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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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No. _____

In the
Texas Court of Criminal Appeals
At Austin

———♦———

No. 01-15-01089-CR

In the Court of Appeals for the
First District of Texas
at Houston

———♦———

JASON RAMJATTANSINGH
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

STATE'S PETITION FOR DISCRETIONARY REVIEW

———♦———

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ORAL ARGUMENT REQUESTED

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 68.4(a), a complete list of the names of all interested parties is provided below.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 68.4(d), the State requests oral argument. Argument in this case is necessary because this case sets a precedent that a court is estopped from using the hypothetically correct jury charge standard for purposes of a sufficiency review when non-statutory elements are included in the State's pleading and thus, requires the State to prove a nonexistent offense. This opinion is contrary to this Court's and other appellate courts' precedent. The undersigned attorney would be delighted to present oral argument if this Court would find it helpful.

STATEMENT OF THE CASE

The appellant was charged by information with driving while intoxicated, and having a breath alcohol concentration of at least 0.15 at the time of analysis and at or near the time of the commission of this offense (CR—6). The jury found appellant guilty as charged in the information (CR—74-75). The trial court assessed punishment at one year in county jail, suspended appellant's sentence, and placed him on community supervision for 18 months (CR—74). The appellant filed notice of appeal and the trial court certified that he had a right to appeal (CR—62, 81).

STATEMENT OF THE PROCEDURAL HISTORY

On August 10, 2017, a panel of the First Court of Appeals issued a published opinion reversing the conviction, finding the evidence was insufficient to prove Class A misdemeanor driving while intoxicated by having an alcohol concentration of at least a 0.15. *See Ramjattansingh v. State*, No. 01-15-01089-CR, 2017 WL 3429944 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, pet. filed) (not yet released for publication). The opinion was authored by Justice Brown, and joined by Justices Higley and Bland. *Id.* The State's petition for discretionary review is timely filed. *See* TEX. R. APP. P. 68.2(a).

REASONS FOR REVIEW

This petition for discretionary review should be granted because the First Court of Appeals' decision conflicts with this Court's and other courts of appeals' decisions on similar issues and the First Court of Appeals has so far departed from the accepted and usual course of judicial proceedings. *See* TEX. R. APP. P. 66.3(a), (f). The court of appeals' decision sets a precedent that the State is estopped from using the hypothetically correct jury charge standard for purposes of a sufficiency review when non-statutory elements are included in the State's pleading—whether intentional or accidental—and thus, requires the State to prove a nonexistent offense. Additionally, the court of appeals improperly sat as the

thirteenth juror, usurping the jury's role to define terms and evaluate the evidence. Thus, this Court's review is needed.

STATEMENT OF FACTS

On April 9, 2015, Jason Wilson, a wrecker driver, called 911 to report a drunk driver at 9:32 p.m. *See* (St. Ex. #1). Wilson reported that the appellant, driving a red Nissan, was swerving "all over the road" and almost caused several accidents (3 RR 225). *See* (St. Ex. #1). The appellant and Wilson were outside their vehicles when officers arrived (2 RR 171, 204).

Officers observed the appellant sway when standing, noticed he was not able to stand up straight, and detected a strong odor of alcohol on his breath (2 RR 171, 204, 241; 3 RR 29, 241). The appellant admitted to police that he began drinking around 5:00 p.m. that day and had some shots of tequila (2 RR 241-2). *See* (St. Ex. #4).

The appellant exhibited signs of intoxication on the standardized field sobriety tests (2 RR 243, 274-8). *See* (St. Ex. #4). Based on her observations, the arresting officer concluded that the appellant was intoxicated and transported him to Central Intoxication, where he was administered the breath test (3 RR 18, 20, 62, 70). The appellant's breath test results showed that the appellant had a

breath alcohol concentration of 0.235 and 0.220 at 11:28 p.m. (3 RR 123). *See* (St. Ex. #7).

FIRST GROUND FOR REVIEW

Does the filing of a charging instrument containing non-statutory language prohibit the appellate court from considering the hypothetically correct jury charge in a sufficiency review?

The First Court of Appeals found that although ordinarily the sufficiency of the evidence must be measured under a hypothetically correct jury charge rather than the charge given, here, the State invited error through its pleadings. *Ramjattansingh v. State*, No. 01-15-01089-CR, 2017 WL 3429944, *3 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, pet. filed) (not yet released for publication). The court of appeals' held that because the State added non-statutory language in its pleading it was estopped from using the hypothetically correct jury charge standard in a sufficiency review. *See id*. This decision is in direct conflict with this Court's precedent considering a hypothetically correct jury charge despite variances from the statutory language. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

Section 49.04 of the Texas Penal Code provides that a driver commits the Class B misdemeanor offense of driving while intoxicated if he operates a motor vehicle in a public place while intoxicated. *See* TEX. PENAL CODE § 49.04(a) (West

2015); TEX. PENAL CODE § 49.04(b) (West 2015). If the proof at trial shows that an analysis of a person's blood, breath or urine showed an alcohol concentration of 0.15 or more at the time the analysis was performed, the offense is a Class A misdemeanor. *See* TEX. PENAL CODE § 49.04(d) (West 2015).

In the present case, the State charged the appellant by information with Class A misdemeanor driving while intoxicated by having an alcohol concentration of 0.15 or more (CR—6). *See* TEX. PENAL CODE § 49.04(d) (West 2015). The State alleged that the appellant unlawfully operated a motor vehicle in a public place while intoxicated and further alleged that "at the time of the analysis and at or near the time of the commission of the offense, an analysis of the [appellant's] [breath] showed an alcohol concentration level of at least 0.15." (CR—6). Thus, in addition to the statutory language in Section 49.04(d), the State included the phrase "at or near the time of the commission of the offense" (CR—6). The jury charge tracked the language of the indictment without objection from either party (CR—63-7; 3 RR 181).

On appeal, the appellant challenged the sufficiency of the evidence. *See* (App'nt Original Brf. to First Court of Appeals pp. 6-13). Specifically, he claimed that the evidence was insufficient to show that the appellant had an alcohol

concentration of at least 0.15 at the time of the offense. *See* (App'nt Original Brf. to First Court of Appeals pp. 6-13).[1]

This Court has held for decades[2] that sufficiency of the evidence should be measured against elements of the offense as defined by the hypothetically correct jury charge for the case. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011); *Fuller v. State*, 73 S.W.3d 250, 252 (Tex. Crim. App. 2002); *Gollihar v. State*, 46 S.W.3d 243, 253 (Tex. Crim. App. 2001); *Malik*, 953 S.W.2d at 240. That is, "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Malik*, 953 S.W.2d at 240.

Contrary to this Court's precedent, the First Court of Appeals held that *Malik* did not apply because the additional language included in the State's charging instrument invited error. *See Ramjattansingh*, 2017 WL 3429944 at *3. The court found that the State affirmatively created an additional burden by the chosen pleading and thus, the State was estopped from utilizing the

[1] The appellant did not dispute that the evidence was sufficient to support the underlying Class B misdemeanor driving while intoxicated, and he did not address whether the evidence was sufficient to show his BAC was at least a 0.15 *near* the commission of the offense. *See* (App'nt Original Brf. to First Court of Appeals pp. 6-13).

[2] This standard has been in effect since this Court's decision in *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997).

hypothetically correct jury charge in reviewing the sufficiency of the evidence. *See id*. But the inclusion of non-statutory language or surplusage in a charging instrument is not an "act" for purposes of the invited error doctrine.

The invited error doctrine estops a party from making an appellate error of an action it induced. *Prytash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999). The doctrine applies when the complaining party on appeal was the reason for the error it complains of. *See id*; *Cary v. State*, 507 S.W.3d 750, 755 (Tex. Crim. App. 2016). But here, no action was induced by the State. *Cf. Cary*, 507 S.W.3d at 755 (declining to apply invited error to a sufficiency analysis with no evidence of an inducing action). This is not a situation where the State acted affirmatively to induce the trial court to do something in the charging instrument and now is complaining about it on appeal. The appellant is complaining of error on appeal regarding the sufficiency of the evidence; the State is attempting to affirm the judgment of the trial court. *See id.* (noting the only issue in a sufficiency analysis is whether a rational jury could have found each essential element beyond a reasonable doubt).

The court of appeals relies on its own decision in *Meza v. State*, 497 S.W.3d 574 (Tex. App.—Houston [1st Dist.] 2016, no pet.), but the facts of *Meza* illustrate why invited error does not apply to this case. In *Meza*, during the charge conference, the trial court pointed to similar surplusage in the jury charge that was

not required by statute and asked the State if they wanted to abandon the language. *Meza*, 497 S.W.3d at 580. The prosecutor specifically declined to do so. *See id*. Although *Meza* did not address the invited error doctrine, it illustrates an affirmative act by the State "inviting error" into the jury charge. *See id*. Whereas, here, other than including the surplusage language in the pleading, no such affirmative action was made by the State. Nothing in this record supports the court of appeals' contention that the State intentionally invited error.[3] Thus, the First Court of Appeals held, for the first time, that by merely including surplusage—regardless if included intentionally or by a mistake—in the pleading estops the State from relying on a hypothetically correct jury charge for sufficiency purposes. *See Ramjattansingh*, 2017 WL 3429944 at *3. But this holding is contrary to this Court's precedent after *Malik*.

Since *Malik*, the hypothetically correct jury charge analysis is a systemic requirement for a sufficiency review. In *Gollihar*, this Court held that a hypothetically correct jury charge "need not incorporate allegations that give rise to immaterial variances." *Gollihar*, 46 S.W.3d at 256. This Court determined that "when faced with a sufficiency of the evidence claim based upon a variance between the indictment and the proof, only a material variance will render the

[3] The court of appeals contends that the additional language in the charging instrument a "deliberate decision [by the State] to increase its burden," but nothing in *this* record supports that contention. *See Ramjattansingh*, 2017 WL 3429944 at *3; *cf. Meza*, 497 S.W.3d at 580.

evidence insufficient." *Id.* at 257 (internal quotations omitted). A variance is material only if it prejudices the defendant's substantial rights. *Id.*

In determining whether a defendant's substantial rights have been prejudiced, two questions are asked:

> When reviewing such a variance, we must determine whether the indictment informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime.

Id. at 258. Variances involving immaterial, non-statutory allegations do not render the evidence legally insufficient. *Johnson v. State*, 364 S.W.3d 292, 299 (Tex. Crim. App. 2012); *see also Gollihar*, 46 S.W.3d at 257 (overruling the surplusage rule, whereby descriptive averments of statutory elements must always be proven as alleged, and holding that "[a]llegations giving rise to immaterial variances may be disregarded in the hypothetically correct [jury] charge" envisioned in *Malik*).

The additional phrase "and at or near the time of the offense" fits the test for an immaterial, non-fatal variance. *Cf. Cornwell v. State*, 471 S.W.3d 458, 465-67 (Tex. Crim. App. 2015) (finding additional phrase "by trying to resolve pending criminal case" not material to prove impersonating a peace officer; rejecting that it was elemental—that the State needed to prove; holding evidence sufficient under hypothetically correct jury charge deleting such language); *Gollihar*, 46 S.W.3d at

257 (finding no material variance when indictment included model number of item stolen and evidence proved different model). The language could have been deleted or abandoned without having affected the charged offense and without prejudicing the appellant's substantial rights. *See Gollihar*, 46 S.W.3d at 257, n. 21 ("If the allegation is one which would be considered 'surplusage' in that it is not essential to constitute the offense and might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, then it would rarely meet the test of materiality."). Whether this would then bring a notice issue is a separate concern that this Court has declined to address in a sufficiency analysis. *See, e.g., Cornwell*, 471 S.W.3d at 467, n. 8 (citing *Johnson*, 364 S.W.3d at 299). Accordingly, the First Court of Appeals' decision is contrary to this Court's precedent.

Furthermore, there appears to be a split among the circuit courts on this issue. Reviewing a similar issue involving the State adding the phrase "at or near the time of the commission of the offense" to the pleading for Class A misdemeanor driving while intoxicated, the Fourteenth Court of Appeals applied *Malik* and found the evidence sufficient under a hypothetically correct jury charge. *Leonard v. State*, 14-15-00560-CR, 2016 WL 5342776, at *2-3 (Tex. App.—Houston [14th Dist.] Sept. 22, 2016, pet. ref'd) (mem. op., not designated for publication) (determining sufficient evidence for Class A driving while intoxicated because the

evidence showed the alcohol concentration of more than 0.15 at the time of analysis despite the additional language in the charging instrument). Thus, the Fourteenth Court of Appeals' decision is in direct conflict with the First Court of Appeals' decision.

The record reflects that the State introduced sufficient evidence to support appellant's conviction under a hypothetically correct jury charge. Under a hypothetically correct jury charge, the non-statutory language should have been omitted. *See, e.g., Leonard*, 2016 WL5342776 at *3. Alternatively, the "and" prior to the additional language, "at or near the commission of the offense," could have been changed to "or." "It is well established that State may plead in the conjunctive and charge in the disjunctive." *Cada v. State*, 334 S.W.3d 766, 771 (Tex. Crim. App. 2011); *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991) ("It is settled that 'when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, ... the verdict stands if the evidence is sufficient with respect to any of the acts charged.'"). The State's conjunctive pleading would not have prevented a disjunctive charge in a hypothetically correct jury charge. *See id.* The record reflects that the appellant's BAC was at least a 0.22 within two hours of the stop. *See* (St. Ex. #7). Thus, the evidence was sufficient to show that the appellant's BAC was at least a 0.15 at the time of analysis or near the commission of the offense.

Review of the First Court of Appeal's opinion in this case is necessary, as this case creates precedent for finding that any mistake in the charging instrument estops the State and prevents a court from using the hypothetically correct jury charge on a sufficiency review. The court of appeals' holding, at its very essence, requires the State to prove a non-existent offense, which was exactly the reason why the hypothetically correct jury charge became part of the sufficiency review, rejecting prior decisions measuring sufficiency by the charge given. The court of appeals improperly applied the invited error doctrine to a systemic requirement for sufficiency review. Moreover, this appears to be the first time in Texas history an appellate court has overturned a trial court's judgment using the doctrine of invited error. Accordingly, this Court's guidance is needed.

SECOND GROUND FOR REVIEW

Did the First Court of Appeals sit as a thirteenth juror when holding that a two-hour interval between the time of the stop and the breath test was not sufficient to prove the appellant's breath alcohol concentration was a 0.15 near the time of the offense?

Even if sufficiency is reviewed under the actual jury charge given, rather than the hypothetically correct jury charge, the State introduced sufficient evidence to support the appellant's conviction. The First Court of Appeals held that a two-hour interval from the time of the stop and the time of the breath test was not close enough in time to be considered *near* the time of the offense.

Ramjattansingh, 2017 WL 3429944 at *4. But in reaching this conclusion the court of appeals incorrectly sat as the thirteenth juror and inserted its own evaluation of the evidence, usurping the jury's evaluation of the same evidence. *See id.*

When reviewing sufficiency of the evidence, a reviewing court shall view all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational fact finder could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). An appellate court does not sit as thirteenth juror and may not substitute its own judgment for that of the fact finder by re-evaluating weight and credibility of the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, the reviewing court should defer to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* A reviewing court's duty is to ensure the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The evidence was sufficient under the charge given to the jury. The State was required to prove that the appellant drove while intoxicated and that his breath alcohol concentration (BAC) was at least 0.15 "at the time of analysis and ***at***

or near the time of the commission of the offense" (CR—6, 62-4) (emphasis added). Thus, the State could have proven the charged offense through either theory—*at* the time of the offense *or near* the time of the offense. *See* (CR—6, 63-64). *See Leza v. State*, 351 S.W.3d 344, 357 (Tex. Crim. App. 2011) (noting a jury returns a general verdict and the evidence is sufficient to support a guilty finding under any of the allegations submitted, the verdict should be upheld).

The evidence proved beyond a reasonable doubt that the appellant had a BAC above a 0.15 *near* the time of the offense.[4] There is no dispute that the appellant was seen driving around 9:30 p.m. and that around 11:30 p.m. the breath test was administered, showing the appellant's BAC was a 0.22, almost three times the legal limit (2 RR 203-4, 217; 3 RR 122). *See* (St. Ex. #1, 4, 7). Therefore, the appellant's BAC was over a 0.15 within two-hours of driving.

The term "near" is not defined by statute and jurors were free to assign it its plain and ordinary meaning. *Clinton v. State*, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011). As the court of appeals pointed out, Webster's defines "near" as "a relatively short distance in space, time, degree." *Ramjattansingh*, 2017 WL 3429944 at *4 (citing WEBSTER'S NEW WORLD COLLEGE DICTIONARY 976 (5th ed. 2014)). It is reasonable to conclude that two hours is a short distance in time, or

[4] The record reflects that the State could not extrapolate in order to prove the appellant's BAC at the time of driving (3 RR 166-67, 202).

otherwise *near* the time of the offense. No extrapolation evidence is needed to prove near; rather, similar to the statutory language "at the time of analysis," if the driver's BAC was a 0.15 or higher at a time near the commission of the offense, that is all that was required to be shown. *See* (CR—6). Thus, the jury could have reasonably concluded that the State sufficiently proved the appellant's BAC was at least a 0.15 within a relatively short distance in time from the offense. *See Clinton*, 354 S.W.3d at 800 ("When analyzing the sufficiency of the evidence, undefined statutory terms 'are to be understood as ordinary usage allows, and jurors may thus freely read statutory language to have any meaning which is acceptable in common parlance.'").

Rather than viewing the evidence in the light most favorable to the verdict, the court of appeals, however, inserted its own opinion that a two-hour interval from the time of driving to the time the breath test was administered was "not close enough in time to an alleged instance of drunk driving to qualify as *near* the time of the offense." *Ramjattansingh*, 2017 WL 3429944 at *4 (emphasis in original). The court based this opinion on its own opinion of an analysis of a person's alcohol concentration. This was inappropriate and stands in the face of years of precedent from this Court. *See, e.g., Adelman v. State*, 828 S.W.2d 418, 423 (Tex. Crim. App. 1992) ("The lower court should not have substituted its opinion of the credibility of the witnesses and the weight to be given their testimony for that of the trier of

fact. Although some hypothetical, rational trier of fact could have accepted appellant's defense in this case, another trier of fact could have rejected that defense beyond a reasonable doubt and such finding would be legally sufficient to support the conviction."); *Johnson v. State*, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017) (reversing court of appeals decision on sufficiency to show deadly weapon used when court of appeals relied on its own interpretation of the security video, although witness testified to the contrary; finding evidence factfinder could have rationally concluded that the knife was exhibited and used in commission of the offense; thus, sufficient).

It's clear that the jury took their charge seriously, weighing the evidence and finding it sufficient to support the offense charged. The record reflects that the jury looked at the scene video and the 911 call during deliberations, asking specifically to "see the time" stamps (3 RR 205). *See* (St. Ex. #1, 4). This was not a runaway jury that an appellate court needed to step in and rectify. Rather, the court of appeals inappropriately usurped the jury's right to interpret the word "near" in its plain meaning and imposed its own restrictive definition. *Cf. Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012) (reversing, for insufficient evidence, appellant's murder conviction as a party to murder when nothing beyond mere speculation supported the State's theory).

The court of appeals' decision only focused on whether the evidence was sufficient to prove that the appellant's BAC was above a 0.15 ***at*** the time of the offense, which was only one alternative manner and means of the State's allegation (CR—6) (emphasis added). It appears from the analysis that the court of appeals was concerned with the inability to extrapolate the appellant's BAC to at the time he was driving (or when the offense occurred). *See Ramjattansingh*, 2017 WL 3429944 at *4. The court points to the State's expert's testimony that it was *possible* for a person's alcohol concentration to rise rapidly if he drinks a large amount of alcohol in a short amount of time and that the appellant's BAC could have been "below .08 when he was on the road." *See id*. But, as previously stated, the State did not need to extrapolate to the exact time of the offense; instead, the jury could have rationally concluded that the two hour time frame was sufficient to show that the appellant's BAC was above a 0.15 *near* the time of the offense. (CR—6, 63-4).[5]

In reaching its conclusion, the court of appeals picked apart the evidence, focusing only on the conflicting evidence in the record—that it was *possible* for a person's alcohol concentration to rise rapidly if he drinks a large amount of alcohol in a short amount of time. *See Ramjattansingh*, 2017 WL 3429944 at *4. But, as

[5] The State was required to prove that the appellant's BAC was at least 0.15 "at the time of analysis and *at* ***or*** *near* the time of the commission of the offense" (CR—6, 62-4) (emphasis added). Thus, the State could have proven the charged offense through either theory.

previously stated, the record reflects other evidence the jury could have considered in finding the appellant guilty of the charged offense.

The appellant admitted to officers that he had been drinking shots since about 5:00 p.m. (2 RR 241-42). *See* (St. Ex. #1, 4). He was seen driving and stopped by police around 9:30 p.m. (2 RR 217). *See* (St. Ex. #1, 4). The officers testified the appellant's speech was slurred, there was a strong odor of alcohol on his breath, he could not maintain his balance, and showed signs of intoxication during the field sobriety tests (2 RR 204, 241-50; 3 RR 19). And Bishop testified that for someone to have the BAC of a 0.22 it would take on average 11 shots (3 RR 123-24). There was no evidence presented that the appellant rapidly consumed any amount of alcohol after being stopped and there was no evidence of any alcohol found in his vehicle. Thus, based on the evidence presented, contrary to the court of appeals' finding, the jury could have reasonably rejected the contention that the appellant rapidly consumed a large amount of alcohol prior to the stop.

Moreover, the record reflects that the officers conducted their tests and investigation in about as quickly a manner as possible without jeopardizing results. This was not a situation where the breath test or blood was taken so many hours or days later that it could not be related to the time of driving.

Furthermore, it appears that the court of appeals would require a *de facto* rule that no defendant could ever be convicted of Class A misdemeanor DWI

without retrograde-extrapolation evidence. But that stands contrary to this Court's prior holdings that BAC results, even absent retrograde extrapolation, are highly probative to prove intoxication. *See, e.g.*, *Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010); *Stewart v. State*, 129 S.W.3d 93 (Tex. Crim. App. 2004); *see also Kuciemba v. State*, 310 S.W.3d 460, 463 (Tex. Crim. App. 2010) (noting that the defendant's high blood-alcohol concentration, determined from a blood sample drawn shortly after the defendant's one vehicle, rollover crash, "supports an inference either that [the defendant] was recently involved in the accident or that he had been intoxicated for quite a while[,]" which, along with other evidence of intoxication, supported the defendant's DWI conviction).

Reviewing the record in the light most favorable to the jury's verdict, there was sufficient evidence presented for a rational trier of fact to have concluded beyond a reasonable doubt that the appellant was guilty of Class A misdemeanor driving while intoxicated with a BAC of 0.15 or higher. *Powell v. State*, 194 S.W.3d 503, 508 (Tex. Crim. App. 2006); *Jackson*, 443 U.S. at 319. Thus, even under the charge actually given, the court of appeals' judgment should be reversed on this issue and the conviction for Class A misdemeanor driving while intoxicated affirmed.

CONCLUSION

It is respectfully requested that this petition be granted, the Court of Appeals' judgment on this issue be reversed, the sufficiency of Class A misdemeanor of driving while intoxicated by 0.15 or higher be affirmed, and the case remanded to address the appellant's remaining issues.

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/s/ Katie Davis

Date: 9/4/2017

APPENDIX A

Ramjattansingh v. State,
01-16-01089-CR, 2017 WL 3429944
(Tex.App.—Houston [1st Dist.] Aug. 10, 2017, pet. filed)

2017 WL 3429944
Only the Westlaw citation is currently available.

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Court of Appeals of Texas,
Houston (1st Dist.).

Jason RAMJATTANSINGH, Appellant
v.
The STATE of Texas, Appellee
NO. 01-15-01089-CR
|
Opinion issued August 10, 2017

Synopsis
Background: Defendant was convicted in the County Criminal Court at Law, Harris County, of driving while intoxicated with an alcohol concentration of least 0.15 at time of analysis and at or near time of offense. Defendant appealed.

Holdings: The Court of Appeals, Harvey Brown, J., held that:

[1] State's decision to increase its burden foreclosed measuring evidence sufficiency under hypothetically correct jury charge with lesser burden, and

[2] evidence was insufficient to prove that defendant had alcohol concentration of 0.15 while driving.

Reversed; rendered judgment of acquittal; and remanded for new trial.

West Headnotes (6)

[1] **Automobiles**

State's deliberate decision to increase its burden at driving-while-intoxicated trial foreclosed it from insisting on appeal that the sufficiency of the evidence had to be measured under a hypothetically correct jury charge with a lesser burden, where State alleged in its information charging defendant that his alcohol concentration was 0.15 or more both at the time of the breath test and at or near the time of the commission of the offense, even though the penal code required only that defendant have an alcohol concentration of 0.15 at the time of test. Tex. Penal Code Ann. § 49.04(a), (b), (d).

Cases that cite this headnote

[2] **Criminal Law**

Appellate courts ordinarily must measure evidentiary sufficiency under a hypothetically correct jury charge, which is one that accurately states the law, is authorized by the charging instrument, does not unnecessarily increase the State's burden of proof or restrict its theories of liability, and adequately describes the crime for which the defendant was tried.

Cases that cite this headnote

[3] **Criminal Law**

Evidentiary sufficiency ordinarily must be measured under a hypothetically correct jury charge rather than the charge given.

Cases that cite this headnote

[4] **Criminal Law**

The "doctrine of invited error" estops a party from asking for something, getting what it asked for, and then complaining about the outcome; the doctrine applies when the complaining party was the "moving factor" in creating the purported error it complains about.

Cases that cite this headnote

[5] **Automobiles**

Evidence was insufficient to prove that defendant had an alcohol concentration of at least 0.15 while driving, as alleged in information charging him with an alcohol concentration of least 0.15 at time of analysis and at or near time of offense; State's expert testified that defendant's alcohol concentration while driving could not be extrapolated from subsequent breath test showing alcohol concentrations of .235 and 220, expert conceded that defendant's alcohol concentration could have been below legal limit of .08 while driving, and State did not introduce proof as to when defendant was driving. Tex. Penal Code Ann. § 49.04(a), (b), (d).

Cases that cite this headnote

[6] **Criminal Law**

Undefined terms in jury charges should be given their ordinary meaning; jurors may read them in the manner in which they are commonly used, and the Court of Appeals must review the sufficiency of the evidence in light of their common usage.

Cases that cite this headnote

On Appeal from the County Criminal Court at Law No. 8, Harris County, Texas, Trial Court Case No. 2019635

Attorneys and Law Firms

Brian W. Wice, 440 Louisiana, Suite 900, Houston, TX 77002-1635, for Appellant.

Kim Ogg, District Attorney, Kimberly Aperauch Stelter, Assistant District Attorney, Harris County, Texas, 1201 Franklin, Suite 600, Houston, TX 77002, for Appellee.

Panel consists of Justices Higley, Bland, and Brown.

OPINION

Harvey Brown, Justice

***1** A jury found Jason Ramjattansingh guilty of driving while intoxicated with an alcohol concentration of at least 0.15 at the time of analysis and at or near the time of the offense. He appeals on several grounds, including insufficiency of the evidence. He contends that the evidence is insufficient because the State's expert testimony did not show that his alcohol concentration was at least 0.15 at or near the time of the offense. We reverse Ramjattansingh's Class A misdemeanor conviction, render a judgment of acquittal on that charge, and remand for a new trial on the lesser-included Class B misdemeanor offense of driving while intoxicated.

Background

Around 9:30 one evening, tow-truck driver Joshua Wilson dialed emergency assistance to report a "drunk driver." Wilson told the dispatcher that he was following a driver who was "all over the road" and had almost caused several accidents. Wilson and the driver he was following, Jason Ramjattansingh, eventually pulled off the road into a public parking lot.

S. Delacruz, a peace officer with the Houston Police Department, arrived at the lot shortly afterward at around 9:45. Delacruz briefly spoke to Wilson, who told the officer that Ramjattansingh had been driving erratically and almost hit other vehicles. In the lot, Ramjattansingh was "swaying," "couldn't stand straight," and seemed intoxicated. Delacruz handcuffed him and placed him in the back of his cruiser to await the arrival of another officer who was en route to investigate whether Ramjattansingh had driven while intoxicated.

Officer A. Beaudion arrived around 10:05 to conduct the investigation. Ramjattansingh admitted to her that he had been drinking "shots" since about 5:00 p.m. He had difficulty answering Beaudion's questions and his speech seemed slurred. He had a strong odor of alcohol on his breath and could not maintain his balance. Beaudion administered three field sobriety tests—the horizontal nystagmus test, one-leg stand test, and walk-and-turn test. Ramjattansingh could not complete the first one because he was unable to hold his head still. He showed additional signs of intoxication during the other two. After these tests,

Beaudion placed Ramjattansingh under arrest and took him to the HPD intoxication center.

About an hour and a half later, at 11:30, Ramjattansingh was administered a breath test at the intoxication center using an Intoxilyzer 5000. The test yielded two results, which showed alcohol concentrations of .235 and 0.220 per 210 liters of breath.

The State subsequently charged Ramjattansingh with the offense of driving while intoxicated. *See* TEX. PENAL CODE § 49.04. It additionally alleged that his breath showed an alcohol concentration of at least 0.15 "at the time of the analysis and at or near the time of the commission of the offense," which elevates the offense from a Class B to a Class A misdemeanor. *See id.* § 49.04(b), (d).

Officers Delacruz and Beaudion testified at trial, as did the HPD employee who administered Ramjattansingh's breath test. In addition, C. Bishop, a technical supervisor for the Texas Department of Public Safety Breath Alcohol Testing Program, testified as an expert. Among other things, she opined that an average person would have to drink about 11 shots to produce a result of 0.220 on a breath test and that someone with this alcohol concentration would have lost the normal use of his physical or mental faculties.

***2** However, Bishop conceded that she could not say what Ramjattansingh's alcohol concentration was when he was driving and that any attempt to do so would be speculative. She testified that retrograde extrapolation—extrapolating backward in time from breath test results to estimate an alcohol concentration at an earlier point—is possible. But she said that certain facts must be known to make such an extrapolation, including not only the time of the traffic stop, the time of the breath test, and its results, but also the time of the driver's last meal, what he ate, and the time of his last alcoholic drink. If any of these facts are unknown, retrograde extrapolation is not possible. Bishop acknowledged that she did not know the facts necessary to make a retrograde extrapolation in this case.

Bishop further conceded that, given the limited facts available and the manner in which the body processes alcohol, it was possible that Ramjattansingh's alcohol concentration was below the legal limit of .08 when he was driving. For example, if he drank several alcoholic beverages in rapid succession before getting behind the wheel, his alcohol concentration could have been below the legal limit while driving but subsequently tested higher because in such a scenario his alcohol concentration would have increased over time.

The jury was instructed on both the Class A and lesser-included Class B misdemeanor offenses of driving while intoxicated. *See* TEX. PENAL CODE § 49.04. It found that Ramjattansingh had an alcohol concentration of at least 0.15 at the time of the breath test and at or near the time he was driving and therefore found him guilty of the former offense.

Driving While Intoxicated with an Alcohol Concentration of at Least 0.15

[1]A driver commits the Class B misdemeanor offense of driving while intoxicated if he operates a motor vehicle in a public place. TEX. PENAL CODE § 49.04(a)–(b). He is intoxicated if alcohol, drugs, and/or another substance have deprived him of the normal use of his mental or physical faculties or if he has an alcohol concentration of .08 or more. *Id.* § 49.01(2). If the proof shows that he had an alcohol concentration of 0.15 or more at the time the analysis was performed, however, the offense is elevated to a Class A misdemeanor. *Id.* § 49.04(d).

While the Penal Code merely requires a defendant to have an alcohol concentration of 0.15 at the time of analysis to elevate the offense to a Class A misdemeanor, the State's information alleged that Ramjattansingh had an alcohol concentration of 0.15 or more both at the time of the analysis and at or near the time of the offense. The charge likewise required the jury to find that he had this alcohol concentration at the time of analysis and at or near the time of the offense to find him guilty of the Class A misdemeanor of driving while intoxicated.

In *Meza v. State*, this court addressed the legal sufficiency of the proof in a situation in which the jury charge included this additional requirement that the defendant's alcohol concentration be at least 0.15 at or near the time of the offense. 497 S.W.3d 574, 581–82 (Tex. App.—Houston [1st Dist.] 2016, no pet.). Because the State's expert conceded that she could only speculate about the defendant's alcohol concentration at the time of the offense based on a subsequent breath test, this court reversed the defendant's conviction for the Class A misdemeanor

offense of driving while intoxicated. *Id.* at 582–84, 586.

Like the State's expert in *Meza*, technical supervisor Bishop said that she could not say what Ramjattansingh's alcohol concentration was when he was behind the wheel and that any attempt to do so would be speculative. She conceded that she could not extrapolate backwards in time based on his breath test because she did not know when he ate his last meal and what he ate, when he had his last alcoholic beverage, or exactly when he stopped driving when confronted by the tow-truck driver. She further conceded that it was possible that Ramjattansingh's alcohol concentration could have been below .08 when he was driving depending on these unknown circumstances.

***3** [2]The State concedes its expert testimony is similar to the testimony that *Meza* held insufficient but responds that *Meza* is distinguishable because that decision assessed the sufficiency of the evidence under the actual charge given to the jury rather than a hypothetically correct jury charge. Appellate courts ordinarily must measure evidentiary sufficiency under a hypothetically correct jury charge, which is one that accurately states the law, is authorized by the charging instrument, does not unnecessarily increase the State's burden of proof or restrict its theories of liability, and adequately describes the crime for which the defendant was tried. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The State did not dispute the standard of review in *Meza* but does dispute it in this case. Under a hypothetically correct charge, the State argues, it needed to prove only that Ramjattansingh had an alcohol concentration of 0.15 or more at the time of analysis, not at or near the time of the offense. It is undisputed that his alcohol concentration was greater than 0.15 at the time of the breath test.

[3]We agree that evidentiary sufficiency ordinarily must be measured under a hypothetically correct jury charge rather than the charge given. "*Malik* flatly rejected use of the jury charge actually given as a means of measuring sufficiency of the evidence." *Gollihar v. State*, 46 S.W.3d 243, 252 (Tex. Crim. App. 2001). But in this case, the State invited error. It alleged in its information charging Ramjattansingh with driving while intoxicated that his alcohol concentration was 0.15 or more both at the time of the breath test and "at or near the time of the commission of the offense," and the jury found him guilty as charged in the information. In its brief, the State acknowledges that it increased its burden of proof by adding the language as to Ramjattansingh's alcohol concentration at or near the time of the offense. The State's deliberate decision to increase its burden at trial forecloses it from insisting on appeal that the sufficiency of the evidence must be measured under a hypothetically correct jury charge with a lesser burden.

[4]The doctrine of invited error estops a party from asking for something, getting what it asked for, and then complaining about the outcome. *Ex parte Roemer*, 215 S.W.3d 887, 890 (Tex. Crim. App. 2007); *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999). The doctrine applies when the complaining party was the "moving factor" in creating the purported error it complains about. *Ex parte Guerrero*, 521 S.W.2d 613, 614 (Tex. Crim. App. 1975); *Franks v. State*, 961 S.W.2d 253, 255 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). In this instance, the higher burden about which the State complains would not have been included in the jury charge had the State not charged Ramjattansingh with having an alcohol concentration of 0.15 or more when he was behind the wheel. We therefore reject the State's argument for review under a hypothetically correct jury charge because it is an impermissible attempt to disown the higher burden of proof that appeared in the actual charge only as a result of the State's charging decision.

While *Malik* rejected a prior line of decisions in which evidentiary sufficiency was measured under the charge given, *Malik* concerned jury charges that imposed a burden on the State "beyond that which was legally required *and beyond the allegations in the indictment.*" *Gollihar*, 46 S.W.3d at 251 (emphasis added). In the cases that *Malik* rejected, the State had been held to additional burdens imposed in the jury charges because it was viewed as having acquiesced in the additional burdens by failing to object to them. *Id.* In contrast, in this case, the State did not merely acquiesce in an additional burden by failing to object to the jury charge; rather, the State affirmatively created the additional burden by the way in which it chose to charge Ramjattansingh in the information. *See Meza*, 497 S.W.3d at 580, 586 (measuring evidentiary sufficiency under actual charge given to jury where information and charge requested by State imposed additional burden of proof); *cf. Leonard v. State*, No. 14-15-00560-CR, 2016 WL 5342776, at *2–3, *5–6 (Tex. App.—Houston [14th Dist.] Sept. 22, 2016, pet. ref'd) (mem. op., not designated for publication)

(assessing evidentiary sufficiency as to DWI under hypothetically correct jury charge instead of actual charge given that included "at or near the time of the commission of the offense" language; State's information included same language, but State had attempted to omit this language from jury charge and acquiesced in its inclusion in the charge only after defendant objected that jury charge should include same language as information).

***4** [5]The State next contends that the evidence was sufficient under the charge given to the jury because the evidence proved beyond a reasonable doubt that Ramjattansingh had an alcohol concentration of at least 0.15 near the time of the offense. Like the expert in *Meza*, however, Bishop unequivocally testified that Ramjattansingh's alcohol concentration at or near the time of the offense could not be extrapolated from the measurements the State later obtained by administering a breath test. The State argues that the manner in which it tried this case distinguishes it from *Meza*. In particular, the State argues that it focused on proving only that Ramjattansingh's alcohol concentration was 0.15 or more *near* the time of the offense, rather than *at* the time of the offense. But the State did not introduce such proof either with respect to when Ramjattansingh was driving or any time near this activity. Instead, the lone evidence that Ramjattansingh had an alcohol concentration of 0.15 or more at any time was the results of his breath test, which was administered about two hours after he was last behind the wheel.

[6]*Near* does not appear in Section 49.04 of the Penal Code, and it was not defined in the charge. The State maintains that the term should be accorded its common meaning, and we agree. Undefined terms should be given their ordinary meaning; jurors may read them in the manner in which they are commonly used, and we must review the sufficiency of the evidence in light of their common usage. *See Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992); *Gilbert v. State*, 429 S.W.3d 19, 22 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). When, as here, *near* is used as a preposition, it ordinarily signifies "a relatively short distance in space, time, degree." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 976 (5th ed. 2014). The State concedes that the interval between the offense and Ramjattansingh's breath test was around two hours. Given the impact that the passage of time has on a defendant's alcohol concentration, a two-hour interval is not close enough in time to an alleged instance of drunk driving to qualify as *near* the time of the offense, at least not on this record. The State's expert testified that a person's alcohol concentration can rise rapidly if he drinks a large amount of alcohol in a short amount of time, and it was undisputed that the circumstances of Ramjattansingh's alcohol consumption and other critical variables that would affect his alcohol concentration were unknown. Bishop even conceded that Ramjattansingh's alcohol concentration could have been below the legal limit of .08 when he was on the road. When viewed in the light most favorable to the verdict, this uncertain evidence was not sufficient to enable a rational factfinder to find beyond a reasonable doubt that Ramjattansingh's alcohol concentration was 0.15 or more near the time of the offense. *See Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (legal sufficiency standard).

Accordingly, we sustain Ramjattansingh's evidentiary insufficiency issue, reverse his conviction for the Class A misdemeanor offense of driving while intoxicated, and render a judgment of acquittal on that charge. *See Meza*, 497 S.W.3d at 586. We remand this case for a new trial on the lesser-included Class B misdemeanor offense of driving while intoxicated. *See id.* at 586–87.

Ramjattansingh's Other Appellate Issues

Because we reverse Ramjattansingh's conviction for insufficient evidence and he does not seek greater relief than we afford him on any other basis, we do not address the additional points of error he raises on appeal. *See* TEX. R. APP. P. 47.1.

Conclusion

We reverse Ramjattansingh's conviction for the Class A misdemeanor of driving while intoxicated, render a judgment of acquittal with respect to that offense, and remand for a new trial on the lesser-included Class B misdemeanor offense.

All Citations

--- S.W.3d ----, 2017 WL 3429944

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