Affirmed and Opinion filed June 28, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00292-CR

JAIME DURANTE FUENTES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Brazos County, Texas
Trial Court Cause No. 1912-99

O P I N I O N

A jury found appellant guilty of driving while intoxicated and the trial court sentenced appellant to 180 days in jail probated for two years, assessed a fine of $2000.00 of which $1,000.00 was probated, and ordered five days in jail as a condition of community supervision. Appellant appeals, asserting that 1) the evidence was factually insufficient to support appellant's conviction for driving while intoxicated, and 2) the trial court erred in admitting opinion evidence from the arresting officer as to the cause of the accident. We affirm.

In his first point of error, appellant claims that the evidence was factually

insufficient to support his conviction. We disagree.

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is factually insufficient if, 1) it is so weak as to be clearly wrong and manifestly unjust; or 2) the adverse finding is against the great weight and preponderance of the available evidence. *Id*. The *Johnson* court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id*. at 9.

The record indicates that on November 28, 1998, appellant was driving a red 1992 Pontiac Grand-Am north bound on State Highway 6. At about 2:54 p.m., appellant cut in front of a truck as it was exiting the highway to the east feeder road. The driver of the truck, Carl Haldt, testified that after appellant exited onto the feeder road, appellant's car struck a curb and rolled over four to six times, coming to rest upside down next to a fence. Furthermore, Haldt testified that when he stopped to render aid to appellant, he found numerous alcoholic beverage containers in the car, appellant's eyes were bloodshot, appellant slurred his words when he spoke, and appellant smelled of alcohol. Officer Ricky Moore arrived at the accident scene and noticed a strong odor of alcoholic beverage on appellant's person and his breath. When appellant was asked if he had been drinking, he initially responded "no," but then said, "Well, I've had three beers and I was drinking one at the time of the accident." Additionally, Officer Moore testified that he found no indication of head injury, and found 6 of 6 possible clues of impairment, indicating that appellant was impaired by alcohol. Appellant argues that he was not intoxicated.

Appellant presented witness testimony that he had only two beers; one beer in the morning and one in the afternoon. Moreover, appellant points to the nine-step walk and

turn test, in which the officer observed only three out of eight possible clues, as evidence that he was not intoxicated. After viewing all the evidence, however, the verdict of guilty is not so weak as to be clearly wrong and manifestly unjust, nor is the finding of guilty against the great weight and preponderance of the available evidence. Accordingly, we overrule appellant's first point of error.

In his second point of error, appellant argues that the trial court erred in admitting opinion testimony by the arresting officer as to the cause of the accident because the evidence fails to show that the arresting officer conducted an investigation into the circumstances surrounding this accident. We disagree.

Appellant has failed to preserve this error for our review. If an objection made in the trial court differs from the complaint made on appeal, nothing has been preserved for review, and the appellate court should express no opinion as to the merits of the claim. *Dixon v. State*, 2 S.W.3d 263, 272 (Tex. Crim. App. 1999). Appellant objected at trial that the testimony being given by the arresting officer was hearsay. The trial court overruled this objection under Rule 702.[1] Appellant did not assert that the arresting officer did not qualify as an expert under Rule 702 until his appeal. Having failed to preserve this complaint for our review, appellant's second point of error is overruled. *See In re M.D.S.*, 1 S.W.3d 190, 202 (Tex. App.—Amarillo 1999, no pet.) (holding that an objection that the witness's opinion was based on speculation was not sufficient to preserve error as to the witness's qualifications as an expert).

[1] Rule 703, however, more appropriately addresses appellant's hearsay objection. Under relevant evidentiary rules, an expert is allowed to rely on hearsay evidence in reaching his conclusions. *See* TEX. R. EVID. 703; *Sosa By and Through Grant v. Koshy*, 961 S.W.2d 420,427 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

The judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed June 28, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.*

Do Not Publish TEX. R. APP. P. 47.3(b).

* Senior Chief Justice Paul C. Murphy sitting by assignment.