

CLAIM FOR RELIEF NUMBER TWENTY-NINE

APPLICANT WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY U.S. CONST. AMEND. V & XIV, AND HIS SENTENCE OF DEATH VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT PROVISIONS OF U.S. CONST. AMEND VIII, BY THE STATE COURT ALLOWING HIM TO BE SENTENCED TO DEATH WHEN THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT HIS CONVICTION FOR CAPITAL MURDER WHERE THE STATE FAILED TO PROVE THAT APPLICANT HAD ATTEMPTED TO COMMIT OR HAD COMMITTED SEXUAL ASSAULT OF THE COMPLAINANT, AS ALLEGED IN THE INDICTMENT.

CLAIM FOR RELIEF NUMBER THIRTY

APPLICANT WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY U.S. CONST. AMEND. V & XIV, AND HIS SENTENCE OF DEATH VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT PROVISIONS OF U.S. CONST. AMEND VIII, BY THE STATE COURT ALLOWING HIM TO BE SENTENCED TO DEATH WHEN THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT HIS CONVICTION FOR CAPITAL MURDER WHERE THE STATE FAILED TO PROVE THAT APPLICANT HAD INTENDED TO CAUSE THE DEATH OF THE COMPLAINANT AND CAUSED THE DEATH OF THE

COMPLAINANT BY STABBING THE COMPLAINANT WITH A KNIFE, AS ALLEGED IN THE INDICTMENT.

CLAIM FOR RELIEF NUMBER THIRTY-ONE

APPLICANT WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY U.S. CONST. AMEND. V & XIV, AND HIS SENTENCE OF DEATH VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT PROVISIONS OF U.S. CONST. AMEND VIII, BY THE STATE COURT ALLOWING HIM TO BE SENTENCED TO DEATH WHEN THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT HIS CONVICTION FOR CAPITAL MURDER WHERE THE STATE FAILED TO PROVE THAT THE COMPLAINANT WAS KILLED BY APPLICANT DURING THE COURSE OF A SEXUAL ASSAULT OR ATTEMPTED SEXUAL ASSAULT, AS ALLEGED IN THE INDICTMENT.

Applicant asserts that the evidence was factually insufficient to support the jury's verdict where the evidence was clearly so weak, unsupported, and unreliable, as to undermine confidence in the jury's determination. Applicant asserts that the evidence was factually insufficient to support the jury's verdict because the evidence that Applicant had committed or had attempted to commit aggravated sexual assault of the complainant, or that Applicant had caused the death of the complainant, or that Applicant had caused the death of the complainant during the course of committing or attempting to commit aggravated sexual

assault of the complainant was greatly outweighed by contrary proof. Applicant presents these issues separately to avoid any question of multifariousness. TEX. R. APP. 38.1(e). Accordingly, Applicant prays that the judgment and sentence be reversed and the cause remanded. TEX. CODE CRIM. PROC. ANN. art. 44.29(a).

FACTUAL SUFFICIENCY

A. Standard of Review

Evidence is factually insufficient if, viewing all of the evidence in a neutral light, "the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." **Johnson v. State**, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). In determining the factual sufficiency of the elements of an offense, the reviewing court "views all the evidence without the prism of 'in the light most favorable to the verdict,' [i.e. views the evidence in a neutral light,] and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." **Clewis v. State**, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996) (cited in **Johnson v. State**, supra, 23 S.W.3d at 6-7)).

In a factual sufficiency review, the appellate court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact. **Jones v. State**, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996), cert. denied, 522 U.S. 832, 118 S.Ct. 100, 139 L.Ed.2d 54 (1997). As stated: "[i]n conducting its factual sufficiency review, an appellate court reviews the fact

finder's weighing of the evidence and is authorized to disagree with the fact finder's determination." **Clewis**, 922 S.W.2d at 133. This review, however, must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder, and any evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility given to witness testimony. **Jones v. State**, 944 S.W.2d at 648.

This Court in **Johnson**, recognized the constitutionally mandated authority vested in appellate courts to conduct a factual sufficiency review of the elements of an offense. **Johnson v. State**, *supra*, 23 S.W.3d at 7. As set forth in its opinion, footnote n.7, "[t]his includes the authority of the Court of Criminal Appeals to conduct a factual sufficiency review of those cases brought to it upon direct appeal, i.e., capital cases." *Id.* See also **Cain v. State**, 958 S.W.2d 404, 408 (Tex. Crim. App. 1997); **Clewis**, 922 S.W.2d at 131-132; Tex. Const. art. V, Sec. 6. Additionally, this Court in **Johnson**, recognized that determining the factual sufficiency of evidence required implementation of distinct standards different from those employed in a legal sufficiency review. **Johnson v. State**, *supra*, 23 S.W.3d at 7. As stated:

A legal sufficiency review calls upon the reviewing court to view the relevant evidence in a light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781,

2789, 61 L.Ed.2d 560 (1979); **Mason v. State**, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995), cert. denied, 516 U.S. 1051, 116 S.Ct. 717, 133 L.Ed.2d 670 (1996). In contrast, a factual sufficiency review dictates that the evidence be viewed in a neutral light, favoring neither party. **Clewis**, 922 S.W.2d at 134. In conducting a factual sufficiency analysis, the reviewing court does not 'indulge inferences or confine its view to evidence favoring one side of the case. Rather, it looks at all the evidence on both sides and then makes a predominantly intuitive judgment.

Johnson v. State, *supra*, 23 S.W.3d at 7 (emphasis added).

This Court in **Johnson, id.**, stated that in **Clewis**, 922 S.W.2d at 134, it had validated the application of a civil factual sufficiency standard of review to criminal cases. At issue in **Johnson** was whether the civil factual sufficiency standard applied in toto or only in part. As noted:

Historically, courts and academicians have recognized that the civil factual sufficiency standard of review consists of two separate elements. In civil matters, the Courts of Appeals are empowered to consider and weigh all the evidence in the case and set aside the verdict and remand the cause for a new trial if it concludes that (1) the evidence is insufficient or if (2) the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust, regardless of whether the record contains some evidence of probative force in support of the verdict. **Pool v. Ford Motor Co.**, 715 S.W.2d 629, 635 (Tex. 1986); **Garza v. Alivar**, 395 S.W.2d 821, 823 (Tex. 1965); **In Re King's Estate**, 150 Tex. 662, 244 S.W.2d 660, 661 (1951). When reversing

for factual insufficiency the Court of Appeals must detail all the evidence relevant to the issue and clearly state why the jury's finding is either factually insufficient or is so against the great weight and preponderance of the evidence that it is manifestly unjust.

Johnson, 23 S.W.3d at 9 (citations included).

The Court in **Johnson** determined that a criminal factual sufficiency review does, in fact, encompass two formulations, both used in civil jurisprudence, that is, evidence can be factually insufficient if (1) "it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence."

Id., 23 S.W.3d at 9-11. The Court then explained:

Because the State always carries the burden of proof to establish the elements of a criminal offense at trial, an appellant's points of error challenging the sufficiency of the evidence used to establish the elements of the charged offense could claim that the evidence used to establish the adverse finding was so weak as to be factually insufficient. This is the most equitable approach, especially given the fact criminal defendants are not under any obligation to present evidence on their behalf and usually rely, instead, on forcing the State to prove its case beyond a reasonable doubt. Alternatively, in the event a defendant does muster contrary evidence, this standard of review allows him, if he so chooses, to present the argument on appeal that his evidence greatly outweighed the State's evidence to the extent that the contrary finding is clearly wrong and manifestly unjust. We hold therefore, that our opinion in **Clewis** is to be read as adopting the complete civil factual sufficiency formulation. ... [T]he complete and correct standard a reviewing court must follow to conduct a **Clewis** factual sufficiency review of the elements of a criminal offense asks whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. ¹⁶

¹⁶ While contrary evidence may be presented by a defendant's own witnesses, it may also be presented via the evidence/testimony produced in the State's case-in-chief or during the cross-examination of the State's witnesses by the defense.

Johnson, 23 S.W.3d at 11 (emphasis added). See also **Martinez v. State**, 129 S.W.3d 101, 106 (Tex. Crim. App. 2004).

This Court in **Zuniga v. State**, 144 S.W.3d 477, 483 (Tex. Crim. App. 2004) recently considered the civil standard for the application of factual sufficiency review of the evidence in criminal cases as follows:

... [T]here are two ways in which the evidence may be insufficient. First when considered by itself, evidence supporting the verdict may be too weak to support the finding of guilt beyond a reasonable doubt. Second, there may be both evidence supporting the verdict and evidence contrary to the verdict. Weighing all the evidence under this balancing scale, the contrary evidence may be strong enough that the beyond-a-reasonable-doubt standard could not have been met, so the guilty verdict should not stand. This standard acknowledges that evidence of guilt can 'preponderate' in favor of conviction but still be insufficient to prove the elements of a crime beyond a reasonable doubt. Stated another way, evidence supporting guilt can 'outweigh' the contrary proof and still be factually insufficient under a beyond-a-reasonable-doubt standard.

Zuniga, 144 S.W.3d at 484-485 (emphasis added).

B. The Evidence in This Case Is Factually Insufficient

The evidence is factually insufficient to prove the elements of capital murder when considered by itself. Specifically, the evidence is factually insufficient to prove that complainant had been sexually assaulted. The evidence is factually insufficient to prove that Applicant killed the complainant. The evidence is factually insufficient to prove that complainant was killed in the course of a sexual assault or attempted sexual assault by Applicant. Additionally, the evidence is unreliable and contradicted in most instances by the

State's own witnesses, thus undermining any confidence in the jury's verdict. **Johnson**, 23 S.W.3d at 9-11.

i. The evidence is factually insufficient to prove that complainant had been sexually assaulted.

Applicant submits that there is no evidence that a sexual assault of the complainant ever occurred. Rossi testified that he did not know whether complainant had been sexually assaulted (RR20, 111); the body did not appear to show any ligature marks. (RR20, 93-94). While Rossi noted that semen was recovered during the complainant's autopsy, this finding was evidence solely of the act of sexual intercourse and not necessarily sexual assault. (RR20, 111-117). Rossi did not observe any bruises on complainant to indicate that her thighs had forcefully been held apart. (RR20, 115). Notably, Rossi admitted that the allegation of sexual assault of the complainant was "just a theory." (RR20, 115).

Additionally, while Rossi agreed that the bloody commode in complainant's bathroom may have been used to wash off the assailant's groin area and that the toilet seat was found up, (RR20, 154), he acknowledged that there was no evidence of blood splashed on the floor surrounding the commode which would likely have been there if the assailant had been a rapist and had washed himself in the commode. (RR20, 159-161).

While evidence in this case supported the fact that semen recovered from the complainant matched Applicant's DNA profile, this alone supports a conclusion that Applicant and complainant had engaged in sexual intercourse. It would alone not support an inference that Applicant had sexually assaulted the complainant nor that he had caused her

death. In fact, where the evidence revealed that complainant had fought hard against her attacker, it would naturally follow that if she had been sexually assaulted, there would have been evidence of trauma to her sexual organs. There was none. See jury argument, (RR25, 37-38).

Dr. Dwayne Wolf, M.E., testified that upon his review of complainant's autopsy report and photographs, No. 87-997, there was no evidence of ligature marks on complainant's body and no evidence of petechial hemorrhages, often observed in strangulation cases. (RR22, 58-59). Most importantly, Wolf reiterated that there was no evidence of trauma to complainant's genitalia, "not to the vagina or the rectum," nor to the anorectal area or complainant's vulva. (RR22, 62-64). Thus, Wolf conceded that it was entirely possible that complainant may have engaged in consensual sexual intercourse while her death may have occurred at a different time. (RR22, 69-70). Wolf could not state that complainant had been sexually assaulted nor whether any questionable assault had occurred prior to or following complainant's death. (RR22, 74-75). Wolf agreed that the complainant could have engaged in sexual intercourse the day before her death. (RR22, 75).

Contrary to speculation by the prosecutor, Wolf testified that SX 50, a photograph did not appear to reflect "bloody streaks" on complainant's hips, produced by a blood drenched hand. (RR22, 77). Notably, during its closing argument to the jury in the guilt/innocence phase of trial, the State conceded that complainant did not exhibit any visible trauma to her genitals. (RR25, 9).

ii. The evidence is factually insufficient to prove that Applicant killed the complainant or was present at her death.

Applicant submits that there is no physical evidence that Applicant killed the complainant or was present at her homicide.:

Applicant's fingerprints were not recovered from complainant's home or on any evidentiary items, including a trophy, a knife, newspapers, a vacuum cleaner, tested and retested over the years by State forensic agencies, personnel, and FBI, respectively.

William Joseph Watson, of Orchid Cellmark, recounted that in 1999, a limited DNA profile obtained from the male fraction of the sperm cells recovered, excluded Jack Shadbolt as the contributor of the stains on the rectal swab, rectal smear, vaginal swab and vaginal smear. (RR23, 69, 154, 162). On April 3, 2002, testing of "additional evidence": a pubic hair fixed to a slide from a fingernail scraping of the complainant, was not a match to Applicant. (RR23, 70-72; 167-168; 172-179; SX. 69).

Randy Schield, HCSD Identification Division, testified that on February 14, 1987, he was dispatched to collect evidence in this case, including a vacuum cleaner, one trophy, one pair of purple shorts, one knife located under the shorts, a button, several pieces of crumpled paper, one pair of panties lying under the complainant, one pair of panties from the couch, one handwritten note from the bathroom, a sheet and blankets from the bedroom, and some clothing from the floor next to the bed. (RR21, 52-53; SX. 13,7,8). Schield also attended complainant's autopsy and recovered fingernail scrapings from the complainant, pulled head hair, pulled pubic hair, a vial of blood, and foreign material from her body. This evidence

was sent for analysis to DPS. (RR21, 55-56; 68-69).

Schild testified that he processed a vacuum cleaner and crumpled newspapers, recovered from the scene, for any latent prints. (RR21, 56-57). While Schild recovered two latent prints from the vacuum cleaner which he believed were of a nature that could not be identified, Schild nevertheless compared them to those of Applicant. (RR21, 58-60; 62).

Schild testified that the prints recovered from the vacuum cleaner did not reveal sufficient characteristics with which to compare to Applicant's prints, "not enough to make a comparison or exclusion." (RR21, 59). Similarly, Schild asserted that the prints recovered from the vacuum cleaner also "did not match" Applicant's as they were not "just not good enough." (RR21, 60). While Schild testified that he recovered three prints from the crumpled newspapers "next to the green chair in the living room," (RR21,101-102), which "were good enough for comparison" and were also compared with Applicant's prints, (RR21, 61- 62), they did not match.(RR21, 105-106).

Schild recounted that a print recovered from a note found in complainant's bathroom (between the commode and the wastepaper basket) and compared with those belonging to Applicant, also did not match. (RR21, 62). It matched those of the complainant in this case. (RR21, 105-106).

Schild stated that he was asked to analyze a knife and a trophy, previously processed by Schroedter, for possible prints. Schild could not recover any prints from the knife but recovered one "poor quality" partial palm print from the trophy. (RR21, 64-66). It was then

compared to those prints belonging to Applicant, (RR21, 65), however, Schield explained that he was unable to effect any identification as to those known prints. "It just wasn't sufficient enough of a print." (RR21, 65-66).

On cross-examination, Schield admitted that on June 21, 1991, Det. Dionn provided him with a known set of Applicant's palm prints and he was asked to compare those prints to the partial print recovered from the trophy at the scene. "They did not match." (RR21, 107-109). Additionally, on May 17, 2000, several months after Applicant had been indicted in this case, Schield again compared Applicant's prints with the recovered latent print on file. "They still did not match." (RR21, 110-111).

Marcel Dionn, formerly of the homicide division of HCSO, testified that in 1989, he requested fingerprint comparisons between Applicant's known fingerprints and any prints recovered from complainant's home. None of Applicant's fingerprints matched any recovered from complainant's home! (RR21, 150). Dionn informed Det. Wedgeworth of the same. (RR22, 99).

Det. Wedgeworth, of the cold case squad, testified that on January 20, 1999, he resubmitted all recovered fingerprints from the crime scene to Danny Rinehart, a fingerprint analyst, with a request that a comparison be made of the fingerprints recovered from the scene with those of Applicant. (RR22, 126-129). "[N]one of the recovered prints were the same as the defendant's [sic] [Applicant]." (RR22, 129).

Wedgeworth also informed the jury that he had tested paint around a bedroom window