

MODIFY and AFFIRM; and Opinion Filed September 29, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-01310-CR

**GABRIEL GRIMALDO, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F15-53058-V**

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Whitehill
Opinion by Justice Lang-Miers

A jury convicted Gabriel Grimaldo for assault involving family violence, having a prior conviction for assault involving family violence. *See* TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2015); TEX. FAM. CODE ANN. §§ 71.0021, 71.005 (West 2014 & Supp. 2015). The trial court assessed punishment, enhanced by two prior felony convictions, at thirty-five years' imprisonment. In a single issue, appellant contends the sentence violates the U.S. Constitution. We modify the trial court's judgment and affirm as modified.

Appellant argues the sentence is proportionally unfair and in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. *See* U.S. CONST. amend. VIII, XIV. Appellant acknowledges the sentence is within the punishment range, but asserts that is only so because of the two enhancement paragraphs included in the indictment. Appellant asserts the thirty-five year sentence constitutes cruel and unusual punishment. The State responds that appellant failed

to preserve the issue for appellate review and alternatively, the sentence is within the statutory punishment range.

To preserve error for appellate review, the record must show appellant made a timely request, objection, or motion. *See* TEX. R. APP. P. 33.1(a)(1). Constitutional rights, including the right to be free from cruel and unusual punishment, may be waived. *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996). Appellant did not object when he was sentenced, nor did he raise this issue in his motion for new trial. Accordingly, he has not preserved the issue for appellate review. *See Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.).

Moreover, as appellant acknowledges in his brief, punishment that is assessed within the statutory range for an offense is neither excessive nor unconstitutionally cruel or unusual. *Kirk v. State*, 949 S.W.2d 769, 772 (Tex. App.—Dallas 1997, pet. ref'd); *see also Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984) (sentence will not be disturbed on appeal if it is within its statutory range of punishment). Assault involving family violence, having a prior conviction for assault involving family violence is a third-degree felony offense punishable by imprisonment for a term of two to ten years and an optional fine not to exceed \$10,000. *See* TEX. PENAL CODE ANN. §§ 12.34, 22.01(b)(2)(A) (West 2011 & Supp. 2015). However, appellant was sentenced as a habitual offender because of two prior felony convictions. Thus, the punishment range increased to a minimum of twenty-five years' imprisonment and a maximum of ninety-nine years or life. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2015). Appellant's thirty-five year sentence is within the statutory punishment range. We overrule appellant's sole issue.

In a cross-point, the State asks us to modify the trial court's judgment to reflect appellant pleaded not true to the two enhancement paragraphs. The record shows that during the punishment phase, appellant entered pleas of not true to the two enhancement paragraphs, and the trial court found both paragraphs true. The judgment, however, incorrectly states "N/A" for the plea and findings of each paragraph. We sustain the State's cross-point. We modify the

judgment to show the plea to the first and second enhancement paragraphs is “not true” and the findings on the first and second enhancement paragraphs is “true.” See TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref’d).

As modified, we affirm the trial court’s judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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TEX. R. APP. P. 47

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

GABRIEL GRIMALDO, Appellant

No. 05-15-01310-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District
Court, Dallas County, Texas

Trial Court Cause No. F15-53058-V.

Opinion delivered by Justice Lang-Miers.

Justices Bridges and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The section entitled "Plea to 1st Enhancement" is modified to show "Not True."

The section entitled "Findings on 1st Enhancement Paragraph" is modified to show "True."

The section entitled "Plea to 2nd Enhancement/Habitual Paragraph" is modified to show "Not True."

The section entitled "Findings on 2nd Enhancement/Habitual Paragraph" is modified to show "True."

As modified, we **AFFIRM** the trial court's judgment.

Judgment entered this 29th day of September, 2016.