**In The**

# *Court of Appeals*

# *Ninth District of Texas at Beaumont*

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**NO. 09-10-00514-CR**

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**MARVIN ALEXANDER GUZMAN, Appellant**

**V.**

**STATE OF TEXAS, Appellee**

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**On Appeal from the 435th District Court**
**Montgomery County, Texas**
**Trial Cause No. 10-05-04991 CR**

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## MEMORANDUM OPINION

A jury found Marvin Alexander Guzman guilty of the felony offense of driving while intoxicated, and found he used his vehicle as a deadly weapon during the commission of the offense. The jury assessed punishment at three years of confinement in the Texas Department of Criminal Justice-Institutional Division and assessed a $3,000 fine. Guzman argues the evidence is insufficient to support the jury's finding that he was the driver, and insufficient for an affirmative finding that the motor vehicle was exhibited or used as a deadly weapon. Because a review of the record establishes the evidence is sufficient to support the jury's findings, we affirm the trial court's judgment.

A witness testified that around one o'clock in the morning he was driving in Montgomery County on his way home from work. He noticed a vehicle ahead of him "that was moving into the left lane and then back into its own lane [then] onto the shoulder and then back into its own lane." The vehicle was drifting "all over the road" and making sharp corrections. The vehicle was speeding up and slowing down. One car attempted to pass the vehicle and the vehicle veered over into the car's lane, causing the passing car to go to the inside shoulder. The witness became concerned for the safety of everyone on the road. He called 9-1-1.

The witness followed the vehicle. The driver of the vehicle continued to drive erratically and pulled into the parking lot of the witness's apartment complex. Just before arriving at the complex, the vehicle approached a curve, veered into the opposite lane of traffic and then returned to the proper lane. The witness waited for the driver to back the vehicle into a parking space. The witness then drove by the parked vehicle. He looked through the windshield, but did not get a good look at the driver's face. No one else was outside.

After parking, the witness remained on the phone with 9-1-1, stayed inside his vehicle, and watched the sole occupant leave the vehicle. The only time the driver of the vehicle was out of the witness's line of sight was when the witness backed into a parking spot, which was before the driver left his vehicle. The witness did not know the man. The

man began walking towards the complex and up the stairs. He was walking slowly and leaning as he walked.

A police officer arrived, and the witness pointed to the driver. The witness watched as the officer approached the driver at the stairwell. The witness went to his apartment unit in an adjacent building. Fifteen or twenty minutes later, another officer knocked on his door and obtained a report of the incident.

The jury listened to the audiotape of the 9-1-1 call. Although the witness could not tell the jury whether the driver of the vehicle was in the courtroom, because it was dark the night of the incident, the witness testified that he was sure that the person driving the vehicle was the man the officer stopped.

Officer Raymond Adams, a patrolman for the City of Conroe, also testified. He was dispatched to the apartment complex at 1:12 a.m. and arrived at 1:14 a.m. He located the vehicle by its license plates and the building location that the dispatcher had provided. Near the same building, Adams saw someone on the phone motioning towards him and pointing to a person walking. Adams did not see anyone else at the apartments other than the person on the phone and the other person walking. Adams approached the person walking, whom Adams identified at trial as Guzman.

The jury viewed the videotape of Adams's contact with Guzman. The video showed Adams taking Guzman's keys out of his hands and placing them on the vehicle's hood. Guzman told Adams he was drunk and that is why he was not driving. At one point

Guzman said that his brother had driven the vehicle, and at another point said his friend was in the vehicle. Adams had a backup officer locate the witness who had left the scene, so Adams could prove Guzman was the driver before he proceeded with the investigation.

Adams attempted to administer field sobriety tests to Guzman. After Guzman refused to provide a breath specimen and after Adams was advised of Guzman's two prior convictions for driving while intoxicated, Adams transported Guzman to the hospital for a mandatory blood test. Guzman's blood alcohol level was .36, which was substantially over the legal limit.

Guzman testified that the vehicle was his brother's and that he did not drive it on the night in question. Guzman had twelve or thirteen beers that night in his apartment with his brother. He explained that around 11:30 p.m. his brother went to sleep. The vehicle never left the complex. Guzman stated he was outside the apartment on the phone from midnight until the officer approached him at 1:16 a.m. He had keys in his pocket when the officer approached him. He keeps all his keys together so he will not lose them. He stated he does not own a car or drive anymore, but he has "[a]partment keys, work keys, and anything [he] find[s] he put[s] that [o]n that key chain."

Guzman argues the evidence is insufficient to convict him of the offense of driving while intoxicated because there was insufficient evidence that he was driving. Guzman also maintains there is insufficient evidence supporting the jury's affirmative

finding that the motor vehicle was a deadly weapon. Section 49.04 of the Texas Penal Code prohibits a person from operating a motor vehicle in a public place while in a state of intoxication. Tex. Penal Code Ann. § 49.04(a) (West 2011). "Deadly weapon," as defined in Penal Code Section 1.07(a)(17)(B), means "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex. Penal Code Ann. § 1.07(a)(17)(B) (West 2011). Texas law authorizes a deadly weapon finding in felony DWI cases. *Mann v. State*, 58 S.W.3d 132, 132 (Tex. Crim. App. 2001).

The standard in *Jackson v. Virginia* is "the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010); *see also Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We review all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Ross v. State*, 133 S.W.3d 618, 620 (Tex. Crim. App. 2004). The *Jackson* standard "gives full play to the jury's responsibility to fairly resolve conflicts in the evidence, to weigh the evidence, and to draw reasonable inferences from the evidence." *Williams v. State*, 301 S.W.3d 675, 684 (Tex. Crim. App. 2009), *cert. denied*, 130 S.Ct. 3411, 177 L.Ed.2d 326 (2010).

Guzman relies on *Duran v. State*, 352 S.W.2d 739, 740 (1962), in arguing that no witness could identify Guzman at trial as the driver of the vehicle. In *Duran*, two cars were parked along the curb of a street. *Id.* at 739. The bumpers of the cars were hung up on each other, "one car having bumped into the one in front of it, pushing it into the one in front of it." *Id*. One witness did not see Duran driving the car and another witness saw the car without the driver roll from an incline and hit his car in the rear bumper. *Id.* The witness testified he could not identify Duran as the driver of the car. *Id.* Duran did not contest that he was intoxicated but challenged the sufficiency of the evidence identifying him as the driver of the vehicle at the time of the accident. *Id.* At the scene, Duran admitted that he was trying to get a parking space and that is the reason he bumped the car in front, but he had no knowledge that the car he bumped hit another car in front of it. *Id.* at 740. He said he parked and locked his vehicle, and when he returned after drinking a few beers at a nearby bar, the officer arrested him. *Id.* The Court of Criminal Appeals determined that the evidence was insufficient to sustain the judgment because nothing in the evidence fixed the time of the accident. *Id.* at 741.

In this case, the jury heard the audiotape of the 9-1-1 call. The witness testified that he saw the driver exit the vehicle and that he was sure that the person he identified to the police officer was the driver of the vehicle. Officer Adams arrived at the apartment complex two minutes after he was dispatched. Both the witness and the police officer testified that they saw no one else outside the complex. The jury viewed the videotape

where Officer Adams placed the keys Guzman had in his hands on the hood of the car. Officer Adams testified that at one point Guzman said his friend was in the vehicle and at another point said that his brother drove the vehicle. The jury heard Guzman's testimony that the vehicle had not left the complex that night and that he was on the phone from midnight until law enforcement approached him. The jury resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from the evidence. *Young v. State*, 283 S.W.3d 854, 861 (Tex. Crim. App. 2009). A rational juror could conclude beyond a reasonable doubt from the evidence that Guzman was the driver of the vehicle; a rational juror could find beyond a reasonable doubt that Guzman was driving while intoxicated. Issue one is overruled.

Guzman also contends there is insufficient evidence to support the jury's finding that the motor vehicle was a deadly weapon. We must decide, viewing the evidence in the light most favorable to the verdict, whether a rational trier of fact could have found beyond a reasonable doubt that Guzman used or exhibited his vehicle as a deadly weapon when he was driving while intoxicated. *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003) (citing *Jackson*, 443 U.S. at 319); *Tisdale v. State*, 686 S.W.2d 110, 114 (Tex. Crim. App. 1985) (op. on reh'g)). We must, therefore, determine if the manner in which Guzman used his vehicle when driving while intoxicated was capable of causing death or serious bodily injury. *See* Tex. Penal Code Ann. 1.07(a)(17)(B). The Court of Criminal Appeals has explained that "in past cases involving a motor vehicle as a deadly

weapon, we have divided this question into two parts: first, we evaluate the manner in which the defendant used the motor vehicle during the felony; and second, we consider whether, during the felony, the motor vehicle was capable of causing death or serious bodily injury." *Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009).

The jury heard testimony that the vehicle was drifting into other lanes and onto the shoulder. The vehicle was drifting "all over the road[,]" making sharp corrections, and speeding up and slowing down. The vehicle ran another vehicle off the road and onto the inside shoulder. When the vehicle approached a curve, it veered into the opposite lane of traffic and then returned to the proper lane. The witness described the driver's actions as dangerous. The witness was worried about the safety of others on the road. The evidence establishes that Guzman was reckless and dangerous in operating the vehicle while intoxicated, and during the felony, the vehicle was capable of causing death or serious bodily injury. *See* Tex. Penal Code Ann. § 1.07(a)(17)(B). Viewed in the light most favorable to the verdict, a rational juror could find beyond a reasonable doubt that Guzman used or exhibited his vehicle as a deadly weapon when he was driving while intoxicated. *Cates*, 102 S.W.3d at 738; *Tisdale*, 686 S.W.2d at 114. The evidence is sufficient to support the jury's deadly weapon finding. Issue two is overruled. We affirm the trial court's judgment.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on August 25, 2011
Opinion Delivered August 31, 2011
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Before McKeithen, C.J., Gaultney and Horton, JJ.