Reversed and Rendered and Plurality and Concurring Opinions filed August 12, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00338-CR

GREGORY CARL GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 40th District Court
Ellis County, Texas
Trial Court Cause No. 32,870-CR

CONCURRING OPINION

I concur with the plurality's judgment. I write separately to address any confusion about this court's constitutionally mandated conclusive jurisdiction over appellate review for factual sufficiency of the evidence.[1] Apparently, the undersigned and the author of the plurality opinion in this case are the only members of this court who have demonstrated a willingness to defend this court's conclusive jurisdiction over factual sufficiency of the evidence in criminal cases. As jurists, we have a sworn duty to protect

[1] "[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).

and defend the Texas Constitution and this court's legitimately conferred jurisdiction to the extent necessary to provide full justice for all litigants. *See Pittsburgh-Corning Corp. v. Askewe*, 823 S.W.2d 759, 761 (Tex. App.—Texarkana 1992, no writ) (quoting *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927, 930–31 (D.C. Cir. 1984)). This is our duty even when the highest court for criminal appeals in Texas seemingly disregards a constitutional protection afforded to all Texans.

In her concurring opinion[2], Justice Frost remonstrates that we are bound by the Texas Constitution to follow the decision of the Court of Criminal Appeals in *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (Hervey, J., joined by Keller, Keasler, & Cochran, JJ., plurality op.) (overruling *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)); *id.* at 926 (Cochran, J., concurring, joined by Womack, J.) (same conclusion as plurality). However, we are not gagged, and it is lamentable that only a very short list of intermediate appellate court justices have questioned the decision of the Court of Criminal Appeals to "abolish" appellate review for factual sufficiency of the evidence in criminal cases. *See 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").

Recently, I called for en banc review of this court's decision to follow, without question, the Court of Criminal Appeals's decision to "abolish" factual-sufficiency review in criminal cases. *See Temple v. State*, --- S.W.3d ---, No. 14-08-00074-CR, 2010 WL 5175018 (Tex. App.—Houston [14th Dist.] Dec. 21, 2010, no pet. h.) (Seymore, J., dissent to denial of reh'g en banc (May 24, 2011)). In my dissent to denial of en banc review, I identified and described analytical errors committed by the plurality in *Brooks*. *Id.* at *68–73. In response to the *Brooks* decision, some of my colleagues argue that the Court of Criminal Appeals has hierarchical authority over this court, and we must accede to that court's pronouncements of law. However, no member of the appellate judiciary in

[2] I join in Part II of Justice Frost's concurring opinion.

Texas has directly addressed my criticisms of the *Brooks* plurality opinion. Accordingly, I invite all members of this court and any member of the Texas appellate judiciary to defend the *Brooks* plurality's decision to "abolish" factual-sufficiency review in criminal cases and respond directly to my criticisms outlined below.

The *Brooks* plurality's stated reasons for discarding factual-sufficiency review are unsupportable.

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 (Price, J., dissenting). Consequently, for many years, appellate courts concluded there was 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. However, the *Brooks* plurality concluded that the *Clewis* requirement of 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." *Id.* at 894, 902 (plurality op.) (overruling *Clewis*, 922 S.W.2d 126). Thus, the Court of Criminal Appeals created a conundrum. The judges 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. *Id.* at 901–02 (plurality op.); *see also id.* at 925–26 (Cochran, J., concurring). Those judges concluded

that the *Clewis* standard of review for factual sufficiency is indistinguishable from the standard of review for legal sufficiency prescribed in *Jackson.* *Id.* at 895, 901–02 (plurality op.). In support of eliminating appellate review of the evidence for factual sufficiency, the *Brooks* plurality created two straw horses: (1) troubling double-jeopardy problems are presented because the *Clewis* factual-sufficiency standard of review 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. *Id.* at 902–06.

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 v. Florida*, 457 U.S. 31, 40–44 (1982). 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." *Id.* 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 Texas Court of Criminal Appeals relies on the Double Jeopardy Clause to "abolish" a Texan's state constitutional right to appellate review of questions of fact.** The judges who formed the *Brooks* plurality were so focused on resolving the analytical conundrum created by *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." *Brooks*, 323 S.W.3d at 905 (plurality op.). The plurality failed to acknowledge the fact that Florida does not have a similar constitutional guarantee of appellate review for questions of fact.

Second, there is persistent irony relative to the *Brooks* plurality's concern that application of "a non-deferential standard could violate the right to trial by jury under the Texas Constitution." *Id.* at 905 (plurality op.). The *Brooks* plurality placed unnecessary emphasis on the statutory language establishing the jury as the exclusive judge of the facts and weight to be given evidence. *Id.* at 908 (plurality op.) (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)). This analytical error results from an overbroad interpretation, contrary to the constitutional mandate and statutory authorization for this court to reverse a criminal conviction "as well upon the law as upon the facts." Tex. Const. art. V, § 6(a); Tex. Code Crim. Proc. Ann. art. 44.25 (West 2006).

In justification of its landmark decision, the *Brooks* plurality opined that the Court of Criminal Appeals had never tolerated the suggestion that an appellate court could simply disagree with the jury's verdict. The plurality remonstrated, "Thus, the only way to retain a factual-sufficiency standard . . . would be to allow reviewing courts to sit as 'thirteenth jurors.' However, our factual-sufficiency decisions have consistently declined to do this." *Brooks*, 323 S.W.3d at 905 (plurality op.) (citing *Watson*, 204 S.W.3d at 416). Consequently, without a reason, other than purported adherence to stare decisis, the Court of Criminal Appeals chose to ignore instructions and admonition of the United States Supreme Court in *Tibbs.* How about the simple proposition that the jurisdiction and authority of the Court of Criminal Appeals to establish standards for appellate review of the evidence does not infuse the Court of Criminal Appeals with power to "abolish" an express constitutional guarantee of conclusive intermediate court appellate review of questions of fact? **There may not be any meaningful distinction between *Jackson v. Virginia* legal-sufficiency review and factual-sufficiency review under *Clewis*, but this conundrum created by the Court of Criminal Appeals should not have resulted**

in disgorgement of a Texan's right to appellate review of questions of fact as *questions of fact.* The simple and logical resolution of the *Clewis* conundrum would have been to fully adopt the standard of review for factual sufficiency prescribed by the same United States Supreme Court that prescribed the standard of review for legal sufficiency of the evidence. *See generally Tibbs*, 457 U.S. 31. Moreover, it should be obvious to all jurists that a convicted criminal defendant is not concerned about preserving the jury's verdict. The *Brooks* plurality can be assured that a convicted criminal defendant will not argue appellate review of the evidence in a neutral light violates his right to a trial by jury!

The *Jackson v. Virginia* standard of review for legal sufficiency does not fulfill a Texan's constitutional right to appellate review of his questions of fact.

In an effort to explain their unquestioning acquiescence to *Brooks*, some of my colleagues readily accept the proposition that the *Jackson* standard of review for legal sufficiency of the evidence covers any questions of fact raised by an appellant. I would gently suggest that those members of the court fail 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)). 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." *Jackson*, 443 U.S. at 319. The appellate court completely and totally defers to the jury's weight and credibility determinations. *Id.* at 319 & n.13, 326. The evidence is not weighed, and a successful challenge to legal sufficiency of the evidence results in acquittal, not a new trial. *See Tibbs*, 457 U.S. at 41–42. 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 when the "only proper verdict" is acquittal. *Tibbs*, 457 U.S. at 42. The United States Supreme Court clearly instructed state courts of appeals not to confuse the two standards of review.

> 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.

Id. at 42–43 (citations and footnotes omitted) (emphasis added).

It is also obvious that 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).

My colleagues should question why the *Brooks* plurality would fully embrace the admonition and instruction from the United States Supreme Court in *Jackson* but ignore clear definitions and instructions from that same court in *Tibbs* when responding to a request for constitutionally guaranteed appellate review of the evidence for factual sufficiency. Obviously, there is no factual-sufficiency component in the standard of review for legal sufficiency prescribed by the United States Supreme Court in *Jackson.* Again, I posit to my colleagues that the conclusion is inescapable: the Court of Criminal Appeals has disgorged Texans of a constitutional right that implicates due process of law

in criminal cases and usurped this court's conclusive jurisdiction over factual sufficiency of the evidence in criminal cases.

Apparently concerned about my vociferous opposition to the Court of Criminal Appeals's decision to "abolish" appellate review of questions of fact guaranteed by the Texas Constitution, Justice Frost suggests intermediate appellate court judges "honor their oaths of office" by following the dictates or pronouncements of the Court of Criminal Appeals. I respectfully respond that the highest duty under the judicial oath of office is to protect and defend the Texas Constitution.[3] Moreover, in response to my colleague, I submit that the plain language in Article 5, Section 6 of Texas Constitution does not limit intermediate courts of appeals to points of error pertaining to sufficiency of evidence to support affirmative defenses in criminal cases. My colleague previously opined, "In interpreting the Texas Constitution, Texas courts rely heavily on the literal text and must give effect to its plain language." *Robinson v. Crown Cork & Seal Co., Inc*., 251 S.W.3d 521, 541 (Tex. App.—Houston [14th Dist.] 2006) (Frost, J., dissenting). The Court of Criminal Appeals previously acknowledged this court's conclusive jurisdiction over factual sufficiency and further acknowledged that the Court of Criminal Appeals does not have jurisdiction or constitutional authority to "abolish" factual-sufficiency review in criminal cases. *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). Moreover, the Court of Criminal Appeals cautioned against a back-door effort to undermine this constitutional imperative.

> [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 v. State, 785 S.W.2d 146, 152 (Tex. Crim. App. 1990) (the court expressed no opinion regarding the role of courts of appeals in reviewing sufficiency of the evidence

[3] 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).

relative to proof of the elements of an offense). In his concurring opinion in *Ervin v. State*, Justice Jennings described the Court of Criminal Appeals's adventure into the conclusive jurisdiction of intermediate courts of appeals. 331 S.W.3d 49, 56–70 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (Jennings, J., concurring). Many legal scholars have expressed concern about this problem. *See* Susan Bleil & Charles Bleil, *The Court of Criminal Appeals Versus the Constitution: The Conclusivity Question*, 23 St. Mary's L.J. 423, 424 (1991).

Finally, some of my colleagues have expressed concern that we risk anarchy if intermediate appellate courts do not adhere to all decisions by the Court of Criminal Appeals. However, I respectfully suggest that greater risk for anarchy ensues when the two highest courts in Texas review the same provision in the Texas Constitution and reach diametrically opposed interpretations. *Compare Howard*, 333 S.W.3d at 138 n.2 ("[W]e have abolished factual-sufficiency review."), *with Regal Fin. Co., Ltd. v. Tex Star Motors, Inc.*, --- S.W.3d ---, No. 08-0148, 2010 WL 3277132, at *7 (Tex. Aug. 20, 2010) ("Because a review of the evidence for factual sufficiency is a power committed exclusively to the court of appeals, we must remand the issue to that court.").

/s/ Charles W. Seymore
Justice

Panel consists of Justices Anderson, Frost, and Seymore. (Anderson, J., plurality and Frost, J., concurring and Seymore, J., concurring)
Publish—Tex. R. App. P. 47.2 (b).