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## **Standards of Review and Error Preservation in Texas Criminal Law**

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## 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 Evidence<sup>1</sup>

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.<sup>2</sup> Thus, we begin with the standards of review in sufficiency of the evidence challenges.

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<sup>1</sup>A 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.

<sup>2</sup>A 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).<sup>3</sup>

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

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<sup>3</sup>The 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.").

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