

PRESENTED AT

2019 Robert O. Dawson Conference on Criminal Appeals

May 1 – 3, 2019
Austin, Texas

Standards of Review and Error Preservation in Texas Criminal Law

**Chief Justice Bonnie Sudderth
Second District Court of Appeals**

**Robley E. Sicard
Second District Court of Appeals**

We wish to acknowledge and extend our deepest thanks to the staff attorneys of the Fort Worth Court of Appeals, whose extensive and thorough work over more than two decades we have heavily relied upon in drafting this paper. These staff attorneys include current staff attorneys Lisa West (Chief Staff Attorney), Patricia Asken, Colin Benton, Lauren Chadwick, Jonathan Cone, Rebecca Heinemann, Amy Hennessee, Alyssa Jurek, Jennifer Roberts, Robley Sicard, Dean Swanda, and Johannes Walker, as well as many past staff attorneys of the court.

Chief Justice Bonnie Sudderth
Second District Court of Appeals
401 W. Belknap, Ste. 9000
Fort Worth, Texas 76196
Bonnie.Sudderth@txcourts.gov
817-884-1900

Table of Contents

| | | |
|------|---|----|
| I. | Introduction | 1 |
| II. | Sufficiency of the Evidence | 1 |
| | A. The Basics | 2 |
| | 1. Weighing the evidence | 3 |
| | 2. Circumstantial Evidence and Inferences | 4 |
| | 3. Outstanding Reasonable Hypothesis Theory | 6 |
| | 4. Improperly Admitted Evidence | 6 |
| | 5. Statutory Construction..... | 7 |
| | B. Sufficiency of Evidence: Affirmative Defenses..... | 7 |
| | 1. Legal insufficiency remedy: acquittal (usually)..... | 9 |
| | 2. Factual insufficiency remedy: remand for a new trial..... | 9 |
| | C. Sufficiency of the Evidence: Competency to Stand Trial | 10 |
| | D. Sufficiency of the Evidence: Accomplice Testimony | 12 |
| | E. Noncapital guilty plea felony cases..... | 14 |
| | F. Variances | 14 |
| | G. Unanimity..... | 15 |
| | H. Confessions | 16 |
| | I. Disproving defenses (except affirmative defenses)..... | 17 |
| | J. Remedy..... | 17 |
| | K. Reformation for lesser-included offense | 18 |
| III. | Jury Charge..... | 18 |
| | A. Preserved Nonconstitutional Charge Error..... | 19 |
| | 1. Disjunctive charge issues. | 21 |
| | 2. Defensive issues | 23 |
| | 3. Harm evaluation | 24 |
| | 4. No error situations | 25 |
| | 5. Application paragraph error. | 26 |
| | 6. Remedy and relief. | 27 |
| | B. Unpreserved Error (except defensive issues)..... | 27 |
| | 1. Defining reasonable doubt..... | 29 |
| | 2. Reasonable doubt <i>instructions</i> | 29 |
| | 3. Remedy..... | 30 |
| | C. Unpreserved Defensive Issues..... | 30 |

| | |
|--|----|
| D. Lesser-Included Offenses | 31 |
| 1. Evidence of a lesser-included offense | 33 |
| 2. Examples. | 34 |
| 3. Conviction for erroneously charged lesser offense. | 37 |
| IV. Double Jeopardy..... | 37 |
| A. When jeopardy attaches..... | 41 |
| B. Effect of mistrial or hung jury on jeopardy | 41 |
| V. Ineffective Assistance of Counsel | 43 |
| A. Conflict of interest..... | 45 |
| B. Collateral proceedings..... | 46 |
| C. Waiver of proceedings/Plea bargains | 47 |
| D. Prejudice..... | 48 |
| E. Failing to investigate..... | 49 |
| F. Ineffective assistance at trial | 50 |
| G. Effective assistance at trial..... | 51 |
| VI. Jury Argument..... | 52 |
| A. Preservation of error (see Tex. R. App. P. 33.1)..... | 53 |
| B. Common areas of improper argument..... | 54 |
| C. Trial court’s limitation of length of argument..... | 55 |
| D. Comments on defendant’s failure to testify | 55 |
| VII. Preservation of error (other than jury-charge error)..... | 57 |
| A. When failure to raise an issue is not fatal on appeal | 58 |
| 1. Absolute rights and waivable-only rights..... | 58 |
| 2. Evidentiary sufficiency..... | 60 |
| 3. Jury charge | 60 |
| B. Preserving error – admission of evidence | 60 |
| 1. Timeliness | 60 |
| 2. Specificity..... | 62 |
| 3. Adverse ruling required..... | 64 |
| C. Preserving error – exclusion of evidence | 64 |
| D. Briefing the error | 65 |
| 1. Inadequate briefing..... | 66 |
| 2. New grounds on rehearing or remand | 66 |
| 3. Constitutional issues..... | 67 |

| | |
|---|----|
| E. Particular forfeiture situations | 67 |
| VIII. Harm | 73 |
| A. Tex. R. App. P. 44.2: Reversible Error in Criminal Cases..... | 73 |
| B. Structural error | 73 |
| C. Constitutional error..... | 75 |
| 1. Harmful constitutional errors | 76 |
| D. Nonconstitutional error..... | 77 |
| 1. Certain errors subject to nonconstitutional harm analysis..... | 78 |
| 2. Harmful nonconstitutional errors | 80 |
| E. Miscellaneous areas..... | 81 |
| F. Remedy..... | 81 |
| IX. Motions to Suppress | 81 |
| A. Motion to suppress granted, arresting officer sole witness | 84 |
| 1. Findings of fact and conclusions | 84 |
| 2. No findings of fact and conclusions of law issued..... | 84 |
| 3. Findings of fact and conclusions of law issued..... | 85 |
| B. Fourth Amendment challenges..... | 85 |
| 1. Challenging a search | 86 |
| 2. Challenging an arrest..... | 87 |
| 3. Challenging a detention..... | 88 |
| C. Warrants | 88 |
| D. Harm..... | 90 |
| X. Revocation of Community Supervision | 90 |
| A. Inability to pay fees | 91 |
| B. Deferred adjudication. | 92 |
| C. Application of evidentiary rules. | 93 |
| D. Proceedings after violation..... | 93 |
| XI. Conclusion..... | 93 |

I. Introduction

Standards of review form the foundation upon which appellate courts review any issue presented to them. Every brief presented to an appellate court should discuss the applicable standard of review, as “these standards ‘frame the issues, define the depth of review, assign power among judicial actors, and declare the proper materials to review.’” W. Wendell Hall, et. al, *Hall’s Standards of Review in Texas*, 42 St. Mary’s L.J. 3, 9 (2010) (quoting Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 269 (2005)).

Error preservation is also a fundamental concern in any appellate proceeding. Without proper preservation of error, appellate courts are often unable to address valid concerns about mistakes that occur at trial.

This paper is intended to address common standards of review and error preservation concepts that are regularly applied by the reviewing courts, particularly the intermediate courts of appeal. Accordingly, **this paper does not address standards of review or error-preservation issues applicable to death-penalty cases.** Nor does it express the opinion of the Second Court of Appeals as a whole (unless citing to a particular opinion issued by the court).

II. Sufficiency of the Evidence¹

Sufficiency of the evidence challenges are the bread and butter of appellate practice. They are, by far, the most frequent of points raised on appeal.² Thus, we begin with the standards of review in sufficiency of the evidence challenges.

¹A defendant need not challenge evidentiary sufficiency in the trial court to preserve that argument for appellate review. *Gutierrez-Rodriguez v. State*, 444 S.W.3d 21, 23 (Tex. Crim. App. 2014). See section VII.A.2. for a discussion of preservation and sufficiency arguments.

²A challenge to the denial of an instructed-verdict motion is actually a challenge to evidentiary sufficiency. *Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App. 2003).

A. The Basics

Federal due process requires that the State prove beyond a reasonable doubt every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979); see U.S. Const. amend. XIV. Under the *Jackson* standard, the reviewing court views all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. *Id.* at 319, 99 S. Ct. at 2789; *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017).³

This standard gives full play to the factfinder's responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. See *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Queeman*, 520 S.W.3d at 622. The factfinder alone judges the evidence's weight and credibility. See Tex. Code Crim. Proc. Ann. art. 38.04; *Queeman*, 520 S.W.3d at 622. Thus, when performing an evidentiary-sufficiency review, the reviewing court may not re-evaluate the evidence's weight and credibility and substitute its judgment for the factfinder's. *Id.* Instead, the reviewing court determines whether the necessary inferences are reasonable based on the evidence's cumulative force when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015); see *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) ("The court conducting a sufficiency review must not engage in a 'divide and conquer' strategy but must consider the cumulative force of all the evidence."). The reviewing court must presume that the factfinder resolved any conflicting inferences in favor of the verdict, and the reviewing court must defer to that resolution. *Murray*, 457 S.W.3d at 448–49. Reversal on evidentiary-sufficiency grounds is restricted to the "rare occurrence" when a factfinder does not act rationally. *Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016); see *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014) (stating that a reviewing court should not act as a "thirteenth juror").

To determine whether the State has met its *Jackson* burden to prove a defendant's guilt beyond a reasonable doubt, the reviewing court compares the

³The traditional *Jackson* evidentiary-sufficiency principles do not apply to a review of assessed court costs. *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014) ("[W]e review the assessment of court costs on appeal to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost.").

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Standards of Review and Error Preservation in Texas Criminal Law

Also available as part of the eCourse

[2019 Robert O. Dawson eConference on Criminal Appeals](#)

First appeared as part of the conference materials for the 2019 Robert O. Dawson Conference on Criminal Appeals session "Standards of Review"