PD-0985-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/18/2019 2:34 PM
Accepted 9/19/2019 10:58 AM
DEANA WILLIAMSON
CLERK

PD-0985-19

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COURT OF CRIMINAL APPEALS
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**IN THE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

ROBERT EARL HARRELL, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

**ON APPEAL FROM CAUSE NUMBER 05-18-01133-CR
IN THE FIFTH COURT OF APPEALS,
REVERSING THE CONVICTION AND RENDERING A JUDGMENT OF
ACQUITTAL IN CAUSE NUMBER 2017-1-0644
FROM THE COUNTY COURT AT LAW #1
OF GRAYSON COUNTY, TEXAS**

STATE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

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HON. JAMES C. HENDERSON

COUNTY COURT AT LAW #1
GRAYSON COUNTY, TX

APPELLATE PANEL:

HON. WHITEHILL
HON. PARTIDA-KIPNESS
HON. PEDERSEN,III

FIFTH COURT OF APPEALS
DALLAS, TX

APPELLANT:

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NO. PD-__________________________

IN THE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

ROBERT EARL HARRELL, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

TO THE HONORABLE COURT OF APPEALS:

COMES NOW THE STATE OF TEXAS, hereinafter referred to as the State, and submits this Petition for Discretionary Review pursuant to the Texas Rules of Appellate Procedure and would show through her attorney the following:

STATEMENT REGARDING ORAL ARGUMENT

The State believes that a discussion of the legal issues in this case would aid the Court in its decision making and hereby requests oral argument.

STATEMENT OF THE CASE

The appellant, Robert Earl Harrell, Jr., was charged with, and a jury convicted him of, Driving While Intoxicated, 2nd Offense. The trial court assessed punishment at 365 days imprisonment, probated for 24 months, and a $1,000 fine.

STATEMENT OF PROCEDURAL HISTORY

The appellant filed his brief on January 11, 2019, that the evidence was insufficient to prove that the appellant drove the vehicle in this case.[1] Oral argument was requested and this case was set for submission in cause number 05-18-01133-CR, on March 29, 2019. The Fifth Court of Appeals reversed and acquitted the appellant on August 22, 2019. *Harrell v. State*, 2019 WL 3955774 (Tex. App.–Dallas, August 22, 2019).

The State now files its Petition for Discretionary Review.

1

In that brief, the appellant alleged insufficiency of the evidence, but then proceeded to argue a failure to prove the *corpus delicti* in the brief itself.

ISSUE PRESENTED

POINT FOR REVIEW:

THE APPELLATE COURT APPLIED AN IMPORTANT QUESTION OF STATE LAW IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THE COURT OF CRIMINAL APPEALS WHEN IT MISTAKENLY MERGED THE *CORPUS DELICTI* STANDARD OF REVIEW WITH THE *JACKSON V. VIRGINIA* SUFFICIENCY OF THE EVIDENCE STANDARD OF REVIEW– MISAPPLYING BOTH.

SUMMARY OF ARGUMENT

The Fifth Court of Appeals has rendered a decision that applies the *corpus delicti* rule in a manner which conflicts with the applicable decisions of the Court of Criminal Appeals. The Fifth Court of Appeals found the evidence in this case insufficient to prove that the appellant was the driver of the vehicle in this case. In doing so, the Court merged two standards of review. The appellate court either improperly applied the *corpus delicti* rule as if that rule required that all elements of the offense of Driving While Intoxicated, including the identity of the perpetrator, be proven, or improperly applied the *Jackson v. Virginia* sufficiency of the evidence standard of review because it excluded the appellant’s admissions from its analysis.

The appellate court confused the evidence necessary to prove the guilt of a defendant under *Jackson v. Virginia* with that necessary to prove the *corpus delicti*. The *corpus delicti* of Driving While Intoxicated is that *someone* drove or operated a motor vehicle in a public place while intoxicated. The appellant argued, and the Fifth Court of Appeals agreed, that the *corpus delicti* was not proven in this cause because there was no evidence other than the appellant's extrajudicial statements tending to prove that he was driving the car. The *corpus delicti* rule requires corroboration of a defendant's extrajudicial confession regarding the commission of a crime, but *does not* require that the corroborating evidence prove that the defendant was the criminal perpetrator.

The analysis regarding straight sufficiency of the evidence was also misapplied. In a *Jackson v. Virginia* analysis of the sufficiency of the evidence, the appellate court should never have ignored the appellant's admission that he had been driving the vehicle.

The appellate court improperly merged the two standards of review–*corpus delicti* and *Jackson v. Virginia* sufficiency. As decided, the appellate court misapplied both standards in their opinion.

ARGUMENT

POINT FOR REVIEW:

THE APPELLATE COURT APPLIED AN IMPORTANT QUESTION OF STATE LAW IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THE COURT OF CRIMINAL APPEALS WHEN IT MISTAKENLY MERGED THE *CORPUS DELICTI* STANDARD OF REVIEW WITH THE *JACKSON V. VIRGINIA* SUFFICIENCY OF THE EVIDENCE STANDARD OF REVIEW– MISAPPLYING BOTH.

The Fifth Court of Appeals has rendered a decision that applies the *corpus delicti* rule in a manner which conflicts with the applicable decisions of the Court of Criminal Appeals. The Fifth Court of Appeals found the evidence in this case insufficient to prove that the appellant was the driver of the vehicle in this case. In doing so, the Court merged the standard of review in *Jackson v. Virginia* with the standard of review regarding the *corpus delicti* rule. The appellate court either wrongly determined that the *corpus delicti* rule required that all elements of the offense of Driving While Intoxicated be proven– including identity, or that the appellant's admission to driving the vehicle should be ignored.

A. EVIDENCE ADDUCED AT TRIAL

At trial, the State offered evidence that appellant committed the offense of Driving While Intoxicated.

- A dispatcher with the Van Alstyne Police Department, identified State's Exhibit 1 (hereinafter SX1) as the 911 call from incident number 17-000194 on March 5, 2017, at 4:00 in the morning. (RR vol. 3, pp. 50, 68-69)

- Officer Brandon Blair, received information from dispatch of a gray van driving recklessly, with a license plate number of GRW-6089, (RR vol. 3, p. 90), was notified that the gray van had taken exit 51, (RR vol. 3, p. 90; SX 1, part 1, time stamp 2:13 & part 2, time stamp 0:10), and then pulled into the McDonald's parking lot, parking near the gas pumps. (RR vol. 3, pp. 90-91; SX1, part 2, time stamp 0:59; SX 3, time stamp 0:03:12)

- Officer Blair located the vehicle and approached the car, observing the appellant in the driver's seat with his seatbelt still fastened and could smell an odor of alcohol beverage emitting from the vehicle. (RR vol. 3, p. 92; SX 3 time stamp 0:03:13-0:03:42)

- The appellant's eyes appeared to be bloodshot and his speech was somewhat mumbled and slurred. (RR vol. 3, pp. 93-94)

- The appellant informed the officer that he and the two other passengers in the van with him had been at the Choctaw Casino since 7:30 that evening and all had been drinking. (RR vol. 3, pp. 93-95; SX 3 time stamp 0:06:30)

- During the investigation, Officer Blair testified that the appellant admitted driving the van, in part as follows:

  A. ...I explained to him that ***he was reported as a reckless driver and -- and he says, well, I'm parked here, and I said, but you were driving and he replies, well, yeah.*** (emphasis added)

Q. Okay. So, he admitted to you that he was driving?

A. That's correct. (RR vol. 3, p. 107; SX 1, time stamp 0:17:51)

- Officer Blair perform standardized field sobriety tests, (RR vol. 3, pp. 95-107; SX 3 time stamp 0:09:54; 0:13:55, 0:17.06), determined that the appellant was intoxicated, and arrested the appellant. (RR vol. 3, p. 108; SX 1, time stamp 0:18:57)

- Officer Blair also determined that both passengers were intoxicated after performing standardized field sobriety tests on them. (RR vol. 3, p. 108-109 SX 1, time stamps 00:26:19, 00:29:37, 00:30:57, 00:36:32)

- After arresting the appellant, the appellant refused to provide a blood sample, then Officer Blair obtained a search warrant, and procured a blood sample from the appellant which tested out as a .095 blood alcohol content. (RR vol. 3, p. 114; 241-242; SX 5)

B. LEGAL STANDARD FOR PROVING THE *CORPUS DELICTI*

The *corpus delicti* rule "is one of evidentiary sufficiency affecting cases in which there is an extrajudicial confession." *Miller v. State*, 457 S.W.3d 919, 924 (Tex. Crim. App. 2015). Under it, a defendant's extrajudicial confession alone is not legally sufficient evidence of guilt; rather, there must be 1) independent evidence of the *corpus delicti*, and 2) that independent evidence must show that someone, not necessarily the defendant, probably committed the "essential nature" of the charged crime. *Id.*; see *Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994). The

corpus delicti rule requires some corroboration of a defendant's extrajudicial confession regarding the commission of a crime, but *does not require that the corroborating evidence prove that the defendant was the criminal perpetrator*. *Salazar v. State*, 86 S.W.3d 640, 644 (Tex. Crim. App. 2002).

C. LEGAL STANDARD FOR PROVING SUFFICIENCY OF THE EVIDENCE UNDER *JACKSON V. VIRGINIA*

Only under a sufficiency of the evidence standard set out in *Jackson v. Virginia,* does the identity of the person committing the crime come into the analysis. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). When reviewing sufficiency of the evidence, all of the evidence is viewed in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 898–900 (Tex. Crim. App. 2010)(plurality opinion). The corroboration of a defendant's admission or confession–as required in establishing the *corpus delicti*–is *not* a part of the sufficiency review under *Jackson v. Virginia.*

D. THE APPELLATE COURT MERGED THE STANDARD OF REVIEW FOR THE *CORPUS DELICTI* RULE WITH THE STANDARD OF REVIEW FOR SUFFICIENCY OF THE EVIDENCE UNDER *JACKSON V.*

VIRGINIA–AND MISAPPLIED BOTH.

The Fifth Court of Appeals erred twice in their analysis of this case. First, they applied the *corpus delicti* rule to the identity of the person who had committed a DWI in this case. Second, the appellate court merged the *corpus delicti* rule into a sufficiency of the evidence review, improperly ignoring the appellant's admission, in order to find that there was insufficient evidence to prove that the appellant committed the DWI. The merger of these two standards was improper, resulting in the misapplication by the appellate court of both the *corpus delicti* rule and the *Jackson v. Virginia* standard of review.

1. THE OPINION BY THE FIFTH COURT OF APPEALS

In its decision, the court of appeals held that the *corpus delicti* rule had not been satisfied because the State failed to prove that the appellant was the driver of the vehicle apart from his admission to Officer Blair that he had driven the van. *Harrell v. State*, 2019 WL 3955774 (Tex. App.–Dallas, August 22, 2019).

At this point, the appellate court appears to have jumped to a

sufficiency of the evidence review under *Jackson v. Virginia*, and decided that, after excluding the admission made by the appellant that he had driven the vehicle, the evidence was not sufficient on its own to prove that the appellant was the driver of the vehicle prior to parking in the McDonald's parking lot. The Fifth Court of Appeals stated that "other than [the appellant's] statements to Officer Blair, there was no other evidence from which a jury could rationally conclude that [the appellant] was operating the vehicle in a public place while intoxicated. Consequently, the evidence is insufficient to support [the appellant's] conviction for driving while intoxicated." *Harrell v. State*, 2019 WL 3955774 (Tex. App.–Dallas, August 22, 2019).

2. SUFFICIENT EVIDENCE PROVED THE *CORPUS DELICTI*

The *corpus delicti* of Driving While Intoxicated is that *someone* drove or operated a motor vehicle in a public place while intoxicated. *Threet v. State*, 157 Tex. Crim. 497, 250 S.W.2d 200 (1952).

The State proved that a vehicle was observed by a 911 caller to be driving recklessly and that caller continued to follow the vehicle being driven recklessly. The caller reported what exit the vehicle took, and where it

eventually parked. An officer the vehicle matching the description given by the caller less than a minute later at the place described by the caller. The vehicle was not running, but the appellant was sitting in the driver's seat with his seatbelt buckled, admitted that he and his two friends were all drinking since 7:30 that evening, failed standardized road sobriety tests, and had a blood alcohol content exceeding .08. The only other passengers in the vehicle were also intoxicated and arrested.

The evidence presented at trial fulfilled the purpose of the *corpus delicti* rule. It assured that the very crime to which appellant confessed, and for which he was prosecuted, actually happened. *Salazar v. State*, 86 S.W.3d 640, 645 (Tex. Crim. App. 2002). This is all that was required by the *corpus delicti* rule, under *Miller* and *Emery*. There is no logical reason the appellate court should have merged the identity requirement for a *Jackson v. Virginia* analysis into its *corpus delicti* analysis.

3. THE STATE PRESENTED SUFFICIENT EVIDENCE UNDER *JACKSON V. VIRGINIA*

The Fifth Court of Appeals also should not have morphed the *corpus delicti* rule into a *Jackson* sufficiency standard. The appellant argued, and the Fifth Court of Appeals agreed, that the evidence did not prove the

appellant was guilty of Driving While Intoxicated because there was no evidence *other than his extrajudicial statements* tending to prove that the appellant was driving the vehicle. This added a corroboration requirement for confessions to the standard of reviewing sufficiency of the evidence under *Jackson v. Virginia*.

The facts set out above, plus the appellant's admission to driving the vehicle, provided sufficient evidence under *Jackson v. Virginia*. There is no logical reason why the appellate court should have ignored the appellant's admission and merged the corroboration requirement regarding admissions or confessions in a *corpus delicti* review into the *Jackson v. Virginia* analysis of the sufficiency of the evidence.

PRAYER

WHEREFORE, the state respectfully prays this court grant the State's Petition for Discretionary Review and remand this case back to the Fifth Court of Appeals for a proper review.

Respectfully Submitted,
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TEXAS BAR NO. 01923400

ATTORNEY FOR THE STATE

STATE'S CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface and word limit requirements of the Texas Rules of Appellate Procedure. This document contains 2,223 words, exclusive of the caption, the identity of parties and counsel, the statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the statement of issues presented, the statement of jurisdiction, the statement of procedural history, the signature, the proof of service, the certification, the certificate of compliance, and the appendix.

/s/ Karla Baugh SEPTEMBER 18, 2019
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APPENDIX

Reversed, Rendered and Opinion Filed August 22, 2019

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-18-01133-CR

ROBERT EARL HARRELL, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1
Grayson County, Texas
Trial Court Cause No. 2017-1-0644

MEMORANDUM OPINION

Before Justices Whitehill, Partida-Kipness, and Pedersen, III
Opinion by Justice Partida-Kipness

Appellant, Robert Earl Harrell, Jr., was charged with driving while intoxicated ("DWI"), enhanced by a prior DWI conviction. The jury convicted him of the offense, as alleged in the information. The trial court assessed punishment at 365 days confinement in a county jail, suspended the sentence and placed Harrell on community supervision for a period of twenty-four months. Harrell contends the evidence is insufficient to establish the corpus delicti of DWI because there is no evidence other than his extrajudicial statements to show he operated the vehicle. We reverse the trial court's judgment and render a judgment of acquittal. Because the issues are settled in law, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.4.

BACKGROUND

On March 5, 2017, at 4:04 a.m., the Van Alstyne Police Department received a 911 call from a motorist travelling southbound on Highway 75. The 911 call was admitted into evidence and played for the jury. The callers[1] described a gray mini-van they were following that was "driving dangerously," "all over the road," "going into the median," and "almost hit us a couple of times." The callers reported the license plate number of the van and told the dispatcher the van had exited the highway and pulled into the McDonald's parking lot. The caller stated that they took the same exit, drove by the McDonald's parking lot and saw the van sitting in the gas station part of the lot, not at a gas pump but pulled off to the side. The callers gave the dispatcher a name, driver's license number, and a phone number where they could be reached.

Officer Brandon Blair responded to the 911 dispatch and arrived in the McDonald's parking lot at 4:11 a.m. The video from the officer's dash-cam was admitted into evidence and played for the jury. When the officer approached the van, the lights were on, but the engine was not running. He saw Harrell sitting in the driver's seat with his seatbelt on. He also saw two other people sitting in the backseat of the van. Officer Blair testified that when Harrell rolled down his window, he immediately smelled an odor of alcohol beverage emitting from the vehicle. He also noticed that Harrell's eyes appeared to be bloodshot, and that his speech was somewhat mumbled and slurred. Harrell told the officer that he and his friends had been at Choctaw Casino since 7:30 that evening, that he drank three or four beers while there, and that he lived in Arlington, Texas. Officer Blair then conducted the standardized field sobriety tests, and based upon the number of clues he observed, believed that Harrell was intoxicated. Officer Blair testified that Harrell admitted to him that he had been driving the car; Harrell's statements admitting that he was driving

[1] It is evident from the audio of the 911 call that there were two people in the vehicle that reported the van's reckless driving, a male and a female.

can also be heard on the dash-cam video shown to the jury. Harrell's blood was also tested. The results of the test indicated that Harrell had a blood alcohol concentration of .095.

ANALYSIS

In his first issue, Harrell contends the evidence is legally insufficient to support the verdict. We agree.

In reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict, and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 313 (1979); *Brooks v. State,* 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We assume the fact finder resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Clayton v. State,* 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the trier of fact's determinations of witness credibility and the weight to be given their testimony. *Brooks,* 323 S.W.3d at 899. Circumstantial evidence is as probative as direct evidence in establishing the guilt of the accused. *Clayton*, 235 S.W.3d at 778. Circumstantial evidence alone can be sufficient to establish guilt. *Id*.

The corpus delicti rule concerns evidentiary sufficiency in cases involving an extrajudicial confession. *Miller v. State*, 457 S.W.3d 919, 924 (Tex. Crim. App. 2015). "When the burden of proof is 'beyond a reasonable doubt,' a defendant's extrajudicial confession does not constitute legally sufficient evidence of guilt absent independent evidence of the corpus delicti." *Id*. (quoting *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013). To satisfy the corpus delicti rule, there must be evidence independent of a defendant's extrajudicial confession showing that the "essential nature" of the charged crime was committed by someone. *Hacker*, 389 S.W.3d at 866. The corroborating evidence need not be sufficient by itself to prove the offense; there simply must be "some evidence which renders the commission of the offense more probable than it would be

without the evidence." *Williams v. State*, 958 S.W.2d 186, 190 (Tex. Crim. App. 1997) (quoting *Chambers v. State*, 866 S.W.2d 9, 15–16 (Tex. Crim. App. 1993); *Rocha v. State*, 16 S.W.3d 1, 4 (Tex. Crim. App. 2000) (citing *Williams*).

A person commits the offense of DWI if he is intoxicated while operating a motor vehicle in a public place. TEX. PENAL CODE § 49.04(a). The corpus delicti of DWI is that someone operated a motor vehicle in a public place while intoxicated. *Rajsakha v. State*, No. 05-16-00489-CR, 2017 WL 2628248, at *2 (Tex. App.—Dallas June 19, 2017, no pet.) (citing *Pace v. State*, No. 05-16-00167-CR, 2017 WL 360669, at *2 (Tex. App.—Dallas Jan. 23, 2017, no pet.) (mem. op.) (citing *Folk v. State*, 797 S.W.2d 141, 144 (Tex. App.—Austin 1990, pet. ref'd)). The penal code does not define "operating" for the purposes of the DWI statute. *Denton v. State*, 911 S.W.2d 388, 389 (Tex. Crim. App. 1995). The court of criminal appeals, however, holds that a person operates a vehicle when the totality of the circumstances "demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." *Id.* at 390.

During oral argument, the State conceded that Harrell's extra-judicial confession was the only evidence that proved Harrell operated the van but contended that the corpus delicti rule was satisfied by corroborating evidence showing that the vehicle had just parked in the McDonald's parking lot, and that Harrell was sitting in the driver's seat with his seat belt on. We disagree. While it is true that Officer Blair found Harrell sitting in the driver's seat with his seat belt on, when the officer approached the vehicle, it was parked in a parking space in the McDonald's parking lot. The engine was not running, and there is no evidence that the keys were in the ignition. The evidence shows that Officer Blair never saw the vehicle operating, either on the highway or in the parking lot, and there was an approximately seven-minute gap between the time the 911 call was received and the officer's arrival in the parking lot. Although the 911 callers identified the

vehicle, they never gave the dispatcher a description of the driver or identified him in any way. The two passengers sitting in the back seat of the van were also arrested for being intoxicated but were never questioned about who had been driving the vehicle before they parked. Further, the evidence showed that when the 911 callers drove by the McDonald's parking lot, they saw the van already parked. In addition, the callers did not remain at the parking lot until the police arrived, so there is no evidence regarding what happened between the time the callers saw the parked van and the time Officer Blair arrived at the vehicle. The evidence also showed that the vehicle did not belong to Harrell, but belonged to one of the two passengers.[2]

While the jury is allowed to draw reasonable inferences, they are not permitted to draw conclusions based on speculation. *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007. "Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." *Id.* "Theorizing or guessing as to the meaning of the evidence is never adequate to uphold a conviction because it is insufficiently based on the evidence to support a belief beyond a reasonable doubt." *Cary v. State*, 507 S.W.3d 761, 766 (Tex. Crim. App. 2016).

To reach the guilty verdict in this case, the jury would have had to infer that Harrell was the person driving the van when the 911 callers saw it on the highway based simply on the fact that he was sitting in the driver's seat with his seat belt on when Officer Blair approached the parked vehicle. Under different circumstances, such an inference may not be completely unreasonable, however, given the evidence, or lack thereof, pertaining to the time gap between the 911 call and when Officer Blair found him, we conclude that such a conclusion is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. "Although an appellate court cannot act as a thirteenth juror and make its own assessment of the evidence, it does act as a

[2] Officer Blair was not questioned during trial about whose vehicle it was. However, the video-cam shows that the officer asked Harrell "if it was his buddie's car," to which Harrell responded that it was and indicated that the vehicle belonged to one of the two people in the back seat.

safeguard to ensure that the factfinder's verdict is a rational one that is based on more than a "mere modicum" of evidence." *Cary*, 507 S.W.3d at 766. Here, other than Harrell's statements to Officer Blair, there was no other evidence from which a jury could rationally conclude that Harrell was operating the vehicle in a public place while intoxicated. Consequently, the evidence is insufficient to support Harrell's conviction for driving while intoxicated. We sustain Harrell's first issue.[3]

CONCLUSION

We reverse the trial court's judgment and render judgment of acquittal.

ROBBIE PARTIDA-KIPNESS
JUSTICE

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[3] Due to our disposition of the legal sufficiency challenge, we do not reach Harrell's second issue.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ROBERT EARL HARRELL, JR., Appellant No. 05-18-01133-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the County Court at Law No. 1, Grayson County, Texas Trial Court Cause No. 2017-1-0644. Opinion delivered by Justice Partida-Kipness, Justices Whitehill and Pedersen, III participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED** and the appellant is hereby **ACQUITTED**.

Judgment entered this 22nd day of August, 2019.