Affirmed and Memorandum Opinion filed November 29, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00857-CR

OLLIE PAUL PACKARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 13-CR-2203

M E M O R A N D U M O P I N I O N

Appellant, Ollie Paul Packard, challenges the legal sufficiency of the evidence supporting his conviction for felony driving while intoxicated and asserts that the trial court erred by allowing hearsay testimony over defendant's objection. We affirm.

FACTUAL BACKGROUND

On August 17, 2013, Officer Lino Garcia responded to a call concerning an intoxicated driver seen pulling into the parking lot of a bar. The dispatcher told Officer Garcia that the caller was following a four-door, silver sedan that was swerving and going against traffic. The caller provided a license plate number and

followed the vehicle until it pulled into the bar's parking lot. The caller described the driver of the car as a white male with short hair, wearing a blue hat, blue shirt, blue jeans, and white tennis shoes.

Officer Garcia arrived at the bar to find a silver car with the same license plate parked out front with one man in the driver's seat and one man in the passenger seat. Officer Garcia approached the driver's side window and realized that the man in the driver's seat did not match the description of the driver he received from dispatch. The man in the driver's seat identified himself as James Boullion, and the man in the passenger seat identified himself as Ollie Paul Packard, the appellant.

Officer Garcia noticed an open beer can in the back of the car and asked Boullion to exit the car for further questioning. Boullion told Officer Garcia that he had been driving the car prior to Officer Garcia's arrival and that they had pulled over so appellant could urinate outside. Officer Garcia informed Boullion that police had received a suspected drunk driver call, and asked Boullion what would explain his erratic driving. At that point, Boullion claimed that he lied about being the driver and stated that appellant was in fact driving.

Officer Garcia removed appellant from the passenger seat for questioning and noticed that appellant was wearing a blue shirt, dark pants, white tennis shoes, and a hat. Officer Garcia testified at trial that appellant showed several signs of intoxication, including red and watery eyes, slurred speech, and lack of balance. When appellant refused to perform the standard field sobriety tests, Officer Garcia arrested him for driving while intoxicated. Officer Garcia would later testify that appellant's arrest was based on Boullion's statement, the fact that appellant matched dispatch's description, his visible signs of intoxication, and his refusal to perform the field sobriety tests.

At trial, Boullion testified that he and appellant left Texas City headed to

appellant's brother's house on the day in question. Boullion said that on the way there he became very ill, and then appellant started to drive. Boullion said he was so sick he laid down in the backseat, and the next thing he remembered was waking up to appellant parked in a parking lot, urinating outside. Boullion said it was at this point he realized how drunk appellant was, and he hopped into the driver's seat to prevent appellant from continuing to drive drunk. Soon after Boullion got into the driver's seat, Officer Garcia arrived on the scene.

Boullion's testimony was inconsistent and contradictory. He had trouble recalling details and the sequence of events from the day in question. Boullion claimed to be nervous because, prior to testifying, appellant asked him to lie on the stand in exchange for money. On cross-examination, Boullion was asked if he ever told officers that he was the driver of the car, but he claimed he never said that. When Boullion was pressed as to whether he ever said he was the driver of the car, Boullion said he remembered nothing about the day in question except that appellant was the driver. Defense counsel produced a document signed by Boullion after appellant's arrest but prior to trial, in which Boullion stated that he was the driver and appellant was not. Boullion claimed he never signed the document, but then later admitted he did sign it. Eventually, Boullion admitted that the statement itself was false, and confirmed that appellant was the driver. Boullion stated that the reason he changed his story so many times was that appellant had been pressuring him to lie, but he finally decided to confess the truth in court.

Joshua Fisher, the 9-1-1 caller who phoned in the description of the driver, also testified. Fisher stated that he saw a car swerving and "driving drunk," so he called 9-1-1 and kept going on his way. Later that day, the police called Fisher and asked him to come to the police station and make a statement as to what he witnessed. In the statement, Fisher reported that on the day in question, he saw a white man driving a

tan Plymouth on the wrong side of the road and veering in and out of his lane. The man, wearing a blue cap and blue shirt, then stopped in a parking lot to urinate. When Fisher was asked how he obtained this detailed description, he unequivocally revoked the statement, saying that he never saw who exited the vehicle. When asked where the description came from, Fisher stated that the police told him what to write at the station. Fisher also was unable to identify appellant as the driver in court. The detective who took Fisher's statement at the police station contradicted Fisher's story, testifying that Fisher's statement was voluntary and that he did not tell Fisher what to write.

After hearing all the evidence, the jury found appellant guilty of felony driving while intoxicated and sentenced him to twenty years in prison.

ANALYSIS

Appellant raises two issues on appeal. First, appellant argues that the evidence presented at trial was insufficient to sustain a conviction. Second, appellant argues that the trial court erred in failing to instruct the jury to disregard hearsay testimony after sustaining appellant's objection and in subsequently allowing the hearsay testimony in violation of the confrontation clause. We address both issues in turn.

I. Sufficiency of the Evidence

In his first issue, appellant argues that the evidence was insufficient to support his conviction "because it contained inconsistencies sufficient to conclusively establish reasonable doubt." According to appellant, reasonable doubt is established by "the inconsistencies and outright contradictions" in the testimony and statements of Fisher and Boullion.

Texas courts use "only one standard to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal

sufficiency." *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) (internal quotations omitted). When reviewing the sufficiency of the evidence, appellate courts consider all of the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt. *Id*. (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Adames v. State*, 353 S.W.3d 854, 859–60 (Tex. Crim. App. 2011); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010)).

The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses. *Temple*, 390 S.W.3d at 360. Juries are permitted to draw multiple reasonable inferences from facts, as long as each is supported by the evidence presented at trial. *Id.* The jury is not permitted to draw conclusions based on speculation because doing so is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. *Id*. (citing *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007)). When the record supports conflicting inferences, reviewing courts presume that the jury resolved the conflicts in favor of the verdict and defer to that determination. *Id*.

In this case, Fisher provided the initial information concerning the driver's description and gave a statement. At trial, however, Fisher recanted his statement and claimed to be unable to identify appellant as the driver. Boullion first told Officer Garcia that he had been driving the car. Then, when Officer Garcia confronted Boullion with the suspicion that he had been driving while intoxicated, Boullion changed his story and said appellant was the driver. After the arrest, but prior to trial, appellant convinced Boullion to sign a written statement claiming that Boullion was the driver and appellant was not. At trial, Boullion testified that appellant was indeed the driver, and explained that his different versions prior to trial were due to pressure

from appellant.

Viewing the evidence in the light most favorable to the jury's verdict, the jury was entitled to disregard Fisher's testimony and to believe Boullion's testimony that appellant was the driver of the car. *See Temple*, 390 S.W.3d at 360. We must presume that the jury weighed the inconsistent testimony and concluded that appellant was the driver of the car. *See id*. Further, it is well-established that the testimony of a single witness is sufficient to support a conviction. *See, e.g.*, *Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971); *Davis v. State*, 177 S.W.3d 355, 358–59 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Although appellant acknowledges that the jury is the exclusive judge of the weight and credibility of the evidence, he argues, based on *Ervin v. State*, that Fisher's recantation and Boullion's inconsistencies amount to conclusive proof of reasonable doubt. *See* 331 S.W.3d 49, 55 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (stating that one circumstance in which evidence is legally insufficient is when "the evidence conclusively establishes a reasonable doubt.").[1] According to appellant, these witnesses "displayed irregularity of such a nature that their entire testimony is placed into doubt" and thus no rational jury could have found beyond a reasonable doubt that appellant was the driver. We conclude that *Ervin* does not support appellant's argument.

The *Ervin* court's discussion of the legal sufficiency standard included a hypothetical example of evidence that conclusively establishes a reasonable doubt:

> The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's

[1] Citing generally to the concurrence in *Ervin*, appellant invites us to apply a more "rigorous" legal sufficiency review that differs from the standard of review first announced in *Brooks v. State*, 323 S.W.3d 893, 901 (Tex. Crim. App. 2010). *See Ervin*, 331 S.W.3d at 56, 59 (Jennings, J., concurring). We decline to do so. *See Temple*, 390 S.W.3d at 359–60 (applying standard of review consistent with *Brooks*).

> prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilt is not a rational finding.

Id. (citations omitted). As in the above example, contradictory evidence was offered at trial; but, unlike the example, this record includes no evidence clearly showing that appellant was not the driver of the car or that someone other than appellant had to be the driver. Nothing in the record conclusively establishes reasonable doubt. We overrule appellant's first issue.

II. Hearsay Testimony

In his second issue, appellant contends that the trial court sustained a hearsay objection, but then failed to give the jury an instruction to disregard the hearsay testimony. Appellant also contends that the trial court erred in subsequently allowing the testimony in violation of the confrontation clause. The State responds that appellant failed to preserve his complaints for appellate review, but even if preserved, the complained-of statements were not hearsay.

Appellant argues that the trial court failed to properly instruct the jury to disregard hearsay testimony based on the following exchange at trial:

> [Prosecutor]: Were you looking for any particular people when you showed up to the scene?
>
> Officer Garcia: Yes, sir, I was.
>
> [Prosecutor]: Did dispatch give you a description of what type of people you were looking for?
>
> Officer Garcia: Yes, sir.
>
> [Prosecutor]: What was that?
>
> Officer Garcia: The caller gave a description of the driver. It was a white male with short hair, blue hat, blue shirt, and blue jeans with white tennis shoes. Dispatch told me the caller said–
>
> [Defense Counsel]: Objection to hearsay, your Honor.

> [The Court]: Sustained.
>
> [Defense Counsel]: And ask that the jury be given an instruction to disregard that.
>
> [Prosecutor]: I am just asking what information he got over dispatch. He's allowed to testify as to what dispatch told him.
>
> [The Court]: Your request is denied.
>
> [Prosecutor]: Thank you, Judge. I don't want you to say exactly what the caller said.
>
> Officer Garcia: Dispatch informed me that the driver was a white male, short hair. Gave me a description of the clothes and what the driver was wearing.

Hearsay is a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. Tex. R. Evid. 801(d). However, an extrajudicial statement or writing which is offered for the purpose of showing what was said rather than for the truth of the matter stated does not constitute hearsay. *Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995). We review a trial court's admission of evidence for abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

Assuming that appellant properly preserved his complaint, the trial court did not abuse its discretion in refusing to instruct the jury because the complained-of testimony was not hearsay. The testimony was not offered for the truth of the matter asserted, but to explain why the officer went to the scene and how appellant became a suspect. *See Dinkins*, 894 S.W.2d at 347; *see also Parker v. State*, 192 S.W.3d 801, 807 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding that officer's statements about tips received from a confidential informant were admissible to show circumstances leading up to appellant's arrest); *Martinez v. State*, 186 S.W.3d 59, 67 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (holding that "Crime Stoppers tip was offered to show how Sergeant Peters began to suspect appellant, not to prove that

appellant was guilty of the crime," and were therefore not hearsay); *Kimball v. State*, 24 S.W.3d 555, 565 (Tex. App.—Waco 2000, no pet.) (holding that officer's testimony regarding information from 9-1-1 call and dispatcher was not a hearsay statement because it was not offered for the truth of the matter asserted but was offered to show the reason for the officer's actions).

Appellant points to *Porter v. State* for the proposition that "a police officer's testimony as to what dispatch said to him is inadmissible hearsay if that information is being offered to prove the truth of the matter at hand." *See* 623 S.W.2d 374, 385 (Tex. Crim. App. 1981). In *Porter*, a tape recording of radio conversations between police officers and a dispatcher was played before the jury at trial. *Id*. at 383. The Court of Criminal Appeals concluded that the communications between the officers and the dispatcher were not hearsay because they were not being offered for the truth of the matter asserted, but were instead being offered to show the circumstances surrounding and leading to the charged offense. *Id*. at 385.

Even though the Court of Criminal Appeals concluded that the communications in *Porter* were not hearsay, appellant asks us to reach the opposite conclusion in this case. Appellant suggests that his case is distinguishable from *Porter* because Officer Garcia's testimony was offered to prove that appellant was in fact the driver of the car. However, nothing in the record supports appellant's conclusion that the testimony in this case was offered to prove the truth of the matter asserted, since neither the officer nor the dispatcher had direct knowledge as to who was driving appellant's car. Officer Garcia was asked who he was looking for at the scene of the incident, and not asked if appellant was the driver of the car. Consequently, Garcia's response could not have been offered to prove the truth of the matter asserted—that appellant was the driver of the car—and was instead was offered to show who Officer Garcia was looking for when he arrived on the scene.

Appellant also argues that allowing the testimony prevented appellant from cross-examining the declarant of the statement in violation of the confrontation clause. To preserve a complaint for appellate review, the complaining party must state the grounds for the desired ruling to the trial court "with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." Tex. R. App. P. 33.1(a)(1)(A); *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). A hearsay objection does not preserve error on Confrontation Clause grounds. *Reyna*, 168 S.W.3d at 179; *Lopez v. State*, 200 S.W.3d 246, 255 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

The record does not show that appellant objected to the officer's testimony on the grounds that it violated his right to confrontation. Because no hearsay testimony was admitted at trial and appellant's confrontation clause complaint does not match his trial objection, we conclude that appellant failed to preserve this issue for appellate review. We overrule appellant's second issue.

CONCLUSION

We overrule appellant's issues and affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Jamison, McCally, and Wise.
Do Not Publish — TEX. R. APP. P. 47.2(b).