensibly, 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." There's no "ostensibly" to it. "The Court of Criminal Appeals is the highest tribunal on matters pertaining to the enforcement of criminal laws, and when it has deliberately and unequivocally interpreted the law in a criminal matter, we must adhere to its interpretation." *Southwick v. State*, 701 S.W.2d 927, 929 (Tex. App.—Houston [1st Dist.] 1985, no pet.); *see also* Tex. Const. art. V, § 5(a); *Robinson v. City of Galveston*, 51 Tex. Civ. App. 292, 297, 111 S.W. 1076, 1079 (Galveston 1908, no writ) (holding that even "if we were disposed to doubt the soundness of [the Court of Criminal Appeals'] decisions, we would yet feel constrained to follow them").[5]

Issues of hierarchical precedent are not child's play. "Inferior courts are absolutely bound to follow the decisions of the courts having appellate or revisory jurisdiction over them. In this aspect, precedents set by the higher courts are imperative

[5] *Accord State ex rel. Vance v. Clawson*, 465 S.W.2d 164, 168 (Tex. Crim. App. 1971) ("'The Court of Criminal Appeals is the court of last resort in this state in criminal matters. This being so, no other court of this state has authority to overrule or circumvent its decisions, or disobey its mandates.'" (quoting *State ex rel. Wilson v. Briggs*, 351 S.W.2d 892, 894 (Tex. Crim. App. 1961)); *Gabriel v. State*, 290 S.W.3d 426, 436 n.5 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (stating that "[a]s an intermediate court of appeals, we are bound by controlling authority from the Court of Criminal Appeals"); *Villarreal v. State*, 267 S.W.3d 204, 209 (Tex. App.—Corpus Christi 2008, no pet.); *State v. Stevenson*, 993 S.W.2d 857, 867 (Tex. App.—Fort Worth 1999, no pet.); *Horton v.. State*, 986 S.W.2d 297, 300 (Tex. App.—Waco 1999, no pet.); *Contreras v. State*, 915 S.W.2d 510, 522 (Tex. App.—El Paso 1995, pet. ref'd) ("As an intermediate appellate court, we are duty[-]bound to follow the law declared by the Texas Court of Criminal Appeals on matters pertaining to the enforcement of criminal laws."); *Flores v. State*, 883 S.W.2d 383, 385 (Tex. App.—Amarillo 1994, pet. ref'd); *Pettigrew v. State*, 822 S.W.2d 732, 734 (Tex. App.—Dallas 1992, pet. ref'd).

in the strictest sense. They are conclusive on the lower courts, and leave to the latter no scope for independent judgment or discretion." Henry Campbell Black, Law of Judicial Precedents 10 (1912).

"[U]nless we wish anarchy to prevail" within our halls of justice, lower courts must follow higher-court precedent "no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 371, 375, 102 S. Ct. 703, 706, 70 L. Ed.2d 556 (1982) (per curiam). The judges of the inferior courts "must either obey the orders of higher authority or yield up their posts to those who will." *Weber v. Kaiser Aluminum & Chem. Corp.*, 611 F.2d 132, 133 (5th Cir. 1980) (Gee, J.).

Even if *Brooks* were an abomination, it is not the role of lower courts to rein in our courts of last resort when they go *ultra vires*. When the Supreme Court of Texas and the Court of Criminal Appeals interpret our state's constitution, we must follow. That's how our system works. To do otherwise—to defy the authority of our state's highest courts—is to forswear the rule of law.

/s/ Jeffrey V. Brown
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.