COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00218-CR

LUIS A. CERVANTES — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 4 OF TARRANT COUNTY
TRIAL COURT NO. 1433251D

MEMORANDUM OPINION[1]

In two issues, Appellant Luis A. Cervantes appeals his conviction for driving while intoxicated (DWI), felony repetition—a third-degree felony for which a jury found him guilty and assessed his punishment at ten years' confinement—complaining that the evidence is insufficient to support his conviction and arguing that his sentence is excessive and disproportionate. We affirm.

[1]*See* Tex. R. App. P. 47.4.

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

Cervantes was charged with operating a motor vehicle in a public place while he was intoxicated on or about October 21, 2015, and that prior to so doing, his DWI convictions of February 14, 2002, and April 6, 2005, had become final.[2] *See* Tex. Penal Code Ann. § 49.04(a) (West Supp. 2016) (defining DWI offense), § 49.09(b)(2) (West Supp. 2016) (explaining that an offense under section 49.04 is a third-degree felony if it is shown on the trial of the offense that the accused has twice previously been convicted of any other offense relating to the operation of a motor vehicle while intoxicated); *see also id.* § 49.01(2)(A)–(B) (West 2011) (defining "intoxicated" to mean not having the normal use of mental or physical faculties by reason of the introduction of alcohol or another substance

[2]The February 14, 2002 conviction bore case number 0799698 from Tarrant County Criminal Court No. 2; the April 6, 2005 conviction bore case number 0970566 from Tarrant County Criminal Court No. 8. The indictment also included a repeat offender notice alleging that Cervantes had been convicted of felony DWI in the 432nd District Court of Tarrant County, in cause number 1195783D, on June 16, 2010. During punishment, Cervantes pleaded true to this allegation.

or having an alcohol concentration of 0.08 or more); *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (stating that in a sufficiency review, the court compares the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial).

The record reflects that Cervantes's sister Lizet, the 911 complainant, called the police on October 21, 2015, "[b]ecause [Cervantes] was driving around the street drunk" and speeding while there were neighbors—adults and children—nearby. She said she knew that he had been drinking because she had seen him intoxicated on many occasions, and he smelled like alcohol. She also had observed him throwing bottles and rocks at the house and shouting at those inside because he was mad that they would not let him in. She was outside when the police arrived, and she also saw Cervantes try to drive off before he was pulled over by the police.

Fort Worth Police Officer Shawn Graves, who responded to the domestic disturbance call, initially spoke with Lizet, who directed his attention to a black vehicle. Officer Graves said that as he heard the car's engine start, Lizet told him, "He typically runs from you guys." Officer Graves stated that when he returned to his patrol vehicle and drove around the corner, he saw the car drive approximately 50 feet but then pull over when Officer Graves turned on his vehicle's lights. As he was getting out of his patrol car, other officers arrived.

When Officer Graves approached the driver's side of the vehicle, he saw Cervantes, the sole occupant of the car, drinking from a can in a paper sack, and

he smelled the odor of alcohol coming from the vehicle. Officer Graves grabbed the can away from Cervantes and told Cervantes to exit the vehicle. When Cervantes resisted getting out of the vehicle, Officer Graves, with the assistance of one of the other officers, physically pulled him from the car. Cervantes told them, "You don't have me for DWI. You didn't see me driving." According to Officer Graves, Cervantes's eyes were bloodshot and watery, and his breath and body emitted a very strong odor of alcohol. Officer Graves radioed for a DWI unit.

Officer Michael Sullivan, with the traffic DWI enforcement unit, arrived at the scene and observed Cervantes's bloodshot, watery eyes and also smelled the strong odor of alcohol on his breath. Officer Sullivan also described Cervantes's speech as slurred. After administering a standardized field sobriety test, he arrested Cervantes for DWI and transported him to the city jail.

At the jail, Cervantes agreed to give a breath specimen. Cervantes's breathalyzer test results were .160 and .158 grams of alcohol per 210 liters of breath.[3] At trial, Cervantes stipulated to the February 14, 2002 and April 6, 2005 DWI convictions, and the trial court admitted the stipulation, along with the judgments of conviction, into evidence.

Cervantes's sole argument with regard to sufficiency is that although he and the State agreed to stipulate to his prior convictions, the trial court did not

[3]The legal limit is 0.08. *See* Tex. Penal Code Ann. § 49.01(2)(B).

sign the written stipulation or approve it in writing in any way. Cervantes relies on code of criminal procedure article 1.15 to support his argument. *See* Tex. Code Crim. Proc. Ann. art. 1.15 (West 2005). As pointed out by the State, however, Cervantes had a jury trial, and it is well-settled that article 1.15 applies only to cases in which a jury trial has been waived. *See Wright v. State*, 28 S.W.3d 526, 537 (Tex. Crim. App. 2000) ("By its plain language, Article 1.15 applies only to cases in which a jury trial has been waived . . . [b]ecause appellant's case was tried by a jury, the requirements regarding stipulations of evidence found in Article 1.15 have no application here."), *cert. denied*, 531 U.S. 1128 (2001); *McClain v. State*, 730 S.W.2d 739, 742 (Tex. Crim. App. 1987) (stating that when the plea is before the court, the trial court's judgment must be reversed if it was based on a stipulation that did not meet the statutory requirements); *Messer v. State*, 729 S.W.2d 694, 699 (Tex. Crim. App. 1986) ("*Stipulations*, oral or written, in criminal cases where the plea of not guilty is entered *before the jury do not have to comply with Article 1.15*."); *Lindley v. State*, 736 S.W.2d 267, 275 (Tex. App.—Fort Worth 1987, pet. ref'd, untimely filed) ("[A]rticle 1.15 applies only when the defendant has 'waived his right of trial by jury.'"); *see also Hutchinson v. State*, No. 02-05-00199-CR, 2006 WL 1281084, at *1 & n.2 (Tex. App.—Fort Worth May 11, 2006, no pet.) (mem. op., not designated for publication) ("Because appellant's case was tried by a jury, the

requirements for stipulations of evidence found in article 1.15 do not apply.").[4] Thus, we overrule Cervantes's second issue.

In his remaining issue, Cervantes argues that his sentence is excessive and disproportionate. Cervantes pleaded true to the repeat offender notice alleging another felony DWI conviction, and the trial court admitted State's Exhibits 15 through 20—additional judgments of conviction and a penitentiary packet—into evidence.[5] Cervantes did not object when the trial court imposed his sentence, and he did not file a motion for new trial.

Cervantes observes that this court has "consistently held that proportionality complaints are forfeited when there is no complaint during the trial

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[4]Cervantes argues that this line of cases should be overruled; however, we are bound by the precedent of the court of criminal appeals and we have no authority to disregard or overrule its precedent. *See Hailey v. State*, 413 S.W.3d 457, 489 (Tex. App.—Fort Worth 2012, pet. ref'd).

[5]State's Exhibit 15 shows a prior felony DWI conviction from 2010 in Tarrant County, for which Cervantes was sentenced to three years in prison; State's Exhibit 16 is the penitentiary packet from 2010 containing Cervantes's photo; State's Exhibit 17 shows a conviction for assault causing bodily injury from 2013 in Tarrant County, for which Cervantes was sentenced to fifty days in jail; State's Exhibit 18 shows another conviction for assault causing bodily injury from 2015 in Tarrant County, for which Cervantes was sentenced to a year in jail; State's Exhibit 19 shows a conviction for theft of property valued under $50 from 2013 in Tarrant County, for which Cervantes was sentenced to forty-five days in jail; and State's Exhibit 20 shows another theft conviction, $50 to $500, from 2009 in Tarrant County, for which Cervantes was sentenced to thirty days in jail. The prosecutor recommended fifteen years' confinement in his closing argument because, in light of Cervantes's DWI history, "every day he's out on the street none of us are safe." Cervantes argued that he deserved punishment on the lower end of the scale so that he could get the help he needed while incarcerated and then become a successful member of the community.

or in a subsequent motion for new trial," but he nonetheless urges us to reconsider this position. We decline the invitation. Because Cervantes neither objected when the sentence was imposed nor filed a motion for new trial to preserve this complaint for appeal, we overrule his remaining issue.[6] *See Laboriel-Guity v. State*, 336 S.W.3d 754, 756 (Tex. App.—Fort Worth 2011, pet. ref'd); *Kim v. State*, 283 S.W.3d 473, 475 (Tex. App.—Fort Worth 2009, pet. ref'd).

Having overruled both of Cervantes's issues, we affirm the trial court's judgment.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: December 8, 2016

[6]We nonetheless note that even if Cervantes had preserved his excessiveness complaint for our review, his ten-year sentence is not outside of the statutory range of punishment—two to twenty years—and as such is generally not subject to a challenge for excessiveness. *See Kim*, 283 S.W.3d at 475–76; *see also* Tex. Penal Code Ann. § 12.34 (West 2011) (stating that a third-degree felony punishment range is not more than ten years or less than two years and may include a fine not to exceed $10,000), § 12.33 (West 2011) (stating that a second-degree felony punishment range is not more than twenty years or less than two years and may include a fine not to exceed $10,000), § 12.42(a) (West Supp. 2016) (increasing punishment range for a third-degree felony to the second-degree felony range when it is shown at trial that the defendant has previously been convicted of a felony other than a state jail felony).