IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

DAVID BAKER	§	
	§	
Appellant,	§	
	§	
vs.	§	**No. 03-MCA-2884**
	§	
STATE OF TEXAS,	§	
	§	
Appellee.	§	

OPINION

Appellant appeals his conviction in Municipal Court for a violation of Section 106.04 The Texas Alcoholic Beverage Code which prohibits a minor from consuming an alcoholic beverage. A fine of $50.00 was assessed.

The evidence, reflected from the Statement of Facts which is contained in the record before this court, reveals that the officers responded to a call about loud noises at a location here in El Paso. Upon arrival with other officers, the testifying officer indicated that there were some three (300) people, many of whom appeared to be under twenty-one (21) years of age, and to have been drinking. There was a large assortment of alcoholic beverages at the location including beer and wine. Many of the individuals were determined to be under the age of twenty-one (21) years and many, including Appellant were cited under the provisions of the above cited section for consuming alcohol.

After hearing the evidence, the Trial Judge found Appellant guilty and assessed a $50.00 fine, and this appeal ensued.

Initially, Appellant contends that the evidence is insufficient both factually and legally, to sustain the conviction.

In reviewing the legal sufficiency of the evidence, the standard set forth in **Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. E. 2d. 560 (1979)** controls. That standard requires the court to review the relevant 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 crime beyond a reasonable doubt. See also **Johnson v. State, 23 S.W. 2d. 3d. 1(Tex. Crim. App. 2000), Clewis v. State 922 S.W. 2d. 126 (Tex. Crim. App. 1996), Zuliani v. State, 97 S.W.3d. 589 (Tex. Crim. App. 2003)**. If a reviewing court determines that the evidence is legally insufficient under the Jackson standard, it must render a judgment of acquittal.

In reviewing a factual insufficiency point of error, a reviewing court must view the evidence in a neutral light, favoring neither party. All of the evidence is reviewed and the verdict is set aside only if it so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. **Johnson v. State, supra; Clewis v. State, supra**. In making this review the court must examine the evidence weighed by the fact finder that tends to prove the existence of the elemental fact in dispute and compare it with the evidence that tends to disprove that fact. **Jones v. State, 944 S.W. 2d. 642 (Tex. Crim. App. 1996)**. If the court sustains a point of error because the evidence is factually insufficient, it is required to remand the case for a new trial. **Clewis, supra**.

Applying the above principals of law to the facts of this case, this court first reviews the legal sufficiency of the evidence.

The officer, and the only witness who was called by the state, testified that upon his arrival, he heard Appellant admit to another police officer that he had been drinking. Although Appellant's objection to this statement as being hearsay was properly sustained initially, somehow that testimony was later introduced by this same witness on both direct, cross and redirect testimony, and the objection was ultimately waived. However, it is substantially on this admission that the state rests its case because there is simply no other evidence supporting the allegations that this Appellant consumed any alcoholic beverage.

The officer testified that he did not see Appellant drinking or in possession of any alcohol. Further, it did not even appear that he had been consuming any alcohol, and as the officer testified, he had no side effects and he was polite. Absent from this record totally is any of the traditional classic evidentiary testimony you normally see in offenses associated with alcohol offenses such as a strong odor of alcohol,

slurred speech, blurry eyes, or unsteady gait. This court is mindful that Appellant was not charged with being intoxicated, but this record is totally void of any evidence that would suggest that Appellant had consumed alcohol other than his admission, which this court finds insufficient to sustain this conviction alone. It is well established that an extrajudicial admission alone is unsufficient to sustain a conviction. **Thomas v. State 807 S. W. 2d. 803 (Tex. App. 1990), Adrian v. State 587 S.W. 2d. 733 (Tex. Crim. App. 1979).** This court also finds that the other evidence introduced by the state failed to corroborate that admission sufficient to establish the commission of a crime. Had it been coupled with other evidence indicating that he had in fact "consumed" an alcoholic beverage at this time and place, the result may have been different, but on the record before this court the evidence is legally insufficient to sustain the conviction. Accordingly, the judgment of the Trial Court is hereby reversed and rendered in Appellant's favor.

Because of the disposition that this court makes on the legal sufficiency point of error, Appellant's other points of error need not be addressed.

SIGNED this 11 day of March, 2004.

JUDGE

JUDGMENT

This case came on to be heard, the same being considered, because it is the opinion of this Court that there was error in the Judgment, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things reversed and rendered in Appellant's favor, and judgment of acquittal be entered in her behalf.

SIGNED this 11 day of March, 2004.

JUDGE