SMITH+
LAW GROUP

Appeals+ The Right Addition to Your Trial Team

CCA Overrules *Clewis*'s Factual Sufficiency Review

Posted on January 9, 2011 by Brandy M. Wingate

Publisher's Note: The following is Brandy Wingate's first post on this blog. Please join me in welcoming Brandy to the blogosphere!

In a splintered decision in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), the Texas Court of Criminal Appeals overruled *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), which provided for review of a jury verdict in a criminal case for factual sufficiency of the evidence. Judge Hervey wrote the plurality opinion announcing the judgment of the Court, joined by Presiding Judge Keller and Judges Keasler and Cochran. Despite joining the plurality, Judge Cochran also filed a concurring opinion, in which Judge Womack joined. Judge Price filed a dissenting opinion, joined by Judges Meyers, Johnson, and Holcomb.

Judge Hervey's opinion begins by stating that the Court was called consider whether "there is any meaningful distinction between a legal-sufficiency standard under *Jackson v. Virginia* and a factual-sufficiency standard under *Clewis v. State* and whether there is a need to retain both standards." Judge Hervey concluded that "these two standards have become essentially the same standard and that there is no meaningful distinction between them that would justify retaining them both." Thus, the plurality would overrule *Clewis* and hold that "the *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."

Judge Hervey wrote that the distinction between these two standards was supposed to be that in a legal sufficiency review, the court views the evidence in the light most favorable to the verdict, while in a factual sufficiency review, the court views the evidence in a "neutral light." Judge Hervey noted that *Clewis*, however, required reviewing courts to afford "'appropriate deference' to the jury's credibility and weight determinations." Judge Hervey concluded that, by requiring "appropriate deference" to a jury's credibility and weight determinations while also requiring a neutral review of the facts, *Clewis*'s factual-sufficiency standard was contradictory and "barely distinguishable" from the *Jackson* legal-sufficiency standard.

Judge Cochran's concurrence expressed the view that adopting *Clewis* in the first place was a misguided attempt to apply civil standards of evidentiary sufficiency to criminal cases, which require proof beyond a reasonable doubt. "The evidence in this case is either sufficient to support appellant's conviction under the constitutionally-mandated *Jackson* standard or it is not.

It cannot be 'semi-sufficient.'" Thus, Judge Cochran and Judge Womack agreed that "it is time to consign the civil-law concept of factual sufficiency review in criminal cases to the dustbin of history." The result: five members of the court agreed that *Clewis* has no place in Texas jurisprudence, and factual sufficiency review is dead.

The dissent argued that the Court could not eliminate factual sufficiency review, "which has been recognized from the beginning to be inherent in the appellate jurisdiction of first-tier appellate courts in Texas," in the absence of a constitutional or statutory change. The dissent disagreed that legal and factual sufficiency standards of review were "barely distinguishable," explaining:

> Deference is not an all-or-nothing proposition. A reviewing court may look to the record *without* the requirement of resolving conflicts and ambiguities in the light most favorable to the jury's verdict and *still* limit the exercise of its power to reverse and remand for a new trial in the interest of justice, out of deference to the jury's verdict, to those cases in which the State's evidence is *most* tenuous or the weight of the evidence *greatly* preponderates against conviction. The qualified deference that we have said first-tier appellate courts should pay to jury verdicts does not somehow convert factual sufficiency review into legal sufficiency review.

The many facets of this opinion, and in particular, the ramifications for legal sufficiency review under *Jackson* after *Brooks*, are too involved to discuss in one blog post. For example, because the majority of the court believes that the *Jackson* and *Clewis* standards are the same, it could be argued that the *Jackson* standard allows courts of appeal to resolve conflicts in the evidence by requiring the evidence to allow a "rational" decision by the jury. If so, defendants may be able to obtain an acquittal based on what is essentially a factual sufficiency argument, where under *Clewis*, they could have only received a new trial. The winter issue of *The Appellate Advocate* will feature an excellent (and positive) analysis of *Brooks* by Ricardo Pumarejo, Jr., titled "Clueless Over *Clewis* or: How I Learned to Stop Worrying and Welcome *Brooks v. State.*" Stay tuned!