



**NUMBERS 13-16-00205-CR & 13-16-00206-CR**

**COURT OF APPEALS**

**THIRTEENTH DISTRICT OF TEXAS**

**CORPUS CHRISTI - EDINBURG**

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**ELPIDIO CANTU,**

**Appellant,**

**v.**

**THE STATE OF TEXAS,**

**Appellee.**

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**On appeal from the 347th District Court  
of Nueces County, Texas.**

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**MEMORANDUM OPINION**

**Before Chief Justice Valdez and Justices Rodriguez and Benavides  
Memorandum Opinion by Justice Benavides**

This appeal consolidates two related cases. First, appellate cause number 13-16-00205-CR concerns appellant Elpidio Cantu's conviction and subsequent sentence for aggravated assault with a deadly weapon, see TEX. PENAL CODE ANN. § 22.02(a)(2) (West, Westlaw through Ch. 49, 2017 R.S.), a second-degree felony, which was enhanced at punishment to a first-degree felony due to Cantu's repeat felony offender

status. See *id.* § 12.42(b) (West, Westlaw through Ch. 49, 2017 R.S.). Second, appellate cause number 13-16-00206-CR concerns Cantu’s conviction and subsequent sentence for driving while intoxicated, a third-degree felony, see *id.* §§ 49.04(a)–(b) (West, Westlaw through 2017 R.S.); 49.09(b) (West, Westlaw through 2017 R.S.) (enhancing a DWI to a third-degree felony for prior DWI convictions), which was enhanced at punishment under the habitual felony offender statute. See *id.* § 12.42(d) (enhancing a habitual felony offender’s punishment to life imprisonment, or “for any term of not more than 99 years or less than 25 years”).

In both appeals, and by one issue in each appeal, Cantu challenges the sufficiency of evidence on the State’s allegations of Cantu’s prior convictions used to enhance his punishment in each case. We affirm.

#### I. BACKGROUND

In 2015, Nueces County grand juries indicted Cantu for two separate, yet related, offenses: (1) aggravated assault with a deadly weapon; and (2) DWI, third or more. Both indictments further alleged previous convictions to be used to enhance Cantu’s punishments under section 12.42 of the penal code. See *id.*

Briefly, the aggravated assault charge stems from an incident at “Meet Me Midway,” a bar in Nueces County. According to Lucia Limon, a bartender and waitress at the bar, Cantu was a regular customer. Limon recalled that on February 19, 2015, Cantu was inside the bar “bothering a lady customer” who was at the bar by touching her in an unwelcomed manner. As a result, Limon asked Cantu to leave the establishment, but Cantu became belligerent and wanted to fight the bar’s manager. Once outside the bar, Cantu pulled out a knife on the bar manager, but the bar manager pulled out a

firearm. Cantu then left the bar and came back “maybe 20, 30 minutes” later in his vehicle and parked it in front of the bar. According to Limon, customers notified her that Cantu had returned to the bar, so Limon exited the bar to again ask Cantu to leave. Cantu then took out a firearm, pointed it at Limon, and discharged the firearm before leaving the scene. Limon then called police. Limon testified that the incident scared her at the time, and that she remains in fear to this day.

With regard to the DWI charge, a review of the record shows that police pulled Cantu over shortly after the incident at Meet Me Midway. Upon making contact with Cantu, police observed Cantu had red blood shot eyes, slurred speech, and a strong odor of an intoxicating beverage emitting from his breath. Cantu told police that he was disabled and unable to perform any field sobriety tests. Police then arrested Cantu for suspicion of driving while intoxicated. At the city jail, Cantu voluntarily consented to give police two breath specimens, which read 0.139 and 0.128.

On July 30, 2015, Cantu openly pleaded guilty to the aggravated assault with a deadly weapon charge. The trial court admitted a judicial confession and stipulation signed by Cantu, which included the police report related to the incident. The trial court found Cantu guilty as charged and reset his punishment hearing for a later date. On March 7, 2016, Cantu openly pleaded guilty to the DWI charge. The trial court admitted a judicial confession and stipulation signed by Cantu, which included the police report related to the incident. The trial court found Cantu guilty as charged. Cantu pleaded not true to the enhancement allegations, and the trial court held a consolidated punishment hearing on both charges.

At the punishment hearing, Captain Patrick Whitmore of the Nueces County Sheriff's Office testified that he was in charge of the Information Section of the sheriff's office. Captain Whitmore sponsored a fingerprint card exhibit containing Cantu's fingerprints, which was taken the day of trial and admitted into evidence. Furthermore, the trial court admitted, without objection, State's Exhibits Three, Four, and Five, which were certified copies of Cantu's penitentiary packets from previous convictions.

State's Exhibit Three related to a 1985 conviction of DWI, second offense in Cameron County, Texas, where the trial court sentenced Cantu to three years' imprisonment. State's Exhibit Four related to a 1989 conviction of DWI in Cameron County, Texas, where the trial court sentenced Cantu to five years' imprisonment. State's Exhibit Five related to a 1981 conviction of DWI, second offense in Cameron County, where the trial court sentenced Cantu to eighteen months' confinement in the Cameron County jail, placed Cantu on probation, and later revoked Cantu's probation due to a subsequent charge of driving while intoxicated.

After the punishment hearing: (1) in appellate cause number 13-16-00205-CR, the trial court found the enhancement paragraph true and sentenced Cantu to twenty years' imprisonment at the Texas Department of Criminal Justice—Institutional Division (TDCJ-ID) with 121 days of credit for time served; (2) in appellate cause number 13-16-00206-CR, the trial court found both enhancement allegations true and sentenced Cantu to fifty years' imprisonment at TDCJ-ID with 118 days of credit for time served.

This appeal followed.

## **II. SUFFICIENCY CHALLENGE**

By one issue under each cause number, Cantu asserts that the evidence is

insufficient to support the State's enhancement allegations under each offense.

**A. Standard of Review and Applicable Law**

In reviewing sufficiency of the evidence to support a conviction, we consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013); *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)); see *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.). In viewing the evidence in the light most favorable to the verdict, we defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *Brooks*, 323 S.W.3d at 899.

To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). No specific document or mode of proof is required to prove these two elements. *Id.* There is no “best evidence” rule in Texas that requires that the fact of a prior conviction be proven with any document, much less any specific document. *Id.* While evidence of a certified copy of a final judgment and sentence may be a preferred and convenient means, the State may prove both of these elements in a number of different ways, including (1) the defendant's admission or stipulation, (2) testimony by a person who was present when the person was convicted of the specified crime and can identify the defendant as that person, or (3) documentary proof (such as a judgment) that contains

sufficient information to establish both the existence of a prior conviction and the defendant's identity as the person convicted. *Id.* at 921–22. As the Texas Court of Criminal Appeals has stated: “Just as there is more than one way to skin a cat, there is more than one way to prove a prior conviction.” *Id.* at 922. Simply stated, Texas substantive law does not require that the fact of a prior conviction be proven in any specific manner. *Id.*

## **B. Discussion**

In each appeal's respective issue, Cantu challenges the evidence to support the trial court's enhancement findings solely on the issue of whether Cantu was sufficiently linked to the prior convictions. We will address each judgment in turn.

### **1. Cause Number 13-16-00205 (Aggravated Assault with a Deadly Weapon)**

Under this cause number, the State alleged that Cantu had been previously convicted of one felony: the October 3, 1989 conviction under trial court cause number 89-CR-490-D from Cameron County.

To prove this conviction, the State offered, and the trial court admitted without objection, State's Exhibit Four, a certified penitentiary packet related to the 1989 conviction from the Texas Department of Criminal Justice—Correctional Institutions Division (TDC) in Huntsville. This packet contained: (1) a booking photograph of Cantu; (2) a signed judgment of conviction on the 1989 offense; (3) a photocopy of Cantu's right index fingerprint; (4) a nunc pro tunc amended judgment of conviction and sentence related to a separate conviction; and (5) a fingerprint identification card document with Cantu's name on it and a listed date of arrest of “03301972.”

Cantu argues that the evidence is insufficient to link him to the 1989 conviction

because the judgment “contained no supporting documentation to show that particular defendant’s date of birth, social security number, or legible fingerprints.” Cantu further argues that the State’s theory linking him to this conviction is “entirely dependent on an assumption that TDC identified [and] attached the correct print card” and because the attached fingerprint identification card from 1972 is insufficient to support the trial court’s enhancement finding. We disagree with all of Cantu’s arguments.

“Introduction of a pen packet containing the prior judgment and sentence, along with evidence connecting them to the defendant, is prima facie proof of the prior conviction.” *Pena v. State*, 867 S.W.2d 97, 100 (Tex. App.—Corpus Christi 1993, writ ref’d) (citing *Johnson v. State*, 725 S.W.2d 245, 247 (Tex. Crim. App. 1987) (en banc)). Here, the State called Captain Whitmore, an un-objected-to expert witness on fingerprint identification, who testified that the fingerprints he took earlier from Cantu matched those fingerprints located in the file included in State’s Exhibit Four. The court of criminal appeals has stated that this method utilized by the State to meet its burden of proving prior convictions is “the most popular with prosecutors because it is the easiest.” *Littles v. State*, 726 S.W.2d 26, 28 (Tex. Crim. App. 1984). Further, the court of criminal appeals has held that arguments such as Cantu’s, which call into question the use of a single set of fingerprints to prove up a defendant’s identity across multiple convictions in a certified prison packet from the TDC, are without merit because the fingerprint set maintained by TDC “refer to the packet as a whole” and can be compared to the set of fingerprints taken from the defendant the same day of trial. See *Cole v. State*, 484 S.W.2d 779, 784 (Tex. Crim. App. 1972). Captain Whitmore verified the proposition stated in *Cole* by testifying that “normally TDC has one set of fingerprints that they

associate with the same person.”

Accordingly, after considering all of the evidence in the light most favorable to the verdict, we conclude that a rational fact finder could have found the essential elements of the enhancement paragraph as it related to this cause number beyond a reasonable doubt. See *Winfrey*, 393 S.W.3d at 768; *Flowers*, 220 S.W.3d at 921. We overrule Cantu’s sole issue in appellate cause number 13-16-0205-CR.

## **2. Cause Number 13-16-00206 (DWI)**

Under this cause number, the State alleged that Cantu had been previously convicted of two felonies: (1) the July 1, 1985 conviction under cause number 85-CR-303-D from Cameron County; and (2) the October 3, 1989 conviction under cause number 89-CR-490-D from Cameron County (the same conviction discussed in Part II B.1 of this memorandum opinion).

To prove these convictions, the State offered, and the trial court admitted without objection, State’s Exhibit Three and Four, certified penitentiary packets from TDC related to the 1985 and 1989 conviction respectively. State’s Exhibit Three contained: (1) booking photographs of Cantu; (2) a signed judgment of conviction; (3) an order revoking probation from a prior conviction for driving while intoxicated; and (4) a fingerprint card in Cantu’s name and a date of arrest listed as “08301972.” The contents of State’s Exhibit Four have been discussed earlier in this opinion and are hereby incorporated by reference into this section.

First, Cantu argues that the evidence is insufficient to link him to the 1989 conviction for the same reasons discussed earlier in this memorandum opinion. Because we have decided that the evidence is sufficient to support the trial court’s finding



on this prior conviction, we disagree with Cantu and incorporate by reference our analysis in Part II B.1 of this opinion. See *Littles*, 726 S.W.2d at 28; *Cole*, 484 S.W.2d at 784; see also TEX. R. APP. P. 47.1.

Secondly, Cantu argues that Cantu's certified packet in State's Exhibit Three is insufficient evidence to link him to the 1985 conviction because it contains only "an old photo of someone not identified as [Cantu] and a fingerprint card from an Elpidio Cantu dated 1972." Again, we disagree. The record shows that Captain Whitmore testified that the fingerprints located in State's Exhibit Three matched the fingerprints he took of Cantu on the day of trial, an established method of proving identity. See *Cole*, 484 S.W.2d at 784.

Accordingly, after considering all of the evidence in the light most favorable to the verdict we conclude that a rational fact finder could have found the essential elements of the enhancement paragraphs as it related to this cause number beyond a reasonable doubt. See *Winfrey*, 393 S.W.3d at 768; *Flowers*, 220 S.W.3d at 921. We overrule Cantu's sole issue in appellate cause number 13-16-00206-CR.

### III. CONCLUSION

Having overruled both of Cantu's issues on appeal, we affirm the trial court's judgments.

GINA M. BENAVIDES,  
Justice

Do not publish.  
TEX. R. APP. P. 47.2 (b).

Delivered and filed the  
13th day of July, 2017.