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Vol. 26, No. 23, June 11, 2018

Case Name: ***Jason Ramjattansingh v. The State of Texas***

- **OFFENSE**: Driving While Intoxicated
- **COUNTY**: Harris
- **COURT OF APPEALS**: Houston [1st] 2017
- **C/A CITATION**: 530 S.W.3d 259
- **C/A RESULT**: Conviction Affirmed in Part / Reversed in Part
- **CCA. CASE No**. PD-0972-17 **DATE OF OPINION**: June 6, 2018
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Newell **VOTE**: 9-0
- **TRIAL COURT**: CCrCL 8
- **LAWYERS**: Brian Wice (Defense); Katie Davis (State)

(**Background Facts**): At approximately 9:30 p.m., S. Delacruz, a peace officer with the Houston Police Department, received a report of a "drunk driver" who was "all over the road" and had almost caused several accidents. At approximately 9:45 p.m., she encountered Appellant, who was "swaying," "couldn't stand straight," and seemed intoxicated. Delacruz handcuffed him and placed him in the back of her cruiser to await the arrival of another officer who was en route to investigate whether Appellant had driven while intoxicated. Officer A. Beaudion arrived around 10:05 to conduct the investigation. Appellant 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. Appellant 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 Appellant under arrest and took him to the HPD intoxication center. At 11:30 p.m., Appellant 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 .220 per 210 liters of breath. The State subsequently charged

Appellant with the offense of driving while intoxicated, and alleged that his breath showed an alcohol concentration of at least .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.

534 Sufficiency of the Evidence: The State's DWI information in this case alleged that Appellant committed the offense of driving while intoxicated. It also alleged that he had an alcohol concentration level of 0.15 or more "at the time the analysis was performed," as the Class "A" DWI statute requires. The information went further, however, alleging that Appellant also had this alcohol concentration level "at or near the time of the commission of the offense," which the statute does not require. The jury charge tracked the information, requiring the jury to find this extra element. The jury convicted Appellant, but the Court of Appeals reversed. Measuring the sufficiency of the evidence under the charge given, found the evidence insufficient to prove the extra element (see , Vol. 25, No. 30; 08/14/2017).

Holding: As the Supreme Court recently made clear in ***Musacchio v. United States***, 14-1095 (01/25/2016), a reviewing court's limited determination on sufficiency review does not rest on how the jury was instructed. *** In ***Malik v. State***, 953 S.W.2d 234 (Tex.Cr.App. 1997)(see , Vol. 5, No. 36; 09/15/1997), this Court set forth the modern Texas standard for ascertaining what those elements are. They are the elements "defined by the hypothetically correct jury charge for the case," a charge 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." *** Only a "material" variance, one that prejudices a defendant's substantial rights, will render the evidence insufficient. This happens when the indictment, as written, 1) fails to adequately inform the defendant of the charge against him, or 2) subjects the defendant to the risk of being prosecuted later for the same crime. *** [In] ***Cornwell v. State***, 471 S.W.3d 458 (Tex.Cr.App. 2015)(see , Vol. 23, No. 41; 10/12/2015), we recently held that we should still look to the hypothetically correct jury charge to evaluate the sufficiency of the evidence even when the State erroneously included unnecessary surplusage in the indictment. *** We measure the sufficiency of the evidence against the elements of the offense as they are defined in the hypothetically correct jury charge. If a jury instruction includes the elements of the charged crime but incorrectly adds an extra, made-up element, a sufficiency challenge is still assessed against the elements of the charged crime, regardless of the source of the extra element.